NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 63

21 JUNE 1983

---

6 SEPTEMBER 1983

RALEIGH
1984

CITE THIS VOLUME

63 N.C. App.

TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges viii

Attorney General xii

District Attorneys xiii

Public Defenders xiv

Table of Cases Reported xv

Cases Reported Without Published Opinion xix

General Statutes Cited and Construed xxii

Rules of Civil Procedure Cited and Construed xxvi

Constitution of North Carolina Cited and Construed xxvi

Constitution of United States Cited and Construed xxvii

Rules of Appellate Procedure Cited and Construed xxvii

Disposition of Petitions for Discretionary Review xxviii

Opinions of the Court of Appeals 1-789

Amendments to the North Carolina Rules of Appellate Procedure 793

Amendment to North Carolina Supreme Court Library Rules 795

Analytical Index 799

Word and Phrase Index 831

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

EARL W. VAUGHN

Judges

R. A. HEDRICK
GERALD ARNOLD
JOHN WEBB
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD
CHARLES L. BECTON
CLIFTON E. JOHNSON
E. MAURICE BRASWELL
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.

Retired Chief Judge

NAOMI E. MORRIS

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

CHRISTIE SPEIR PRICE

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	DAVID E. REID	Greenville
	HERBERT O. PHILLIPS III	Morehead City
4	HENRY L. STEVENS III	Kenansville
	JAMES R. STRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	N. B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	FRANKLIN R. BROWN	Tarboro
	CHARLES B. WINBERRY	Rocky Mount
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN	Kinston

Second Division

9	ROBERT H. HOBGOOD	Louisburg
10	JAMES H. POU BAILEY	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
11	WILEY F. BOWEN	Dunn
12	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	JOHN C. MARTIN	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	B. CRAIG ELLIS	Laurinburg

Third Division

17A	MELZER A. MORGAN, JR.	Wentworth
17B	JAMES M. LONG	Pilot Mountain
18	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	High Point
	THOMAS W. ROSS	Greensboro
19A	THOMAS W. SEAY, JR.	Spencer
	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
20	F. FETZER MILLS	Wadesboro
	WILLIAM H. HELMS	Wingate

DISTRICT	JUDGES	ADDRESS
21	WILLIAM Z. WOOD	Winston-Salem
	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
	PRESTON CORNELIUS	Mooresville
23	JULIUS A. ROUSSEAU	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.[1]	Boone
25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	FRANK W. SNEPP, JR.	Charlotte
	WILLIAM T. GRIST	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	JAMES U. DOWNS	Franklin

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
ARTHUR L. LANE	Fayetteville
JAMES ARTHUR BEATY, JR.	Winston-Salem
RUSSELL G. WALKER, JR.	Asheboro
THOMAS S. WATTS	Elizabeth City
JOHN B. LEWIS	Farmville
MARY MCLAUCHLIN POPE[2]	Southern Pines

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
GEORGE M. FOUNTAIN	Tarboro
SAMUEL E. BRITT	Lumberton

1. Appointed Resident Judge 2 May 1984 to succeed Ronald W. Howell who resigned 30 April 1984.

2. Appointed Judge 23 March 1984.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES HARDISON	Williamston
3	E. BURT AYCOCK, JR. (Chief)[1]	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Bethel
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	JAMES RANDAL HUNTER[2]	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN M. WILLIAMSON	Kenansville
	JAMES NELLO MARTIN	Clinton
	WILLIAM M. CAMERON, JR.	Jacksonville
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUINTON T. SUMNER	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	PAUL MICHAEL WRIGHT	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Franklinton
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	PHILIP O. REDWINE	Raleigh

DISTRICT	JUDGES	ADDRESS
	NARLEY LEE CASHWELL	Apex
	WILLIAM A. CREECH	Raleigh
	L. W. PAYNE	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
12	SOL G. CHERRY (Chief)	Fayetteville
	CHARLES LEE GUY	Fayetteville
	LACY S. HAIR	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	WARREN L. PATE	Raeford
13	WILLIAM E. WOOD (Chief)	Whiteville
	ROY D. TREST	Shallotte
	WILLIAM C. GORE, JR.	Whiteville
	LEE GREER, JR.	Whiteville
14	J. MILTON READ, JR. (Chief)	Durham
	WILLIAM G. PEARSON II	Durham
	DAVID Q. LABARRE	Durham
	KAREN B. GALLOWAY	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	WILLIAM S. HARRIS, JR.	Graham
	JAMES KENT WASHBURN	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	PATRICIA HUNT	Chapel Hill
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
17A	PETER M. MCHUGH (Chief)	Reidsville
	ROBERT R. BLACKWELL	Reidsville
17B	FOY CLARK (Chief)	Mount Airy
	JERRY CASH MARTIN	Mount Airy
18	ROBERT L. CECIL (Chief)	High Point
	JOHN F. YEATTES, JR.	Greensboro
	JOSEPH R. JOHN	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	High Point
	WILLIAM K. HUNTER	High Point

DISTRICT	JUDGES	ADDRESS
19A	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
19B	L. T. HAMMOND, JR. (Chief)	Asheboro
	WILLIAM M. NEELY	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Southern Pines
	W. REECE SAUNDERS[3]	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
	DAVID R. TANIS	Winston-Salem
	JOSEPH JOHN GATTO	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	MAX F. FERREE	Wilkesboro
	EDGAR GREGORY	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	LIVINGSTON VERNON (Chief)	Morganton
	SAMUEL MCD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD H. BLAIR	Lenoir
	DANIEL R. GREEN[4]	Hickory
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	T. MICHAEL TODD	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	T. PATRICK MATUS II	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	W. TERRY SHERRILL	Charlotte

DISTRICT	JUDGES	ADDRESS
27A	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	JOHN M. GARDNER	Shelby
28	WILLIAM MARION STYLES (Chief)	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
	ROBERT HARRELL	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	JOHN J. SNOW, JR.	Murphy
	DANNY E. DAVIS[5]	Waynesville

1. Appointed Chief Judge 16 January 1984 to replace Robert D. Wheeler who retired 31 December 1983.

2. Appointed Judge 2 March 1984.

3. Appointed Judge 30 December 1983 to replace Walter M. Lampley who retired 30 November 1983.

4. Appointed Judge 8 February 1984 to replace Edward J. Crotty who resigned 31 December 1983.

5. Appointed Judge 16 April 1984 to replace J. Charles McDarris who retired effective 1 April 1984.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

J. MICHAEL CARPENTER

Deputy Attorney General For Legal Affairs

JAMES M. WALLACE, JR.

Special Assistant to the Attorney General

PHILLIP J. LYONS

Senior Deputy Attorneys General

ANDREW A. VANORE, JR.
EUGENE A. SMITH, JR.
WILLIAM W. MELVIN

Deputy Attorney General

JEAN A. BENOY

Special Deputy Attorneys General

MILLARD R. RICH, JR.
MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
LESTER V. CHALMERS, JR.
ANN REED DUNN
CHARLES J. MURRAY
ISAAC T. AVERY III
H. AL COLE, JR.
RICHARD N. LEAGUE
CLAUDE W. HARRIS
I. B. HUDSON, JR.
JO ANNE SANFORD
DANIEL C. OAKLEY
REGINALD L. WATKINS
DAVID S. CRUMP

Assistant Attorneys General

WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
ARCHIE W. ANDERS
ELIZABETH C. BUNTING
ELISHA H. BUNTING, JR.
ALAN S. HIRSCH
SANDRA M. KING
JOHN C. DANIEL, JR.
JOAN H. BYERS
DONALD W. GRIMES
NONNIE F. MIDGETTE
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
THOMAS F. MOFFITT
GEORGE W. LENNON
MARILYN Y. RICH
DAVID R. BLACKWELL
NORMA S. HARRELL
THOMAS H. DAVIS, JR.
DENNIS P. MYERS
KAYE R. WEBB
DANIEL F. MCLAWHORN
TIARE B. SMILEY
DONALD W. STEPHENS
HENRY T. ROSSER
LUCIEN CAPONE III
FRANCES W. CRAWLEY
MICHAEL D. GORDON
JAMES C. GULICK
HARRY H. HARKINS, JR.
GRAYSON G. KELLEY
R. BRYANT WALL
RICHARD L. KUCHARSKI
ROBERT E. CANSLER
LEMUEL M. HINTON
SARAH C. YOUNG
STEVEN M. SHABER
W. DALE TALBERT
THOMAS G. MEACHAM, JR.
FRED R. GAMIN
RICHARD H. CARLTON
BARRY S. MCNEILL
CLIFTON H. DUKE
STEVEN F. BRYANT
JANE P. GRAY
JOHN F. MADDREY
WILSON HAYMAN
EVELYN M. COMAN
GEORGE C. WINDHAM
JANE R. THOMPSON
CHRISTOPHER P. BREWER
THOMAS J. ZIKO
WALTER M. SMITH
MARY E. ANANIA
JOHN R. CORNE
DANIEL C. HIGGINS
MICHAEL L. MORGAN
PHILIP A. TELFER
DAVID E. BROOME, JR.

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. WILLIAMS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3A	THOMAS D. HAIGWOOD	Greenville
3B	W. DAVID MCFADYEN, JR.	New Bern
4	WILLIAM H. ANDREWS	Jacksonville
5	JERRY LEE SPIVEY	Wilmington
6	DAVID BEARD	Murfreesboro
7	HOWARD S. BONEY, JR.	Tarboro
8	DONALD JACOBS	Goldsboro
9	DAVID WATERS	Oxford
10	RANDOLPH RILEY	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	MICHAEL F. EASLEY	Whiteville
14	RONALD L. STEPHENS	Durham
15A	GEORGE E. HUNT	Graham
15B	WADE BARBER, JR.	Pittsboro
16	JOE FREEMAN BRITT	Lumberton
17A	PHILIP W. ALLEN	Wentworth
17B	H. DEAN BOWMAN	Dobson
18	LAMAR DOWDA	Greensboro
19A	JAMES E. ROBERTS	Kannapolis
19B	GARLAND N. YATES	Asheboro
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H. W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	JAMES T. RUSHER	Boone
25	ROBERT E. THOMAS	Newton
26	PETER S. GILCHRIST III	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	RONALD C. BROWN	Asheville
29	ALAN C. LEONARD	Rutherfordton
30	MARCELLUS BUCHANAN III	Sylva

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICKS III	Greenville
12	MARY ANN TALLY	Fayetteville
15B	J. KIRK OSBORN	Chapel Hill
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

	PAGE
Ahern v. Ahern	728
Alford, Leach v.	118
Allen v. Duvall	342
American Nat'l Ins. Co. v. Ingram	38
Asheville, City of, Garland v.	490
Ballard, In re	580
Bank, First Union Nat'l, Church v.	359
Bank, First Union Nat'l v. King	757
Basic Media, Canfield v.	69
Basic Media, Coker v.	69
Beam, Chamberlain v.	377
Belk v. Peters	196
Braun v. Grundman	387
Brook Valley Enterprises, Inc., Corda v.	653
Brooks, In re House of Raeford Farms v.	106
Brown v. Miller	694
Brown's Cabinets, Edwards v.	524
Bumgarner v. Tomblin	636
Byrd Motor Lines v. Dunlop Tire and Rubber	292
Cabarrus Bank & Trust Co. v. Chandler	724
Campbell v. Campbell	113
Canal Wood Corp., Locklear v.	185
Canfield v. Basic Media	69
Capitol Funds v. White	785
Carpet Outlet, Internat'l, Durham Life Broadcasting v.	787
Casstevens v. Casstevens	169
Chamberlain v. Beam	377
Chandler, Cabarrus Bank & Trust Co. v.	724
Chapel Hill, Town of, Piney Mt. Neighborhood Assoc. v.	244
Chapman v. Southern Import Co.	194
Chemical Corp., Coastal v. Guardian Industries	176
Church v. First Union Nat'l Bank	359
City Federal Savings & Loan, Driftwood Manor Investors v.	459
City of Asheville, Garland v.	490
City of Newton, Southern Glove Mfg. Co. v.	754
City of Raleigh, Goodman Toyota v.	660
City of Washington, Lewis v.	552
City of Winston-Salem, Stillings v.	618
Coats v. Jones	151
Coastal Chemical Corp. v. Guardian Industries	176
Coble, S. v.	537
Coker v. Basic Media	69
Commercial Union Ins. Co., Wright v.	465
Cone Mills Corp., Hogan v.	439
Conner Homes v. Ratliff	306
Connor, Pinkston v.	628
Consolidated Systems v. Granville Steel Corp.	485
Construction Co., Monroe, Shaver v.	605
Corda v. Brook Valley Enterprises, Inc.	653
CPHC Investors, Orange Grocery Co. v.	136
Cunningham, S. v.	470
Cutchin, Holiday v.	369
Davis v. Edgecomb Metals	48
Dawson v. Radewicz	731
Dept. of Public Health, Stanly Co., Snuggs v.	86
Dixon v. Peters	592
Driftwood Manor Investors v. City Federal Savings & Loan	459
Drucker & Falk, Shepard v.	667
Duggins v. Town of Walnut Cove	684
Duke University, Holbrooks v.	504
Dunlop Tire and Rubber, Byrd Motor Lines v.	292
Durham v. Quincy Mutual Fire Ins. Co.	700
Durham Life Broadcasting v. Internat'l Carpet Outlet	787
Duvall, Allen v.	342
Edgecomb Metals, Davis v.	48
Edwards, S. v.	92
Edwards, S. v.	737
Edwards v. Brown's Cabinets	524
Ellenberger v. Ellenberger	721

	PAGE
Enterprises, Inc., Zickgraf v. Yonce	166
Enterprises, Matthews, Porter v.	140
Everhart v. Sowers	747
Farmer, S. v.	384
Fire Ins. Co., Quincy Mutual, Durham v.	700
First Union Nat'l Bank v. King	757
First Union Nat'l Bank, Church v.	359
Foreclosure of Connolly, In re v. Potts	547
Foreclosure of Taylor, In re	744
Foster, S. v.	507
Foster, S. v.	531
Frazier, Moore v.	476
Gaither v. Peters	559
Gardner v. Gardner	678
Garland v. City of Asheville	490
Gentry, Wilkes County v.	432
George Goodyear Co., Hong v.	741
Goodman, Sawyer v.	191
Goodman Toyota v. City of Raleigh	660
Graham, In re	146
Granville Steel Corp., Consolidated Systems v.	485
Greene, Michael v.	713
Greensboro News, Renwick v.	200
Grundman, Braun v.	387
Guardian Industries, Coastal Chemical Corp. v.	176
Hall, Tice v.	27
Hankins, Hutchens v.	1
Hardee v. Hardee	321
HBD, Inc. v. Steri-Tex Corp.	761
Hedrick, Mashburn v.	454
Henry Angelo & Sons, Inc. v. Prop. Development Corp.	569
Hilton v. Howington	717
Hoch v. Young	480
Hogan v. Cone Mills Corp.	439
Holbrooks v. Duke University	504
Holiday v. Cutchin	369
Holt v. Shoffner	381
Hong v. George Goodyear Co.	741
Howington, Hilton v.	717
Hutchens v. Hankins	1
Import Co., Southern, Chapman v.	194
In re Ballard	580
In re Foreclosure of Connolly v. Potts	547
In re Foreclosure of Taylor	744
In re Graham	146
In re House of Raeford Farms v. Brooks	106
In re Mash	130
In re Rogers	705
In re Shue	76
In re Sterling	562
In re Thomas	495
In re Truesdell	258
Inco, Inc. v. Planters Oil Mill	374
Industries, Guardian, Coastal Chemical Corp. v.	176
Ingram, American Nat'l Ins. Co. v.	38
Ins. Co., American Nat'l v. Ingram	38
Internat'l Carpet Outlet, Durham Life Broadcasting v.	787
Investors, CPHC, Orange Grocery Co. v.	136
Jeffries, S. v.	181
Johnson v. Manning	673
Johnson, S. v.	173
Jones v. Service Roofing & Sheet Metal Co.	772
Jones, Coats v.	151
Jones, S. v.	411
Kabatnik v. Westminster Co.	708
King, First Union Nat'l Bank v.	757
Krispy Waffle, Pollard v.	354
Lackey v. Tripp	765
Latch v. Latch	498
Leach v. Alford	118
Lewis v. City of Washington	552
Lewis, S. v.	98
Locklear v. Canal Wood Corp.	185

	PAGE
McCann v. Travis	447
McKay v. Parham	349
McKee, N.C.N.B. v.	58
McMillan v. Newton	751
Manning, Johnson v.	673
Martin County v. R. K. Stewart & Son	556
Mash, In re	130
Mashburn v. Hedrick	454
Matthews Enterprises, Porter v.	140
Media, Basic, Canfield v.	69
Media, Basic, Coker v.	69
Metals, Edgecomb, Davis v.	48
Michael v. Greene	713
Miller, Brown v.	694
Miller Machine Co., Northern Nat'l Life Ins. v.	424
Miller, Normile v.	689
Miller, Segal v.	689
Mitchell, Spector Industries v.	391
Mobil Oil, Wilson Brothers v.	334
Monk, S. v.	512
Monroe Construction Co., Shaver v.	605
Moore v. Frazier	476
Moore v. Reynolds	160
Morrison, S. v.	125
Moss, Ratliff v.	306
Moss v. Tripp	765
Motor Lines, Byrd v. Dunlop Tire and Rubber	292
Murdock v. Ratliff	306
N.C.N.B. v. McKee	58
Neighborhood Assoc., Piney Mt. v. Town of Chapel Hill	244
News and Observer, Renwick v.	200
Newton, McMillan v.	751
Normile v. Miller	689
Norris, Radford v.	501
Northeastern Motors, Inc., Vanlandingham v.	778
Northern Nat'l Life Ins. v. Miller Machine Co.	424
Oil Mill, Planters, Inco, Inc. v.	374
Orange Grocery Co. v. CPHC Investors	136
Parham, McKay v.	349
Peters, Belk v.	196
Peters, Dixon v.	592
Peters, Gaither v.	559
Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill	244
Pinkston v. Connor	628
Planters Oil Mill, Inco, Inc. v.	374
Pollard v. Krispy Waffle	354
Porter v. Matthews Enterprises	140
Potts, In re Foreclosure of Connolly v.	547
Prop. Development Corp., Henry Angelo & Sons, Inc. v.	569
Quincy Mutual Fire Ins. Co., Durham v.	700
Radewicz, Dawson v.	731
Radford v. Norris	501
Raeford Farms, In re House of v. Brooks	106
Raleigh, City of, Goodman Toyota v.	660
Rankins, S. v.	782
Ratliff v. Moss	306
Ratliff, Conner Homes v.	306
Ratliff, Murdock v.	306
Red House Furniture Co. v. Smith	769
Rees v. Tripp	765
Renwick v. Greensboro News	200
Renwick v. News and Observer	200
Reynolds, Moore v.	160
R. K. Stewart & Son, Martin County v.	556
Rogers, In re	705
Roshelli v. Sperry	509
Rufus Tart Trucking, Wiggins v.	542
Salvation Army v. Welfare	156
Sawyer v. Goodman	191
Segal v. Miller	689
Service Roofing & Sheet Metal Co., Jones v.	772

	PAGE
Shaver v. Monroe Construction Co.	605
Shaw v. Shaw	775
Shepard v. Drucker & Falk	667
Shoffner, Holt v.	381
Shue, In re	76
Smith, Red House Furniture Co. v.	769
Snuggs v. Stanly Co. Dept. of Public Health	86
Southern Glove Mfg. Co. v. City of Newton	754
Southern Import Co., Chapman v.	194
Sowers, Everhart v.	747
Spector Industries v. Mitchell	391
Sperry, Roshelli v.	509
Stanly Co. Dept. of Public Health, Snuggs v.	86
S. v. Coble	537
S. v. Cunningham	470
S. v. Edwards	92
S. v. Edwards	737
S. v. Farmer	384
S. v. Foster	507
S. v. Foster	531
S. v. Jeffries	181
S. v. Johnson	173
S. v. Jones	411
S. v. Lewis	98
S. v. Monk	512
S. v. Morrison	125
S. v. Rankins	782
S. v. Taylor	364
S. v. Templeton	125
S. v. White	734
Steel Corp., Granville, Consolidated Systems v.	485
Steri-Tex Corp., HBD, Inc. v.	761
Sterling, In re	562
Stillings v. City of Winston-Salem	618
Taylor, In re Foreclosure of	744
Taylor, S. v.	364
Templeton, S. v.	125
Thomas, In re	495
Tice v. Hall	27
Tomblin, Bumgarner v.	636
Town of Chapel Hill, Piney Mt. Neighborhood Assoc. v.	244
Town of Walnut Cove, Duggins v.	684
Toyota, Goodman v. City of Raleigh	660
Travis, McCann v.	447
Tripp, Lackey v.	765
Tripp, Moss v.	765
Tripp, Rees v.	765
Truesdell, In re	258
Vanlandingham v. Northeastern Motors, Inc.	778
Wade v. Wade	189
Walker v. Walker	644
Walnut Cove, Town of, Duggins v.	684
Washington, City of, Lewis v.	552
Welfare, Salvation Army v.	156
Westminster Co., Kabatnik v.	708
White, Capitol Funds v.	785
White, S. v.	734
Wiggins v. Rufus Tart Trucking	542
Wilkes County v. Gentry	432
Wilson Brothers v. Mobil Oil	334
Winston-Salem, City of, Stillings v.	618
Wood Corp., Canal, Locklear v.	185
Wright v. Commercial Union Ins. Co.	465
Yonce, Zickgraf Enterprises, Inc. v.	166
Young, Hoch v.	480
Zickgraf Enterprises, Inc. v. Yonce	166

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
Aikens, S. v.	566
Alston, S. v.	566
Asheville, City of, Wolfe v.	568
Atkinson, S. v.	566
Barker, Smith v.	565
Barnes, S. v.	789
Bd. of Adjustment, The Zoning, Pierce v.	565
Beasley, S. v.	199
Bell, S. v.	566
Best v. Fellows	789
Boone, S. v.	566
Bowers, Chase v.	565
Boyer v. Boyer	565
Boyette, S. v.	566
Brame v. Bryant-Durham Electric	199
Brown v. Brown	565
Bryant-Durham Electric, Brame v.	199
Bumgarner v. Bumgarner	565
Bumgarner v. Harris	789
Bumgarner Pontiac, Leasing Systems v.	199
Burlington Ind., Haskett v.	199
Campbell, S. v.	566
Cassity, S. v.	566
Chase v. Bowers	565
City of Asheville, Wolfe v.	568
Cook, Taylor v.	789
Davis, S. v.	568
Davis, Wachovia Bank & Trust v.	789
Dependable Ins. Co. v. Middlesex Constr.	390
Dewberry, Terry v.	567
Driggers v. United Insurance	568
Eller, S. v.	566
Fayetteville State Univ., Liang v.	199
Fellows, Best v.	789
Garner, Lineberry v.	789
Garvin, S. v.	568
Gattis, S. v.	566
General Electric Co., Peele v.	789
Gore, S. v.	568
Granberry, S. v.	566
Great Lakes Carbon Corp., In re Connelly v.	565
Hardy v. Hardy	568
Harris, Bumgarner v.	789
Haskett v. Burlington Ind.	199
Henez, S. v.	566
Hiatt v. Hiatt	390
Hicks, S. v.	566
Hobbs, Weaver v.	199
Hogan v. Hogan	565
Hollar, Prevette v.	565
In re Connelly v. Great Lakes Carbon Corp.	565
In re Jones	565
In re Love	568
In re Prevette v. Prevette	199
In re Schweizer	565
Ins. Co., Dependable v. Middlesex Constr.	390
Jackson, S. v.	566
Jacobs, S. v.	566
Jennings, S. v.	566
Jones v. Jones	565
Jones, In re	565
Joyce v. Nance	568
Kilby, S. v.	199
Kindley, S. v.	567
Kordas v. Robbins	789
Leasing Systems v. Bumgarner Pontiac	199
Ledford v. Ledford	568
Lewis, S. v.	567
Liang v. Fayetteville State Univ.	199
Lineberry v. Garner	789
Love, In re	568
Lyon, S. v.	568
McDowell, S. v.	567
McElrath, S. v.	568
McFadden, Neal v.	565

CASES REPORTED WITHOUT PUBLISHED OPINION

PAGE

Middlesex Constr., Dependable Ins. Co. v. ... 390
Morton, S. v. ... 567

Nance, Joyce v. ... 568
Neal v. McFadden ... 565
Norris v. West ... 789
Norton, Ramsey v. ... 789

Osborne v. Osborne ... 565

Padgett v. Stutts ... 565
Peele v. General Electric Co. ... 789
Perkins v. Perkins ... 565
Phelps, S. v. ... 567
Pierce v. The Zoning Bd. of Adjustment ... 565
Prevette v. Hollar ... 565
Prevette, In re Prevette v. ... 199
Purifoy v. Williamson ... 789

Ramsey v. Norton ... 789
Renegar, S. v. ... 567
Robbins, Kordas v. ... 789
Ross, S. v. ... 568

Sampson County v. Westbrook ... 390
Sanford Finishing Corp., Wilkes v. ... 567
Saunders, S. v. ... 567
Schweizer, In re ... 565
Sellers, S. v. ... 199
Smith v. Barker ... 565
Smith, S. v. ... 567
S. v. Aikens ... 566
S. v. Alston ... 566
S. v. Atkinson ... 566
S. v. Barnes ... 789
S. v. Beasley ... 199
S. v. Bell ... 566
S. v. Boone ... 566
S. v. Boyette ... 566
S. v. Campbell ... 566
S. v. Cassity ... 566
S. v. Davis ... 568
S. v. Eller ... 566
S. v. Garvin ... 568
S. v. Gattis ... 566

PAGE

S. v. Gore ... 568
S. v. Granberry ... 566
S. v. Henez ... 566
S. v. Hicks ... 566
S. v. Jackson ... 566
S. v. Jacobs ... 566
S. v. Jennings ... 566
S. v. Kilby ... 199
S. v. Kindley ... 567
S. v. Lewis ... 567
S. v. Lyon ... 568
S. v. McDowell ... 567
S. v. McElrath ... 568
S. v. Morton ... 567
S. v. Phelps ... 567
S. v. Renegar ... 567
S. v. Ross ... 568
S. v. Saunders ... 567
S. v. Sellers ... 199
S. v. Smith ... 567
S. v. Tavares ... 567
S. v. Tolar ... 567
S. v. Underwood ... 567
S. v. Ward ... 567
S. v. Williams ... 567
S. v. Williams ... 789
S. v. Wilson ... 567
S. v. Wright ... 567
Stewart v. Stewart ... 568
Stutts, Padgett v. ... 565

Tavares, S. v. ... 567
Taylor v. Cook ... 789
Terry v. Dewberry ... 567
The Zoning Bd. of Adjustment, Pierce v. ... 565
Tolar, S. v. ... 567

Underwood, S. v. ... 567
United Insurance, Driggers v. ... 568

Wachovia Bank & Trust v. Davis ... 789
Ward, S. v. ... 567
Weaver v. Hobbs ... 199
West, Norris v. ... 789
Westbrook, Sampson County v. ... 390
Wilkes v. Sanford Finishing Corp. ... 567
Williams, S. v. ... 567

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
Williams, S. v.	789
Williamson, Purifoy v.	789
Wilson, S. v.	567
Withers v. Withers	568
Wolfe v. City of Asheville	568
Wood, Woodlief v.	568
Woodlief v. Wood	568
Wright, S. v.	567

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-38	Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp, 765
1-40	Casstevens v. Casstevens, 169
1-52	Roshelli v. Sperry, 509
1-52(1)	Bumgarner v. Tomblin, 636
	Byrd Motor Lines v. Dunlop Tire and Rubber, 292
1-52(4)	Hoch v. Young, 480
1-52(9)	Brown v. Miller, 694
1-52(16)	Byrd Motor Lines v. Dunlop Tire and Rubber, 292
1-75.4(4)	Coastal Chemical Corp. v. Guardian Industries, 194
1-272	Brown v. Miller, 694
1-277(a)	Lewis v. City of Washington, 552
1-277(a) & (b)	Coastal Chemical Corp. v. Guardian Industries, 194
1-279(c)	First Union Nat'l Bank v. King, 757
1-339.28(a)	First Union Nat'l Bank v. King, 757
1-440.16(c)	Edwards v. Brown's Cabinets, 524
1-440.36 & .37	Edwards v. Brown's Cabinets, 524
1A-1	See Rules of Civil Procedure infra
7A-27(d)(1)	Lewis v. City of Washington, 552
7A-27(d)(2), (3) & (4)	Coastal Chemical Corp. v. Guardian Industries, 194
7A-61	State v. Jones, 411
7A-289.32	In re Sterling, 562
7A-289.32(2)	In re Ballard, 580
	In re Graham, 146
7A-517(21)	In re Graham, 146
	In re Sterling, 562
7A-640	In re Shue, 76
7A-657	In re Shue, 76
8-45	Durham Life Broadcasting v. Internat'l Carpet Outlet, 787
8-51	Corda v. Brook Valley Enterprises, Inc., 653
	Hardee v. Hardee, 321
8-58.13	Inco, Inc. v. Planters Oil Mill, 374
8-81	Moore v. Reynolds, 160

G.S.	
14-87	State v. Foster, 507
15A-1232	State v. Morrison and State v. Templeton, 125
15A-1340.4(a)	State v. Foster, 507
15A-1340.4(e)	State v. Foster, 507
18A-21	State v. Jones, 411
18A-34	Hutchens v. Hankins, 1
20-16(c)	Belk v. Peters, 196
	Gaither v. Peters, 559
20-139.1(f)	State v. Jones, 411
20-141	Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss, 306
20-150(d)	Belk v. Peters, 196
22-2	Bumgarner v. Tomblin, 636
24-11(a)	Inco, Inc. v. Planters Oil Mill, 374
25-1-201(20)	In re Foreclosure of Connolly v. Potts, 547
25-2-313(1)(a)	Byrd Motor Lines v. Dunlop Tire and Rubber, 292
25-2-316(4)	Byrd Motor Lines v. Dunlop Tire and Rubber, 292
25-2-719(3)	Byrd Motor Lines v. Dunlop Tire and Rubber, 292
25-3-401	Cabarrus Bank & Trust Co. v. Chandler, 724
25-3-416	Cabarrus Bank & Trust Co. v. Chandler, 724
25-3-603	N.C.N.B. v. McKee, 58
33-9(3)	In re Thomas, 495
Ch. 35, Art. 7	In re Truesdell, 258
35-37	In re Truesdell, 258
35-39	In re Truesdell, 258
35-43	In re Truesdell, 258
36A-74(c)	Church v. First Union Nat'l Bank, 359
45-21.16(a)	In re Foreclosure of Taylor, 744
45-21.16(d)	In re Foreclosure of Connolly v. Potts, 547
46-19	Brown v. Miller, 694
47-115.1	Cabarrus Bank & Trust Co. v. Chandler, 724
49-2	Wilkes County v. Gentry, 432

G.S.	
49-7	Wilkes County v. Gentry, 432
49-15	Wilkes County v. Gentry, 432
50-13.4(b) & (c)	Wilkes County v. Gentry, 432
50-13.4(c)	Campbell v. Campbell, 113
50-16.7(i)	Wade v. Wade, 189
50A-3	In re Ballard, 580
50A-3(a)(2)(i) & (ii)	Latch v. Latch, 498
50A-3(a)(4)	Latch v. Latch, 498
55-145(a)	Coastal Chemical Corp. v. Guardian Industries, 194
58-3	Henry Angelo & Sons, Inc. v. Prop. Development Corp., 569
58-54.20, .21, .22 & .23	Henry Angelo & Sons, Inc. v. Prop. Development Corp., 569
58-56.1(c)	Inco, Inc. v. Planters Oil Mill, 374
58-197	Northern Nat'l Life Ins. v. Miller Machine Co., 424
58-251.2	American Nat'l Ins. Co. v. Ingram, 38
59-2(a)	Johnson v. Manning, 673
59-16(a)(1)	Johnson v. Manning, 673
Ch. 75	Michael v. Greene, 713
87-1	Coats v. Jones, 151
90-21.12	Tice v. Hall, 27
90-21.13	Dixon v. Peters, 592
90-21.13(a)(3)	Dixon v. Peters, 592
95-137(b)(1)	In re House of Raeford Farms v. Brooks, 106
97-31(15)	Davis v. Edgecomb Metals, 48
97-58(c)	Hogan v. Cone Mills Corp., 439
97-85	Pollard v. Krispy Waffle, 354
97-86	Jones v. Service Roofing & Sheet Metal Co., 772
110-129(3)	Wilkes County v. Gentry, 432
110-132(a)	Holt v. Shoffner, 381
110-132(b)	Leach v. Alford, 118
110-135	Wilkes County v. Gentry, 432

G.S.	
110-137	Wilkes County v. Gentry, 432
122-58.13	In re Rogers, 705
146-6	Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp, 765
146-6(e)	Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp, 765
146-79	State v. Taylor, 364
160A-50	Southern Glove Mfg. Co. v. City of Newton, 754
160A-381	Duggins v. Town of Walnut Cove, 684
162-14	Red House Furniture Co. v. Smith, 769

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(a) & (b)	Everhart v. Sowers, 747
4(j)(6)c	In re House of Raeford Farms v. Brooks, 106
8(a)(2)	Coastal Chemical Corp. v. Guardian Industries, 194
9(b)(3)	State v. Monk, 512
19	Brown v. Miller, 694
28(b)(5)	State v. Jones, 411
41(a)	Everhart v. Sowers, 747
41(b)	In re Foreclosure of Taylor, 744
55(b)(1)	N.C.N.B. v. McKee, 58
60(b)	Hilton v. Howington, 717
60(b)(1)	Braun v. Grundman, 387
60(b)(4)	Sawyer v. Goodman, 191
60(b)(6)	Leach v. Alford, 118

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 10	In re Rogers, 705
Art. I, § 16	In re Rogers, 705
Art. I, § 19	Duggins v. Town of Walnut Cove, 684
	In re House of Raeford Farms v. Brooks, 106
	In re Rogers, 705
Art. IV, § 1	Dixon v. Peters, 592

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

I Amendment	Renwick v. News and Observer and Renwick v. Greensboro News, 200
IV Amendment	State v. Jones, 411
V Amendment	State v. Jones, 411
XIV Amendment	Duggins v. Town of Walnut Cove, 684
	In re House of Raeford Farms v. Brooks, 106
	In re Rogers, 705

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
3(c)	First Union Nat'l Bank v. King, 757
4(a), (b) & (d)	Roshelli v. Sperry, 509
32(a)(5)	Holbrooks v. Duke University, 504

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

Case	*Reported*	*Disposition in Supreme Court*
Allen v. Duvall	63 N.C. App. 342	Allowed, 310 N.C. 152
American Nat'l Ins. Co. v. Ingram	63 N.C. App. 38	Denied, 309 N.C. 819
Barber v. Barber	61 N.C. App. 567	Denied, 310 N.C. 475
Best v. Fellows	63 N.C. App. 789	Denied, 310 N.C. 743
Bridgers v. Bridgers	62 N.C. App. 583	Denied, 310 N.C. 475
Brown v. Miller	63 N.C. App. 694	Denied, 310 N.C. 476 Appeal Dismissed
Byrd Motor Lines v. Dunlop Tire and Rubber	63 N.C. App. 292	Denied, 310 N.C. 624
Campbell v. Campbell	63 N.C. App. 113	Denied, 309 N.C. 460
Carter v. Frank Shelton, Inc.	62 N.C. App. 378	Denied, 310 N.C. 476
Chase v. Bowers	63 N.C. App. 565	Denied, 310 N.C. 624
Church v. First Union Nat'l Bank	63 N.C. App. 359	Denied, 309 N.C. 460 Appeal Dismissed
Dependable Ins. Co. v. Middlesex Constr.	63 N.C. App. 390	Denied, 309 N.C. 460
Driggers v. United Insurance	63 N.C. App. 568	Denied, 309 N.C. 819
Duggins v. Town of Walnut Cove	63 N.C. App. 684	Denied, 309 N.C. 819
Durham v. Quincy Mutual Fire Ins. Co.	63 N.C. App. 700	Allowed, 310 N.C. 476
Edwards v. Brown's Cabinets	63 N.C. App. 524	Denied, 309 N.C. 632
Garland v. City of Asheville	63 N.C. App. 490	Denied, 309 N.C. 632
Goodman Toyota v. City of Raleigh	63 N.C. App. 660	Denied, 310 N.C. 477
Hilton v. Howington	63 N.C. App. 717	Denied, 310 N.C. 152
Hoch v. Young	63 N.C. App. 480	Denied, 309 N.C. 632
Hogan v. Hogan	63 N.C. App. 565	Denied, 309 N.C. 632
Holiday v. Cutchin	63 N.C. App. 369	Allowed, 309 N.C. 633
Hutchens v. Hankins	63 N.C. App. 1	Denied, 309 N.C. 191
In re Foreclosure of Taylor	63 N.C. App. 744	Denied, 309 N.C. 820
In re Graham	63 N.C. App. 146	Denied, 309 N.C. 321

Case	*Reported*	*Disposition in Supreme Court*
In re House of Raeford Farms v. Brooks	63 N.C. App. 106	Denied, 310 N.C. 153 Appeal Dismissed
In re Rogers	63 N.C. App. 705	Denied, 309 N.C. 633 Appeal Dismissed
In re Schweizer	63 N.C. App. 565	Denied, 309 N.C. 820
In re Truesdell	63 N.C. App. 258	Allowed, 310 N.C. 745
Lackey v. Tripp	63 N.C. App. 765	Denied, 309 N.C. 821
Lineberry v. Garner	63 N.C. App. 789	Denied, 309 N.C. 821
McKay v. Parham	63 N.C. App. 349	Denied, 310 N.C. 477
McMillan v. Newton	63 N.C. App. 751	Denied, 309 N.C. 821
Mashburn v. Hedrick	63 N.C. App. 454	Denied, 309 N.C. 821
Misenheimer v. Misenheimer	62 N.C. App. 706	Allowed, 310 N.C. 309
Padgett v. Stutts	63 N.C. App. 565	Denied, 309 N.C. 822
Porter v. Matthews Enterprises	63 N.C. App. 140	Denied, 309 N.C. 462
Purifoy v. Williamson	63 N.C. App. 789	Denied, 310 N.C. 154
Ramsey v. Norton	63 N.C. App. 789	Denied, 309 N.C. 822
Red House Furniture Co. v. Smith	63 N.C. App. 769	Allowed, 309 N.C. 822
Roshelli v. Sperry	63 N.C. App. 509	Denied, 309 N.C. 633
Sawyer v. Goodman	63 N.C. App. 191	Denied, 309 N.C. 823
Shaver v. Monroe Construction Co.	63 N.C. App. 605	Denied, 310 N.C. 154
Snuggs v. Stanly Co. Dept. of Public Health	63 N.C. App. 86	Allowed, 309 N.C. 823
State v. Boone	63 N.C. App. 566	Denied, 310 N.C. 627
State v. Brown	59 N.C. App. 411	Denied, 310 N.C. 155
State v. Campbell	63 N.C. App. 566	Denied, 310 N.C. 155
State v. Edwards	63 N.C. App. 92	Denied, 309 N.C. 633
State v. Granberry	63 N.C. App. 566	Denied, 309 N.C. 633
State v. Johnson	63 N.C. App. 173	Allowed, 309 N.C. 824
State v. Jones	63 N.C. App. 411	Denied, 309 N.C. 323
State v. Lewis	63 N.C. App. 98	Allowed, 309 N.C. 634
State v. Proctor	62 N.C. App. 233	Denied, 310 N.C. 311

Case	*Reported*	*Disposition in Supreme Court*
State v. Sellers	63 N.C. App. 199	Denied, 309 N.C. 464 Appeal Dismissed
State v. Tavares	63 N.C. App. 567	Denied, 309 N.C. 324 Appeal Dismissed
State v. Taylor	63 N.C. App. 634	Denied, 310 N.C. 311 Appeal Dismissed
State v. White	63 N.C. App. 734	Denied, 309 N.C. 825
State v. Wilson	63 N.C. App. 567	Denied, 309 N.C. 825 Appeal Dismissed
Stillings v. City of Winston-Salem	63 N.C. App. 618	Allowed, 310 N.C. 480
Vanlandingham v. Northeastern Motors, Inc.	63 N.C. App. 778	Denied, 309 N.C. 826
Wilson Brothers v. Mobil Oil	63 N.C. App. 334	Denied, 309 N.C. 634
Wolfe v. City of Asheville	63 N.C. App. 568	Denied, 309 N.C. 464
Wright v. Commercial Union Ins. Co.	63 N.C. App. 465	Denied, 309 N.C. 634

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SHIRLEY K. HUTCHENS, INDIVIDUALLY; SHIRLEY K. HUTCHENS, ADMINISTRATRIX OF THE ESTATE OF OTIS WAYNE HUTCHENS; MARK WAYNE HUTCHENS, BY AND THROUGH HIS GUARDIAN AD LITEM,SHIRLEY K. HUTCHENS v. CICERO HANKINS AND WIFE, MARTHA HANKINS, T/A YOUNGER BROTHERS LOUNGE; DONNY RAY FLETCHER AND WELDON EVERETT

No. 8217SC514

(Filed 21 June 1983)

1. **Automobiles and Other Vehicles §§ 43, 50.2; Intoxicating Liquor § 24; Negligence § 1.3— violation of statute regulating sale of intoxicating liquors—grounds for action for negligence**

The general purposes of G.S. 18A-34 would appear to be (1) the protection of the customer from the adverse consequences of intoxication and (2) the protection of the community at large from the possible injurious consequences of contact with an intoxicated person; therefore, the Court adopted the requirements of G.S. 18A-34 as a minimum standard of conduct for defendant-licensees, and held that a violation of this statute can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer.

2. **Automobiles and Other Vehicles §§ 43, 50.2; Intoxicating Liquor § 24; Negligence § 1.3— sale of alcohol to intoxicated person—requirement that licensee knew or should have known**

In order for a licensee to violate G.S. 18A-34, prohibiting the sale of alcohol to obviously intoxicated persons, there must be a sale to an intoxicated person whom the licensee knew to be in an intoxicated condition. Plaintiffs' allegations that the licensee sold a beer to an individual defendant while he was intoxicated under circumstances indicating that defendants knew or should have known that he was intoxicated were sufficient to state a claim for negligence *per se* and to withstand defendants' motion to dismiss.

3. Automobiles and Other Vehicles § 50.2; Intoxicating Liquor § 24; Negligence § 8.1— sale of alcohol to intoxicated customer—proximate cause of subsequent automobile accident

The consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are not reasonably unforeseeable events so as to insulate a tavern owner who knew or should have known that his patron intended to drive a motor vehicle from liability as a matter of law. The act of the patron in consuming the alcohol may certainly be considered a contributing factor, but whether it is such an intervening cause as would break the chain of foreseeable consequences emanating from the tavern owner's negligent serving is a question of fact to be determined by a jury.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 8 March 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 18 March 1983.

The plaintiffs' action against the defendants Cicero and Martha Hankins, doing business as Younger Brothers Lounge, for tortious injury and death sustained by plaintiffs as a result of an automobile collision with an intoxicated patron of Younger Brothers Lounge was dismissed pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief may be granted, and the plaintiffs have appealed.

Bethea, Robinson, Moore & Sands, by Alexander P. Sands, III, for plaintiff appellants.

Benjamin R. Wrenn and Albert J. Post, for defendant appellees.

JOHNSON, Judge.

The sole question presented by the motion to dismiss is whether a common law dram shop liability exists in North Carolina for injuries or death sustained by innocent third parties in an automobile collision with the customer of a tavern who was sold alcoholic beverages while in an intoxicated condition. For the reasons set forth below, we hold that a licensed provider of alcoholic beverages for on-premises consumption may be held liable for injuries or damages proximately resulting from the acts of persons to whom beverages were illegally furnished while intoxicated.

I

This action for personal injuries and death was instituted by Shirley K. Hutchens as Administratrix of the Estate of Otis Wayne Hutchens, individually, and as Guardian Ad Litem for Mark Wayne Hutchens, her minor son. Otis Wayne Hutchens was killed, and Shirley K. Hutchens, his wife, and Mark Wayne Hutchens, their minor son, were severely injured when the Hutchens automobile collided head-on with an automobile driven by Donnie Ray Fletcher, and owned by Weldon Everett. This action was instituted against Fletcher and Everett, and also against Cicero Hankins and his wife, Martha Hankins, owners and operators of Younger Brothers Lounge.

Younger Brothers Lounge is situated at the intersection of Freeway Drive and U.S. 29 Business, near the city of Reidsville, North Carolina. The Lounge provided a parking lot for its customers, and was licensed by the State of North Carolina and permitted to sell at retail beer to customers for on-premises consumption.

The complaint alleged that on 19 March 1981, prior to the collision, Donny Ray Fletcher purchased and consumed on the premises of Younger Brothers a large number of beers over a period of several hours; that Fletcher became intoxicated, and as a result, negligently operated his automobile so as to cause the head-on collision with the plaintiffs' automobile some 15 minutes after leaving Younger Brothers Lounge. At the time of the accident, Fletcher had a blood alcohol content of .16% by weight, which is prima facie evidence that Fletcher was driving under the influence of intoxicating liquor. G.S. 20-138(b).

In the second cause of action, plaintiffs allege that as a result of Younger Brothers' furnishing beer and Fletcher's consumption of it while on the premises, Fletcher became intoxicated and that the furnishing of beer was a proximate cause of the collision with plaintiffs. Paragraph 7 alleges further that defendants were negligent in furnishing beer to Fletcher in that:

A. They failed to exercise reasonable care under the circumstances then existing;

B. That they furnished beer to Donny Ray Fletcher when he was in such a condition as to be deprived of his willpower and responsibility for his behavior;

C. That they knew or should have known that Donny Ray Fletcher habitually became intoxicated and drove automobiles in a negligent manner;

D. They violated G.S. 18A-34 when they sold beer to Donny Ray Fletcher;

E. They engaged in a course of conduct while operating Younger Brothers that they knew or should have known, would lead to the death or serious injuries, of innocent third parties injured by drivers of automobiles who became intoxicated at their premises.

The complaint also alleges that the negligence of defendants was wanton and willful and, as such, entitles plaintiffs to recover punitive damages in addition to the compensatory damages requested for the injuries received as a result of the automobile collision. Thus, the complaint presents two theories of negligent conduct: (1) a failure to exercise due care to avoid a reasonably foreseeable risk of harm to innocent third parties upon the highways by the serving of alcoholic beverages to an obviously intoxicated person by one who knows or should know that such intoxicated person habitually became intoxicated and drove automobiles in a negligent manner, and (2) the sale of alcoholic beverages to Fletcher while he was intoxicated in violation of G.S. 18A-34 as constituting negligence *per se*. G.S. 18A-34 (a), in effect at the time of plaintiffs' injury, provides:

No holder of a license or permit authorizing the sale at retail of malt beverages or wine (fortified or unfortified) for consumption on or off premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises;

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition.[1]

1. A statutory duty upon a licensee or permittee not to sell such beverages to an intoxicated person or minor has existed in some form in North Carolina since enactment of the Beverage Control Act of 1939. *See* G.S. 18-78.1(1) & (2) (repealed by Session Laws, 1971).

A violation of G.S. 18A-34(a)(2) constitutes a misdemeanor, punishable by fine, imprisonment, or both. G.S. 18A-56.

Voluntary dismissals, with prejudice, have been taken against defendants Fletcher and Everett, and the cause of action against them is not the subject of this appeal. The sole issue presented by the dismissal of plaintiffs' action is whether civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to an intoxicated customer who, as a result of intoxication, injures third persons. Since the following issues are not presented in the case under discussion, we do not decide whether, under similar circumstances, (1) a noncommercial furnisher of alcoholic beverages may be subject to civil liability; (2) whether a person who is served alcoholic beverages may recover for injuries suffered as a result of such sale or furnishing; or (3) whether off-premises retailers may be held civilly liable for sales or furnishing of alcohol to intoxicated customers.

II

Under the common law rule it was not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and no cause of action existed against one furnishing liquor in favor of those injured by the intoxication of the person so furnished. The reason usually given for this rule being that the drinking of the liquor, not the remote furnishing of it, was the proximate cause of the injury. *See* 48 C.J.S., Intoxicating Liquors, § 430 (1947); 45 Am. Jur. 2d, Intoxicating Liquor, § 553 (1969); 97 A.L.R. 3d 528, § 2 (1980). However, the question of civil dram shop liability is apparently one of first impression in North Carolina. Our research has disclosed no judicial decision addressing the question of dram shop liability under general principles of tort law and no case in which a claim of negligence has been predicated upon a violation

In 1981, Chapter 18A was repealed, and in its place Chapter 18B was substituted. A similar provision was enacted, § 18B-305(a), which provides: It shall be unlawful for a permittee or his employee or for an ABC store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated. G.S. 18B-102(b) provides that violation of any provision of Chapter 18B, Regulation of Alcoholic Beverages, shall constitute a misdemeanor, punishable by fine, imprisonment for not more than two years, or both.

of G.S. 18A-34 or its predecessor statute. In fact, these statutes have not previously been construed by our courts.[2]

Other jurisdictions have dealt with the question in three separate ways. Approximately twenty-one states have legislatively enacted a "Civil Damages Act" or a "Dram Shop Act," which statutorily provides a cause of action for injuries resulting from the sales of alcoholic beverages to intoxicated customers who injure third persons.[3] At the time of plaintiffs' injuries in 1981, no comparable dram shop legislation had been enacted in North Carolina. However, we note here that the North Carolina General Assembly has recently amended Chapter 18B of the General Statutes to provide dram shop liability for negligent sales of alcoholic beverages to underaged persons for injuries proximately caused by the underaged driver's negligent operation of an automobile while impaired by an alcoholic beverage, as part of the Safe Roads Act of 1983. *See* G.S. 18B-121 *et seq.* (Session Laws, 1983). As originally proposed, the Act included a provision creating dram shop liability for sales to intoxicated persons. Section 41.1 of the Safe Roads Act of 1983 specifically states:

> The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons.

In light of this express declaration of "no legislative intent" to include or preclude liability for sales to intoxicated persons we will treat the issue as have courts in those jurisdictions which either

2. In a recent decision applying North Carolina law, the Fourth Circuit Court of Appeals concluded that under the law of torts as developed by our Supreme Court, civil liability will be imposed on a licensee who violates a law prohibiting the sale of alcoholic beverages to a person known to be intoxicated. *Chastain v. Litton Systems, Inc.*, 694 F. 2d 957 (4th Cir. 1982). We agree with this analysis. See discussion, *infra*, Part III.

3. For discussion and examples of some current dram shop acts *see generally* Comment, 23 S.D.L. Rev. 227 (1978) and Note, 35 Ohio St. L.J. 630 (1974). Many of these statutes limit (1) the class of plaintiffs who may recover; (2) the maximum monetary recovery possible; and (3) the period of limitations during which action may be commenced. *See e.g.* Ill. Rev. Stat. Chapter 43 § 135 (Supp. 1977).

do not have Civil Damages or Dram Shop Acts, or whose acts were found inapplicable to the situation presented.

In recent years only a handful of courts have continued to follow the old rule of nonliability and refused to allow the injured person to recover from the liquor supplier.[4] Two rationales are commonly advanced to support this rule. First, the proximate cause of both the patron's intoxication and the subsequent injury to the third party was held to be the consumption of the liquor, not its sale or furnishing. Second, even if the sale or furnishing were found to have caused the patron's intoxication, the subsequent injury to a third party was held to be an unforeseeable result of the furnishing of the intoxicating beverage. The common law rule was succinctly stated in the oft-quoted passage from *State for Use of Joyce v. Hatfield*, 197 Md. 249, 254, 78 A. 2d 754, 756 (Md. App. 1951):

> Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for "causing" intoxication of the person whose negligent or willful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between the sale of liquor and a tort committed by a buyer who has drunk the liquor.

The rules rests in part on the further assumption that it is not a tort to sell liquor to an able-bodied man, since the liquor vending business is legitimate and the purchaser is deemed to be responsible.[5] The other common justification for adherence to the old

4. ARIZONA: *Lewis v. Wolf*, 122 Ariz. 567, 596 P. 2d 705 (Ct. App. 1979); ARKANSAS: *Carr v. Turner*, 238 Ark. 889, 385 S.W. 2d 656 (1965); CONNECTICUT: *Slicer v. Quigley*, 180 Conn. 252, 429 A. 2d 855 (Supp. Ct. 1980); GEORGIA: *Keaton v. Kroger Co.*, 143 Ga. App. 23, 237 S.E. 2d 443 (Ga. App. 1977); MARYLAND: *Felder v. Butler*, 292 Md. 174, 438 A. 2d 494 (1981); MISSOURI: *Alsup v. Garvin-Wienke, Inc.*, 579 F. 2d 461 (8th Cir. 1978) (Applying Missouri law); NEBRASKA: *Holmes v. Circo*, 196 Neb. 496, 244 N.W. 2d 65 (1976); NEVADA: *Hamm v. Carson City Nugett, Inc.*, 85 Nev. 99, 450 P. 2d 358 (Nev. 1969); WISCONSIN: *Olsen v. Copeland*, 90 Wis. 2d 483, 280 N.W. 2d 178 (1979).

5. This principle was stated in *Meade v. Freeman*, 93 Idaho 389, 462 P. 2d 54 (1969), a decision relied upon in many cases denying liability. However, *Meade* itself was recently expressly overruled in *Alegria v. Payonk*, 101 Idaho 617, 619 P. 2d 135 (1980), where the court stated that: "It is of pivotal significance in this case that

rule is that, in the final analysis, the controlling consideration is one of public policy, and the decision as to liability should be left to the legislature. *See e.g. Holmes v. Circo, supra.* Defendant contends that the reasoning in these decisions supports the dismissal of plaintiffs' claims and urges that the common law rule of nonliability be adopted by this Court.

Plaintiff's principal contention on appeal is that the North Carolina General Assembly, by enacting G.S. 18A-34, established a statutory duty not to sell alcoholic beverages to an intoxicated person, that the statute was enacted not only to protect the intoxicated person, but also for the protection of the safety of the general public, including the deceased and plaintiffs' herein, and that the conduct of defendants, in violating this safety statute, constitutes negligence *per se* sufficient to give rise to a cause of action. Plaintiff urges that this Court reach the same decision as the courts (1) that have imposed civil liability on a licensee who violates a liquor control law prohibiting the sale of alcoholic beverages to a person known to be intoxicated and (2) have determined that the furnishing of alcoholic beverages is not causally remote, but rather, may be a proximate cause of the consequential injuries suffered by third persons, as the better reasoned approach to the question of civil dram shop liability.

Most state and federal courts that have considered these issues since 1960 have reevaluated and rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person on the grounds that sale or service is causally remote from the subsequent injurious conduct of the patron. A substantial majority have decided that the furnishing of alcoholic beverages may be a proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person, and nearly every court recognizing such a claim for relief against a licensed vendor has premised the action for negligence upon the violation of statutes imposing a duty upon

---

respondents are persons and entities engaged in the daily business of selling intoxicants by the drink, and to whom a jury might reasonably attribute a conscious awareness of the number of drinks sold to and consumed by the minor Payonk as well as the effect such consumption would have on one particularly susceptible to the incapacitating effects of alcohol due to physical and mental immaturity." *Id.* at 620 n. 1, 619 P. 2d at 138.

licensees to refrain from selling or serving alcoholic beverages to a visibly intoxicated person.[6]

The two leading cases abrogating or modifying the common law rule are *Waynick v. Chicago's Last Department Store*, 269 F. 2d 322, 77 A.L.R. 2d 1260 (7th Cir. 1959), *cert. denied*, 362 U.S. 903, 80 S.Ct. 611, 4 L.Ed. 2d 554 (1960) and *Rappaport v. Nichols, supra*. In *Waynick*, after heavy drinking in an Illinois tavern, the intoxicated patron drove into Michigan, where his negligent operation of his automobile caused an accident, resulting in serious injuries to the plaintiffs. The court reasoned that neither the Illinois nor Michigan Civil Damage Acts applied extrater-

6. ALASKA: *Vance v. United States*, 355 F. Supp. 756 (D. Alaska 1973); CALIFORNIA: *Vesely v. Sager*, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P. 2d 151 (1971); DELAWARE: *Taylor v. Ruiz*, 394 A. 2d 765 (Del. Super. 1978); DISTRICT OF COLUMBIA: *Marusa v. District of Columbia*, 484 F. 2d 828 (D.C. Cir. 1973) (Shooting victim allowed to recover from bar owner for negligent conduct of intoxicated patron); FLORIDA: *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. App. 1967); *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963) (Violation of statutory prohibition of sale to minor); HAWAII: *Ono v. Applegate*, 612 P. 2d 533 (1980); IDAHO: *Alegria v. Payonk*, 101 Idaho 617, 619 P. 2d 135 (1980); INDIANA: *Elder v. Fisher*, 247 Ind. 598, 217 N.E. 2d 847 (1966) (Violation of statutory prohibition of sale to minor); ILLINOIS: *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E. 2d 292 (1963); IOWA: *Lewis v. State*, 256 N.W. 2d 181 (Iowa 1977); KENTUCKY: *Pike v. George*, 434 S.W. 2d 626 (Ky. App. 1968) (Violation of statutory prohibition of sale to minor); MASSACHUSETTS: *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E. 2d 18 (1968); MICHIGAN: *Grasser v. Fleming*, 74 Mich. App. 338, 253 N.W. 2d 757 (1977) (Sale to compulsive alcoholic contrary to private agreement); *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W. 2d 820 (1973) (Social host serving minor in violation of penal statute); MINNESOTA: *Trail v. Christain*, 298 Minn. 101, 213 N.W. 2d 618 (1973); MISSISSIPPI: *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979); MONTANA: *Deeds v. United States*, 306 F. Supp. 348 (D. Mont. 1969) (Violation of statutory prohibition of sale to minor); NEW HAMPSHIRE: *Ramsey v. Anctil*, 106 N.H. 375, 211 A. 2d 900 (1965) (Patron who injured himself while inebriated); NEW JERSEY: *Rappaport v. Nichols*, 31 N.J. 188, 156 A. 2d 1, 75 A.L.R. 2d 821 (1959); NEW MEXICO: *Lopez v. Maez*, 98 N.M. 625, 651 P. 2d 1269 (N.M. 1982); NEW YORK: *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S. 2d 290 (1965); OHIO: *Mason v. Roberts*, 33 Ohio St. 2d 29, 294 N.E. 2d 884 (1973) (Cause of action recognized upon general tort principles of negligence); OREGON: *Campell v. Carpenter*, 279 Or. 237, 566 P. 2d 893 (1977) (Cause of action recognized upon general tort principles of negligence); PENNSYLVANIA: *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A. 2d 550 (1964); SOUTH DAKOTA: *Walz v. City of Hudson*, 327 N.W. 2d 120 (S.D. 1982); TENNESSEE: *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W. 2d 755 (1964) (Cause of action recognized upon general tort principles of negligence); WASHINGTON: *Callan v. O'Neil*, 20 Wash. App. 32, 578 P. 2d 890 (1978) (Violation of statute prohibiting sale to minor). *But see*, LOUISIANA: *Thrasher v. Leggett*, 373 So. 2d 494 (La. 1979) (Loud and aggressive inebriated bar patron who is injured while being "bounced" from bar may not recover from bar owner for injuries suffered).

ritorially and therefore a vacuum existed in the law. However, the court determined that the Illinois statute prohibiting the sale of liquor to an intoxicated person was enacted "for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes" and that the statute imposed a duty upon the sellers of alcoholic beverages in favor of those who might be injured as a result of a violation of the statute. Holding that a common law action would lie, the court, citing traditional tort principles of duty and proximate cause, concluded that serving the patron set into motion a foreseeable chain of events for which the tavern keepers may be held responsible. 269 F. 2d at 325-26. *Rappaport* involved a wrongful death action by a widow against the operators of four taverns for selling liquor to an intoxicated minor whose negligent operation of his automobile resulted in the fatal accident. At the time of the accident, New Jersey had no Civil Damage Act. The New Jersey Supreme Court stated:

> Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through the action of the intoxicated person or the minor.

31 N.J. at 201, 156 A. 2d at 8. The court determined that the legislature, having recognized the unreasonable risk of harm to others through action of the intoxicated person or the minor, explicitly prohibited such sales by both a criminal statute and administrative regulations, concluding that these broad restrictions were intended to protect members of the general public.

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.

31 N.J. at 202, 156 A. 2d at 8. After citing recent government reports on the frequency and severity of accidents caused by intoxicated drivers, the court stated, "[i]f the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is

unlawful; and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence." *Id.* at 202, 156 A. 2d at 9. Finally, the court rejected the defendants' argument that their conduct, if negligent, was not a proximate cause of the plaintiff's injuries.

> But a tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries . . .
>
> . . . The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability . . .
>
> . . . Ordinarily these questions of proximate and intervening cause are left to the jury for its factual determination . . .
>
> . . . And a jury could also reasonably find that Nichols' negligent operation of his motor vehicle after leaving the defendants' taverns was a normal incident of the risk they created, or an event which they could reasonably have foreseen, and that consequently there was no effective breach in the chain of causation. (Citations omitted.)

Id. at 203-04, 156 A. 2d at 9. On the basis of the foregoing, the court concluded that it would not, as a matter of law, hold that there could have been no proximate causal relation between the defendants' unlawful and negligent conduct and the plaintiff's injuries.

We agree with the reasoning of the Supreme Court of California in *Vesely v. Sager, supra,* 5 Cal. 3d at 163-64, 95 Cal. Rptr. at 630-31, 486 P. 2d at 158-59, as it held:

> To the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned that rule . . . [A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct . . .

> . . . Moreover, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." . . .
>
> . . . Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the *furnishing* of an alcoholic beverage to an intoxicated person *may be a proximate cause* of injuries inflicted by that individual upon a third person. *If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent.* (Citations omitted) (Emphasis supplied.)

The principles of proximate cause articulated by the *Vesely* court are substantially identical to those developed by our Supreme Court in *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); and *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1 (1960).[7] The reasoning in *Waynick*, *Rappaport* and *Vesely*, combined with the clear modern trend towards liability demonstrated by the authorities cited in note 6, *supra*, persuades this Court to allow persons injured by an intoxicated tavern customer the right to recover from the tavern that provided liquor to the customer upon proof of the tavern owner's negligence. The elements of the common law dram shop action in this jurisdiction are set out below.

III

Under the common law, a person who has sustained injuries due to the negligent conduct of another may recover against the tortfeasor provided that the negligent behavior was the proximate cause of the injuries suffered. *See e.g. Sutton v. Duke*,

7. These decisions will be discussed more fully in Part III, *infra*.

supra; Restatement (Second) of Torts § 281 (1965). The elements of common law negligence have been summarized by W. Prosser in The Law of Torts, § 30, p. 143 (4th ed. 1971) as follows:

> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on his part to conform to the standard required . . .
>
> 3. A reasonable (sic) close causal connection between the conduct and the resulting injury . . .
>
> 4. Actual loss or damage resulting to the interests of another . . .

Duty

Our Supreme Court has defined negligence as the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. The breach of duty may be by negligent act or a negligent failure to act. *Dunning v. Warehouse Co.*, 272 N.C. 723, 158 S.E. 2d 893 (1968). The plaintiffs' complaint alleges that the defendant Younger Brothers Lounge furnished beer to Donny Ray Fletcher while he was in an intoxicated condition, in violation of G.S. 18A-34. Plaintiffs do not contend that this statute creates a new civil cause of action. Rather, plaintiffs contend that this statute sets a minimum standard of care for purposes of the common law cause of action based upon ordinary negligence. That is, plaintiff is contending that an unexcused violation of this statute is negligence *per se* under the rule of such cases as *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971) and *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967).

In *Lutz Industries v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E. 2d 333, 339 (1955) our Supreme Court recognized that a standard of conduct may be determined by reference to a statute that imposes upon a person a specific duty for the protection of others, so that a violation of such statute is negligence *per se.* The Restatement (Second) of Torts, § 285 provides:

> How Standard of Conduct is Determined.
>
> The standard of conduct of a reasonable man may be

(a) established by a legislative enactment or administrative regulation which so provides, or

(b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or

(c) established by judicial decision, or

(d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

We also quote Comment c to this section:

Standard adopted from legislation.

Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence. The same is true of municipal ordinances and administrative regulations. See § 286 and Comments.

Section 286 provides:

When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted.

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

G.S. 18A-34(a)(2) provides that it shall be unlawful for a licensee or permittee to knowingly sell at retail malt beverages to an intoxicated person. The persuasive trend of modern tort law in this

area of statutory regulation is well illustrated in *Marusa v. District of Columbia, supra.*

In *Marusa* the court held that regulations controlling the sale of alcoholic beverages in the District were enacted to enhance the public safety. The statute in *Marusa* made it a criminal offense for a licensed vendor to serve alcoholic beverages to a person who is intoxicated or who appears intoxicated. 25 D.C. Code § 121, 132.

The court held that violation of the statute was evidence of negligence sufficient to state claim against a tavern owner arising from a patron's drunken shooting of a third party. The court set out the criteria for determining whether violation of a criminal statute can create civil liability as follows:

> Generally, the law or regulation should be one designed to promote safety; the plaintiff must be a "member of the class to be protected" by the statute; and the defendant must be a person upon whom the statute imposes specific duties.

Marusa's case meets these criteria.

It seems obvious that regulations governing the sale of liquor are intended to enhance public safety; such statutes serve "the well-being of the community" by guarding against "the dangers attending the indiscriminate sale of intoxicating liquors." It is also obvious that the statute imposes duties upon tavern owners such as DeMiers. In light of the purpose of the statute, we think those duties are owed to the community at large—not only to patrons of the tavern-owners' taverns, but also to third parties, such as Marusa, who might come into contact with inebriated persons.

484 F. 2d at 834. The rationale behind such statutory standards of conduct was eloquently stated by the court in *Jardine v. Upper Darby Lounge, supra* at 631-32, 198 A. 2d at 553.

> Since an intoxicated person is and can be an instrument of danger to others, especially if he is operating a motor vehicle, the Legislature of Pennsylvania declared by the Act of 1951, as already stated, that it shall be unlawful for any person to sell liquor to one already intoxicated. *The first prime requisite to de-intoxicate one who has, because of alcohol,*

lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute. The person who would put into the hands of an obviously demented individual a firearm with which he shot an innocent third person would be amenable in damages to that third person for unlawful negligence. *An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light that fuse.* (Emphasis added.)

[1] Although G.S. 18A-34 has never previously been so construed, its general purposes would appear to be (1) the protection of the customer from the adverse consequences of intoxication and (2) the protection of the community at large from the possible injurious consequences of contact with an intoxicated person. Accordingly, we adopt the requirements of G.S. 18A-34 as the minimum standard of conduct for defendant-licensees, and hold that a violation of this statute can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer. This approach is consistent with the interpretation given such statutes by the authorities previously discussed, those cited at note 6, *supra*,[8] and with the rationale followed by our Supreme Court when an ordinance imposes a public duty. "The violation of a municipal ordinance imposing a public duty and designed for the protection of life and limb is negligence *per se*." *Bell v. Page, supra* at 399, 156 S.E. 2d at 715. The complaint in this case alleges that plaintiffs are members of the general public, in particular, the motoring public, and that their personal injuries and death have resulted from an automobile collision caused by an intoxicated patron of defendant's tavern who operated his motor vehicle in a negligent manner. Further, that defendant Younger Brothers Lounge is a permittee whose sales are regulated by the alcohol control laws. Thus, the elements of a legal duty owed the plaintiffs under the

8. *See e.g. Elder v. Fisher, supra; Adamian v. Three Sons, Inc., supra;* and *Berkeley v. Park, supra.*

circumstances surrounding them are stated. *Dunning v. Warehouse Co., supra.* In view of our determination that the Legislature has, by enacting G.S. 18A-34, imposed a specific duty and defined a minimum standard of care sufficient to decide the issues presented by this appeal, we do not reach plaintiff's arguments based on general tort principles of duty and reasonable care under the circumstances. We next examine what conduct on the part of a licensee violates the statute so as to constitute negligence *per se.*

Violation or Breach of Duty

[2] In order for a licensee to violate G.S. 18A-34, there must be a sale to an intoxicated person, whom the licensee knew to be in an intoxicated condition. Most courts imposing civil liability on the basis of a violation of alcohol control statutes have required that before a violation of such statutes can be found, notice or knowledge on the part of the defendant tavern owner that the patron was intoxicated at the time he or she was served alcohol must be shown, regardless of whether that element is contained in the applicable statute. *See e.g. Ono v. Applegate, supra,* 612 P. 2d at 539. In *Kyle v. State,* 366 P. 2d 961 (Okl. Cr. 1961), the court held that conviction under a statute prohibiting the knowing sale of alcohol to an intoxicated person is sufficiently justified by proof that ample circumstances existed to indicate that the defendant knew or should have known that the customer was drunk. The court reasoned as follows:

> In the liquor business, it is the intent of the law that a high degree of responsibility be placed upon the dealer to take care that he does not sell to a drunk man. The rule in such cases is stated in 30 Am. Jur. 672, § 237, wherein it is said, concerning statutes as herein set forth: "These [statutes] usually place a duty upon the seller, before he serves a prospective purchaser, to use his powers of observation to see that which can easily be seen and hear that which can easily be heard, under the existing conditions and circumstances, although he is not required to subject his customers to tests which would disclose symptoms not readily apparent to one having normal powers of observation."

366 P. 2d at 965. The court noted that the use of intoxicating liquor by the average person in quantities sufficient to cause intox-

ication causes many commonly known outward manifestations, and if such observable outward manifestations of intoxication exist, and the seller fails to observe or ignore them and serves the customer, he has broken the law. *Id.* In other words, a sale of alcohol to a visibly or obviously intoxicated customer would constitute a violation of such a statute. *Jardine v. Upper Darby Lounge, Inc., supra,* involved a claim of negligence based on the violation of a statute prohibiting the sale of alcohol to a "visibly intoxicated" person. The court held the examining doctor's evidence describing the condition of the motorist shortly after the accident to be relevant, competent and revelatory on the issue of whether the motorist was visibly intoxicated before he obtained his last beer at the defendant's tavern. 413 Pa. at 629-30, 198 A. 2d at 552. The outward manifestations of intoxication described by the doctor consisted of bloodshot eyes, thick speech, emotional disturbance, unsteady gait, poor coordination and a strong smell of alcohol from the motorist. In addition, the testimony of a police officer arriving at the scene that the motorist was "visibly drunk" and "just drunk," as well as the testimony of other tavern patrons was held relevant and admissible on the issue.

We are cognizant of the fact that what is later to be identified as "obvious intoxication" may often only be recognizable with absolute certainty after the fact.[9] However, the visible indicia of intoxication such as those listed in *Jardine* are sufficiently well-known and plain to put the reasonably prudent tavern owner on notice of the patron's condition. We conclude that for purposes of imposing civil liability, before a violation of G.S. 18A-34 may be found, the plaintiff must allege and prove (1) that the patron was intoxicated and (2) that the licensee or permittee knew or should have known that the patron was in an intoxicated condition at the time he or she was served. We are of the opinion that the forego-

9. The court in *Cooper v. National Railroad Passenger Corp.*, 45 Cal. App. 3d 389, 394 n. 1, 119 Cal. Rptr. 541, 544 (1975), stated the problem inherent in visual diagnosis of intoxication as follows: "What is patent when the drinker falls off his bar stool may have been only latent sixty seconds earlier . . . Visual diagnosis of intoxication has not greatly improved upon Peacock's rough and ready classification of 1829:

> 'Not drunk is he who from the floor
> Can rise alone and still drink more;
> But drunk is he, who prostrate lies,
> Without the power to drink or rise.' "

ing standard will not result in the imposition of an undue burden, for the tavern owner may readily protect himself by the exercise of reasonable care under the circumstances. As the court observed in *Alegria v. Payonk, supra* at note 5, it is of "pivotal significance" that such licensees are in the daily business of selling intoxicating beverages, giving them, as a class, a presumed expertise in such matters commensurate with the duty of care imposed by statute or otherwise.

Plaintiffs' complaint alleges a sale to Donny Ray Fletcher while he was intoxicated, under circumstances indicating that defendants knew or should have known that he was in an intoxicated condition. These allegations state a claim for negligence *per se* sufficient to withstand defendants' motion to dismiss. We next examine the proximate cause element of a common law dram shop action.

Proximate Cause

"It is well settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence *per se.* Of course, to make out a case of actionable negligence the additional essential element of proximate cause is required." *Lutz Industries, Inc. v. Dixie Home Stores, supra,* at 341, 88 S.E. 2d at 339. In *Bell v. Page, supra,* the court stated the rule as

> The violation of a municipal ordinance imposing a public duty and designed for the protection of life and limb is negligence *per se.* However, to impose liability therefor it must be established that such violation proximately caused the alleged injury. The general definition of proximate cause, including the element of foreseeability, is applicable in determining whether the violation of such ordinance constitutes actionable negligence . . .
>
> . . . "What is the proximate or a proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury." (Citations omitted.)

271 N.C. at 399-400, 156 S.E. 2d at 715. In *Sutton v. Duke, supra* at 107, 176 S.E. 2d at 168-69, the court defined proximate cause.

> In this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct. (Citations omitted.) It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only "that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result,* was probable under the facts as they existed. (Emphasis in original.)

[3] As we stated in Part II of this opinion, we are persuaded by the reasoning in such cases as *Waynick v. Chicago's Last Department Store, supra, Rappaport v. Nichols, supra,* and *Veseley v. Sager, supra,* that a tavern's sale of alcohol to an intoxicated customer may be found to be a substantial factor in the chain of events culminating in injuries to third persons as a result of the customer's operation of an automobile while intoxicated.

During oral argument defendants raised a legitimate concern that under the theory of actionable negligence proposed, the allegedly negligent act occurs at a time when the customer is *already in an intoxicated condition.* The concern would appear to be directed at the question of whether the illegal sale of one or two further drinks could have sufficiently contributed to the subsequent injury to make the defendant tavern owners liable. The issue would appear to be one of concurrent causes and, as a general rule, a defendant would not be relieved of liability unless he could show that such other causes of intoxication would have produced the injury independently of his negligence.[10] The issue seems likely to arise in a situation where the customer visits several bars or taverns and is served numerous drinks while intoxicated. When a plaintiff has proved that the particular tavern served a customer while that person was visibly intoxicated, in violation of the statute, and that the injury resulted from intoxication, then a permissible inference may be drawn that the illegal serving was a substantial cause of the injury. This would not foreclose a defendant from proving the plaintiff was so intox-

10. *See generally,* 9 Strong, N.C. Index 3d, Negligence, §§ 8, 10, p. 363, 366-67 (1977) and cases cited therein.

icated when the illegal sale was made that the accident would have occurred despite that illegal sale. *See Majors v. Brodhead Hotel*, 416 Pa. 265, 272-73, 205 A. 2d 873, 878 (1965). We cannot say as a matter of law that the injurious consequences of drunken driving could not be found to be the natural and ordinary consequences of the chain of events set in motion by the illegal and negligent sale of alcohol to an already visibly intoxicated person. It must be remembered that,

> [t]here may be more than one proximate cause of an injury. It is not required that the defendants' negligence be the sole proximate cause of injury, or the last act of negligence . . . In order to hold the defendant liable, it is sufficient if his negligence is one of the proximate causes. (Citations omitted.)

Hester v. Miller, 41 N.C. App. 509, 512-513, 255 S.E. 2d 318, 320, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979). In an age of almost universal use of the automobile, the sale of alcoholic beverages to an already intoxicated tavern patron is not so remote in the causal chain of consumption, resulting intoxication, and injury-producing conduct so as to insulate the tavern owner, as a matter of law, from liability for the injuries so produced. However, the question does arise whether the consumption of alcohol and subsequent acts of the intoxicated consumer are intervening causes sufficient to release the tavern from liability for injuries to the third party.

It is well settled that the negligence of one tortfeasor cannot be insulated by the negligence of another so long as the negligence of the first plays a "substantial and proximate part in the injury . . . [T]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is the reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Watters v. Parrish, supra*, at 796-97, 115 S.E. 2d at 7-8. In *Sutton v. Duke, supra*, 277 N.C. at 108, 176 S.E. 2d at 169, the court quoted the following passage from W. Prosser, Law of Torts, § 50, p. 288 (3d Ed. 1964).

> "Proximate cause" cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street: "It is always to be determined on the

facts of each case upon mixed considerations of logic, common sense justice, policy and precedent . . ."

Mindful of the need to determine some boundary at which to cut off liability for the infinite consequences which may flow from the negligent act of a defendant, the court concluded that "the concept of the foreseeable risk, especially in cases involving an intervening cause, seems to offer the most elastic and practical solution." *Id.*

We find the principles of proximate and intervening cause developed by our Supreme Court to be substantially identical to those followed by the authorities cited and discussed in Part II, *supra.* On the question of the foreseeability of the consequences of serving an intoxicated customer, these courts, citing reports of the National Safety Council, modern conditions, the problem of the drinking driver, and the almost universal use of automobiles, have concluded that the injurious consequences of furnishing an intoxicated person who drives an automobile more alcohol may be easily foreseeable to the reasonable tavern owner. *See e.g. Berkeley v. Park, supra; Deeds v. United States, supra.*[11] By enacting alcoholic beverage control laws, and expressly prohibiting the sale of alcoholic beverages to an already intoxicated person, the Legislature sought to impose a duty upon licensed liquor vendors for the protection of the general public. We reject the defendants' argument that the effect of this prohibition be nullified by adherence to the theory that the drinking patron alone is responsible for ensuing injuries to innocent third parties, regardless of the fact that he is already intoxicated when repeatedly served more alcohol. If the tavern owner or bartender has actual or constructive knowledge that the intoxicated patron will thereupon drive on the public highways, to exclude injury caused by the patron's drunken driving from the scope of the foreseeable risk created by the negligent sale of alcohol under the theory of proximate cause would be unsound doctrine and a distortion of public policy.

11. *See also Slicer v. Quigley, supra* (dissenting opinion of Bogdanski, J.), 180 Conn. at 264-67, 429 A. 2d at 861-62. (The dissent quotes extensively from the Third Special Report to the United States Congress on Alcohol and Health prepared in June, 1978 by the Secretary of Health, Education, and Welfare, and argues that in today's automobile age, it is unrealistic to conclude that automobile accidents caused by the drinking driver are unforeseeable intervening causes.)

The reasonable foreseeability of injuries caused by the intervening negligent conduct of an intoxicated motorist is recognized in the tort of "negligent entrustment." In this respect the negligent sale of intoxicating liquors is closely analogous to negligent entrustment. Generally stated, one who entrusts a vehicle to another may be held liable for damages resulting from the use of the vehicle under the theory of negligent entrustment where he knew, or should have known in the exercise of ordinary care, that the person to whom the vehicle was entrusted was intoxicated at the time of the entrustment or was likely to become so thereafter because of his habit of drinking. 19 A.L.R. 3d 1175, § 3, p. 1182-83 (1968). The tort has been recognized in North Carolina. *See e.g. McIlroy v. Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530 (1948); *Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446 (1936). In *Roberts v. Hill,* 240 N.C. 373, 378, 82 S.E. 2d 373, 378 (1954) the Supreme Court observed that the basis for the defendant's liability is not imputed negligence, but the *independent and wrongful breach of duty in entrusting* his automobile to one who he knows or should know is likely to cause injury.

Many courts have recognized the similarity between the two torts.[12] In *Alegria v. Payonk, supra,* the court noted that the tort of "negligent entrustment" is a recognition of the foreseeable risk of injury which exists when two ingredients are combined; the automobile and an incompetent or incapacitated driver. Reasoning that if a party may be liable for providing an intoxicated individual with an automobile, the converse, providing the driver of an automobile with intoxicants, where proven, should also result in liability for consequential injuries. 101 Idaho at 620, 619 P. 2d at 138.

Thus, considerations of logic, common sense, and precedent lead to the conclusion that principles of "proximate cause" not be used to limit the liability of a tavern owner who negligently sells alcohol to an already visibly intoxicated patron. The remaining consideration is that of public policy.

12. *See e.g. Rappaport v. Nichols, supra; Elder v. Fisher; Mitchell v. Ketner, supra,* 54 Tenn. App. 656, 393 S.W. 2d at 759. The court stated it could "see little difference in principle between the act of an owner entrusting an automobile to one known to be an habitual drunkard and the act of a tavern keeper in plying the driver of a car with intoxicants knowing that he is likely to drive upon the public highway where he will become a menace to third persons."

Defendants rely on the Wisconsin decision in *Garcia v. Hargrove*, 46 Wis. 2d 724, 176 N.W. 2d 566 (1970), where the court by a 4-3 decision reaffirmed the common law rule of nonliability on the controlling consideration of public policy. The dissenting opinion of Hallows, C.J., points out that the majority (1) recognizes that the selling of liquor to a drunk is negligence and a substantial factor contributing to the cause of a foreseeable injury to third persons; (2) reiterates the court's past position that it has a duty and the power to change and mold the common law to meet changing needs and is not compelled to defer changes in the common law to the legislature; (3) sidesteps the question of whether the legislature had pre-empted the field; and (4) rests its decision in part upon the traditional ground that creating liability would open the door to a flood of unfounded cases. The sole consideration of public policy of evident concern to the majority was the question of liability for noncommercial supplier of alcoholic beverages. That question is not before us in this case. We find the dissenting opinion in *Garcia* most persuasive on the question of whether public policy concerns dictate liquor vendor liability in view of the shift in modern conditions from "commingling alcohol and horses to commingling alcohol and horsepower." 46 Wis. 2d at 737, 738-39, 176 N.W. 2d at 572, 573.

> Of course, drinking is a social problem but the function of law is to help solve social problems. Law is life; it deals with the relationship of human beings and must concern itself with everyday problems whether they are labeled social or legal. It does no good to verbalize about the court's inherent power to update the law and then not act when there is a need crying for satisfaction. In recognizing the selling or giving of liquor to a drunk is negligence because it is reasonably foreseeable that such a person will cause harm to another while intoxicated, the common law justly removes an arbitrary exception to the fault principle of tort liability. This reasonable foreseeability of harm is evidenced by the statistics of auto accidents and carnage on our highways. (Citations to Highway Safety Reports omitted.) Recognizing liability is not singling out a particular type of business upon which to impose liability. On the contrary, the majority opinion in effect immunizes a particular industry from liability for

conduct the court concedes to be negligence and a cause of injury to third persons.

The view expressed by the *Garcia* dissent is entirely consistent with the trend of our courts to "expand liability in an effort to afford decent compensation . . . to those injured by the wrongful conduct of others." *Mims v. Mims*, 305 N.C. 41, 55, 286 S.E. 2d 779, 788-89 (1982). In *Mims* the court pointed out several recent areas of judicial modification in the common law including: recognition of a cause of action for loss of consortium, *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980); abolition of charitable immunity for public hospitals, *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967); and abolition of sovereign immunity in contract actions against the State of North Carolina, *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976). The *Mims* decision itself recognized the presumption of a gift when property purchased from funds of the wife is placed in the name of the husband. *See also Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981) upholding a cause of action against a shopping mall when a shopper was robbed and battered in the mall's parking lot on theory of foreseeable risk of danger from intentional or criminal acts of third persons.

We, therefore, hold that the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are not reasonably unforeseeable events so as to insulate a tavern owner who knew or should have known that his patron intends to drive a motor vehicle from liability as a matter of law. Of course, the act of the patron in consuming the alcohol may certainly be considered a contributing factor, but whether it is such an intervening cause as would break the chain of foreseeable consequences emanating from the tavern owner's negligent serving is a question of fact, to be determined by a jury in the appropriate case. *Bell v. Page, supra.*

The complaint alleges that (1) defendants owned and operated a tavern at the intersection of two main roads near the city limits of Reidsville, North Carolina; (2) the tavern provided a parking lot for its customer's automobiles; (3) after consuming a number of beers there over several hours, Donny Ray Fletcher became intoxicated and, upon leaving the tavern by driving an automobile,

negligently caused a head-on collision with the plaintiffs' automobile some 15 minutes later; (4) at the time of the collision Fletcher had a blood alcohol content of .16% by weight; (5) that defendants knew or should have known that Fletcher habitually became intoxicated and drove automobiles in a negligent manner; and (6) that defendants illegally sold Fletcher beer while he was in such a condition as to be deprived of his willpower and responsibility for his behavior. Thus, the complaint alleges the element of proximate cause by indicating an unbroken sequence of events from the sale of beer to the injury-producing conduct and its consequences, and more than adequately alleges the element of the foreseeability of Fletcher's intervening conduct by the allegation that defendants had knowledge or should have known of Fletcher's drinking and driving habits.[13]

If we assume, as we must, to test the sufficiency of the complaint, that the defendant tavern owners unlawfully and negligently sold malt beverages to Fletcher which resulted in his intoxication, which in turn caused or contributed to his negligent operation of the motor vehicle at the time of the accident, then a jury could reasonably find that the plaintiffs' injuries resulted in the ordinary course of events from the defendants' negligence and that such negligence was, in fact, a substantial factor in bringing them about. We would be unable to say, at this stage, that plaintiffs can prove no facts which would entitle them to recover from defendants for the damages resulting from the automobile collision. *See Sutton v. Duke, supra* at 108, 176 S.E. 2d at 169. Therefore, the complaint does state a claim upon which relief could be granted and the plaintiffs are entitled to be heard on the merits. The order dismissing the complaint is

Reversed.

Judges WELLS and HILL concur.

13. The complaint in this case established the element of foreseeability with a great degree of particularity in alleging defendants' knowledge of Fletcher's drinking and driving habits. In view of our discussion of proximate causation, *supra*, the foreseeability of the intervening conduct need not be shown with the degree of particularity as set forth in this case.

JOSIE PHILLIPS TICE v. WILLIAM HALL

No. 8212SC720

(Filed 5 July 1983)

Physicians, Surgeons and Allied Professions § 18— leaving sponge in patient's body—departing from standard of care

In an action to recover for injuries caused by a surgical sponge left inside plaintiff's abdominal cavity during surgery performed by defendant surgeon, the evidence would permit, but not compel, a jury finding that the standard of practice among surgeons with similar training and experience in the city in question was to conduct a search for the possible presence of surgical sponges in a patient's body before closing a surgical incision and that defendant did not conduct a search for sponges before closing plaintiff's incision but relied on a sponge count by operating room nurses who were not employed by defendant. G.S. 90-21.12.

Judge BECTON dissenting.

APPEAL by plaintiff from *Bowen, Judge.* Judgment entered 11 February 1982 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 12 May 1983.

Plaintiff brought this medical malpractice action against defendant to recover damages for injuries caused by a surgical sponge which was left inside plaintiff's abdominal cavity during surgery performed by defendant.

At the conclusion of all the evidence, the trial judge granted defendant's motion for directed verdict. Plaintiff appealed.

Clark, Shaw, Clark & Bartelt, by Jerome B. Clark, Jr. and Teague, Campbell, Conely & Dennis, by John W. Campbell, for plaintiff.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Hal W. Broadfoot, for defendant.

WELLS, Judge.

The question we decide in this case is whether plaintiff's evidence was sufficient to raise a jury issue on a violation of the standard of care incorporated in G.S. 90-21.12, which provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish profes-

sional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

We answer the question in the affirmative and reverse the judgment of the trial court.

Our appellate courts have held that the standard of care adopted in G.S. 90-21.12 reflects the decisional law of our courts, *Thompson v. Lockert*, 34 N.C. App. 1, 237 S.E. 2d 259, *disc. rev. denied*, 293 N.C. 593, 239 S.E. 2d 264 (1977), and imposes a standard of care known as the "same or similar community rule." *Id.* Usually, expert testimony is required to establish the standard, to show its negligent violation, and to show that such negligent violation was the proximate cause of the injury complained of. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978); *see also Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980).

The evidence in this case must be reviewed in accordance with well-established and recognized rules applicable to motions for a directed verdict.

> A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). If, when so viewed, the evidence is such that reasonable minds could differ as to whether the plaintiff is entitled to recover, a

> directed verdict should not be granted and the case should go to the jury. *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974). On such a motion made at the close of all the evidence, any of defendant's evidence which tends to contradict or refute plaintiff's evidence is not to be considered, but the plaintiff is entitled to the benefit of defendant's evidence which is favorable to plaintiff, *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976), or which tends to clarify plaintiff's case, *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774, *disc. review denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980).

Koonce v. May, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

> The trial court should deny motions for directed verdict . . . when, viewing the evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all reasonable inferences, it finds " 'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements."

Hunt v. Montgomery Ward, 49 N.C. App. 642, 272 S.E. 2d 357 (1980).

We now review the evidence in this case in accordance with the above-stated rules.

Plaintiff testified that she was a resident of Cumberland County, where she has resided for about 30 years. On 8 September 1976, defendant William Hall performed surgery on plaintiff at Cape Fear Valley Hospital to repair a hiatal hernia. Plaintiff had been referred to Dr. Hall by her family doctor, Dr. Izurieta. Following her surgery, plaintiff remained in the hospital for about 17 days. After plaintiff's surgery, plaintiff visited Dr. Hall in his office in Fayetteville on a number of occasions, complaining of pain and discomfort in the area of her body where the surgery was performed. Dr. Hall gave plaintiff various responses as to the cause of her discomfort, but provided no specific treatments. Plaintiff visited Dr. Izurieta frequently during 1977, 1978, and 1979, complaining of pain and discomfort. In September 1979, Dr. Izurieta arranged for a radiological examination of plaintiff. The examination disclosed a surgical sponge in plaintiff's body. Plaintiff received a telephone call from defendant, who was

then residing in Tulsa, Oklahoma, defendant saying to plaintiff that Dr. Izurieta had called him and that when Dr. Izurieta mentioned plaintiff's name, he (defendant) knew "what happened," that when defendant did plaintiff's surgery, a sponge was "left inside." As a result of the circumstances, plaintiff underwent surgery by Harold Newman, M.D., on 20 November 1979. Dr. Newman removed the sponge.

Dr. Newman testified that he was a medical doctor, practicing in surgery in Fayetteville since 1964. He was recognized as an expert witness. Dr. Newman's testimony was, in summary, as follows. Dr. Hall was practicing surgery in Fayetteville when Dr. Newman began practicing in 1964; they practiced together, but were not practicing together in 1976. Dr. Newman knew the training and experience of Dr. Hall; such training and experience was similar to Dr. Newman's. On 20 November 1979, he performed surgery on plaintiff to remove a "foreign substance" disclosed by x-ray. He found a mass of tissue near and involving plaintiff's spleen, near the site where a hiatal hernia operation would take place. The tissue removed by Dr. Newman included the remains of a surgical sponge. It was expectable that plaintiff would experience discomfort from the presence of the sponge "within her." On the standard of practice as to use of sponges during surgical procedures, Dr. Newman testified:

> It is in accordance with my standards of practice to make a systematic search before closing the incision in an operation. It is in accordance with my standards of practice to find and remove all sponges before sewing up a patient. It was also in accordance with my standards in 1976. There was no purpose to be served by leaving a sponge in Mrs. Tice in connection with her hiatal hernia.

On cross-examination, Dr. Newman testified as to the use of sponges in surgical procedures as follows:

> [I]t is conceivable that during the course of an operation the surgeon could run out of sponges. It does happen. If it happens the hospital personnel, the circulator (a nurse who is not what they call a sterile nurse) gets the additional sponges. She is on the staff of the hospital.
>
> . . .

When I come into the operating room for surgery as I did in the case of Mrs. Tice, the sponges are already there. I did not count them before they came out of the sterile supply. When I go into the operating room, by tradition, I know how many sponges are there. I do not count them. There is a traditional number that is put on each lap pack. The sponges are first counted before the operation starts. The instrument nurse and the circulator nurse count them. They frequently do the count in unison. They write the count down on a pad or a note. It is spoken of as the sponge count. There are notes kept in the operating room by the nurses. . . .

The next usual sponge count is done just prior to the starting of the closure of the wound. This was so in the 1976 and 1979 surgeries of Mrs. Tice. At that point the operation is basically over with. At that point I am ready to close up.

The most inner layer is called the peritoneum. It is a lining of the abdominal cavity. That is the first thing that is closed. The first count is taken before the peritoneum is closed. As soon as you let the operating room circulator know that you are ready to complete the operation, she then proceeds with the sponge count. She tells you the count is correct. The surgeon says, "I am ready to close." It is then she proceeds with this sponge count. She says, "I have a correct sponge count," or something to that effect. At that point the peritoneum is closed.

The next step is to close the next layer. . . . At that point, there is another count usually assisted by the instrument nurse, there are two of them doing it. After making the count in the fascia, she says "Dr. Newman, I have another correct count." I close the fascia at that point. There is a third layer which is just in front of or anterior to the fascia. When we get to that third layer there is another sponge count by the instrument nurse and the circulator nurse together. This is done after the surgeon has announced that he is ready for the third closure. After the sponge count, the nurse again indicates that they have a correct sponge count and the third layer is then closed. The next closing is the skin. There is no sponge count related to that. There are three sponge counts by two nurses in the employ of the hos-

pital and that terminates the matter unless there is something missing or something wrong.

I have never closed a peritoneum if the nurse reported an incorrect count. If the same has applied as to the second layer, the fascia, the same applies to the third layer. . . . When I am getting ready to close the peritoneum, I do not participate with the nurses in the sponge count. . . . When I come to the third level, before coming out altogether, I do not physically contact those sponges and participate in that count. I have no involvement or contact with those sponges. When the sponge count is given to me by the person that gives it at the fascia when I am ready to close the peritoneum, I rely on that count. When I come up to the fascia in the level of the human body and getting ready to close that count and I tell the nurses and they do a sponge count and report it to me. Yes, I rely on that sponge count. When I come to the second and third level getting ready to close and announce that I am ready the nurses make a sponge count and report it back to me. If they report the sponge count is correct I rely on that count. If at any point in that three-pronged coming out, so to speak, a nurse or a counter reports that they do not have a correct sponge count, I do not close. If the sponge count is not correct they recount again to make sure they are counting correctly. If they turn up the error they stop and go forward. If they don't turn up the error they start looking for a sponge. One could have dropped on the floor or one could be stuck under some instruments, some of the sponges that are no longer used are taken off of the "field," so to speak, and they can be—there is usually some kind of arrangement, the sponge—two could be stuck together. They could be tucked down under one of the drapings of the sheet or the surgery or the sheets or drapery. Something like that could have happened.

. . .

I have never sent a patient back to the recovery room knowing that the sponge count was incorrect. The standards of care among surgeons with my background, training and experience in similar circumstances under similar conditions at Cape Fear Valley Hospital in 1976, in an operation like we

are talking about, permitted the operating surgeon to rely on the sponge count given to them by the nurses as correct. He would rely on that count. As a matter of fact in the operation which I did on Mrs. Tice in 1979 to remove the sponge, I relied on the sponge count that the counting people did at that time. The sponge count that was made at that time is the type that we have just indicated a few minutes ago.

It is not uncommon to miss a sponge. A sponge is not too difficult to lose within the cavities of the human body. They can be misplaced fairly easily. Being a gauze type material, they can and do assume the makeup that is in there and the mixture of the fluids and so on. They assume the coloration of those fluids. By virtue of that, they can become camouflaged and that is one of the reasons they can be missed in the procedure.

Yes, during the manipulation of surgery the sponges can be shifted around and during the hiatal hernia surgery itself, it is necessary to make some shifts in the organs within the cavity. In fact, the stomach itself is shifted.

Yes, I learned before I did the 1979 operation on Mrs. Tice that the sponge count had been reported to Dr. Hall in 1976 as correct and made a note of that in my record. It is my recollection that I was told the sponge count on the previous operation was correct.

On re-direct examination, Dr. Newman testified:

Yes, I testified earlier that in accordance with my standard of practice in 1976, I conducted a systematic search within the patient before I sewed them up and, in accordance with my standard of practice, I do a search for all sponges before sewing up the patient. I do that notwithstanding the sponge count.

At the close of plaintiff's evidence, the trial court reserved judgment on defendant's motion for a directed verdict. Dr. Hall testified on his own behalf as to surgical standards, practice, and procedures, in pertinent part, as follows:

The average incision is five to six inches in length. It goes all the way down through the four layers of the abdomi-

nal wall. At that particular stage of the operation you put in surgical retractors, and those surgical retractors are lined with sponges so that they will not damage the patient's tender skin and muscles. The retractors are made of stainless steel. You line the entire cavity with sponges before you put the retractor in to open up the abdomen as much as possible. This is to protect the patient's tender skin and muscles from the stainless steel. The sponges I just mentioned are used for other purposes in the abdominal surgery. They are used to line other retractors that you also have to put in after this particular retractor has been put in. You will have a retractor in to hold the liver over and out of the way and they also line that retractor and then sponges are put in to hold the stomach to one side, the liver to another, the intestines down and the diaphragm up. So, there are sponges in every direction.

As the operation gets underway and after you have got everything visualized, which takes a fair amount of time, then the sponges are used to soak up irrigating solutions that you would use within a patient's body or they are used to soak up blood and serum, you know, that has accumulated as part of the operation and they are used also against organs that begin to ooze because of the nice warm sponge laid against an organ sometimes will help the oozing to stop. The sponges take on the coloration of whatever is adjacent to them in the way of the fluid or blood or irrigating solutions. I am sure there are records where maybe a hundred and fifty sponges have been used but I would say in the average hiatal hernia maybe thirty sponges.

You have absolutely no visibility once the incision has been made, because, as I brought out, the hernia is on the back side of the patient and up underneath the ribs and so, you have to develop visibility. You put in sponges to pack off the liver to the left and to the stomach to the right and the intestines below and the diaphragm above. These sponges come from the operating room nurses. They are put in there by the entire team meaning the first assistant puts sponges in, the surgeon also puts sponges in and the first assistant and second assistant would also be putting sponges in. Everybody takes sponges out. The scrub nurse also handles

sponges by handing them to the first assistant. The sponges are counted before the patient is brought to the operating room. They are counted by the nursing team that is delegated with that responsibility for that particular part of the surgical procedure.

The nursing team is employed by Cape Fear Valley Hospital. I do not engage in any sponge counting at the time the sponges are brought into the operating room. When I come into the operating room to do the surgery I do not know how many sponges are there. As the operation is finished, the two designated nurses, make the count, meaning the circulating nurse and the scrub nurse.

Once I have examined the patient inside *and looked at all the organs to make sure there is no foreign body within the patient,* I say that I am ready to close the patient, I say this to the circulating nurse. She puts the part of the operation in motion whereby she gets with the scrub nurse and they leave me completely and she takes the sponge count in unison with scrub nurse. That is usually done behind my back or else in one area of the operating room that the operation is not going on so it will not disturb the surgeons. While those people are engaged in the sponge count, I am in the process of getting the proper suture to close the peritoneum, which is the first layer of the lining of the abdominal cavity and at the same time having conversation between the anesthetist in bringing this patient out of this very deep state of consciousness back to life.

. . .

Q. Dr. Hall, do you have an opinion, as a medical expert practicing surgery in the Fayetteville area in September of 1976, as to whether or not the standards of care prevailing at that time among general surgeons, having a similar background and a similar amount of training in practicing here, permitted a general surgeon to close a patient upon receiving a correct sponge count? First of all, do you have such an opinion?

A. Yes.

Q. What is that opinion?

A. That is the only procedure that you can function with in closing the patient. It has to be carried out.

Q. State whether or not, Dr. Hall, in 1976, on the 8th day of September, 1976, when you begin or preparatory to your closing the fascia of Mrs. Tice, did you rely on the sponge count reported to you at that time?

A. Yes. I did.

Q. Did you rely on the sponge count reported to you at the time of reaching the fascia?

A. I did.

Q. Did you rely on the sponge count reported to you at the time of reaching the subcutaneous tissue?

A. Yes.

Q. And state whether or not, Dr. Hall, the standard of care prevailing at that time we've just discussed, in your opinion as a medical expert, permits you to rely on that sponge count then reported to you?

A. Yes. That goes throughout the entire United States. That is the same procedure every place. (Emphasis supplied.)

We are persuaded that the evidence in this case would permit, but not compel, a jury to find that the standard of practice among surgeons with similar training and experience in Fayetteville was to conduct a search for the possible presence of surgical sponges in a patient's body before closing a surgical incision. Defendant strongly contends that the evidence shows that the standard of practice in such procedures is for the surgeon to rely on the sponge count provided by operating room nurses, persons not employed by the surgeon. While such evidence is certainly capable of persuading the trier of facts toward defendant's position, the testimony of both Dr. Newman and Dr. Hall was that they followed the practice of conducting a search or looking for sponges (or foreign bodies) before closing, allowing the jury to find that the sponge count provided by the nurses is but one of the practices relied on by surgeons to avoid the risk of leaving a sponge in the incision.

On the question of negligent violation of the standard established by the evidence, plaintiff is entitled to rely on the doctrine of *res ipsa loquitur*. Our appellate courts have consistently held that the leaving of a foreign object in a patient's body during a surgical procedure is in itself some evidence of negligence. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957); *Hyder v. Weilbaecher*, 54 N.C. App. 287, 283 S.E. 2d 426, *disc. rev. denied*, 304 N.C. 727, 288 S.E. 2d 804 (1981), and cases cited and discussed therein. We note also that in this case, plaintiff's proof was aided by defendant's own testimony that he relied on the sponge count before closing plaintiff's incision, allowing the jury to find that he did not conduct a search for sponges before closing the incision.

There is no question as to the quality of plaintiff's evidence as to the proximate cause of her injuries complained of in this action. The sponge left in her was the villain.

In cases such as this, we deem it appropriate to once again emphasize the procedural point that

> [w]here 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., *supra*; *Koonce v. May*, *supra*.

For the reasons stated, we hold that the trial court erred in granting defendant's motion for a directed verdict and that there must be a new trial.

Reversed and remanded.

Judge BECTON dissents.

Judge EAGLES concurs.

Judge BECTON dissenting.

While I have not hesitated to hold doctors to the appropriate standard of care when that standard has been clearly established, *see Howard v. Piver*, 53 N.C. App. 46, 279 S.E. 2d 876 (1981); *Powell v. Shull*, 58 N.C. App. 68, 293 S.E. 2d 259, *pet. for disc. rev. denied*, 306 N.C. 743, 295 S.E. 2d 479 (1981); and *Hyder v. Weilbaecher*, 54 N.C. App. 287, 283 S.E. 2d 426, *disc. rev. denied*, 304 N.C. 727, 288 S.E. 2d 804 (1981), I am not persuaded that the evidence in this case shows that Dr. Hall violated the standard of practice among surgeons with similar training and experience in similar communities when he relied on the sponge count given him by the nurses. Dr. Hall clearly violated Dr. Newman's standard of practice of making "a systematic search before closing the incision in an operation," but Dr. Newman's standard is not the applicable standard.

Because the evidence shows that the standard of practice is for the surgeon to rely on the sponge counts provided by operating room nurses and that Dr. Hall did that in the case *sub judice*, I believe the trial court correctly granted the defendant's motion for a directed verdict.

AMERICAN NATIONAL INSURANCE COMPANY, PETITIONER-PLAINTIFF v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE, STATE OF NORTH CAROLINA, RESPONDENT-DEFENDANT

No. 8210SC232

(Filed 5 July 1983)

Insurance § 1— insurance regulation—Commissioner not exceeding statutory authority

The Insurance Commissioner did not exceed his statutory authority by promulgating a rule in conjunction with G.S. 58-251.2 that required optionally renewable hospitalization and accident and health insurance policies to be terminated before a rate increase could be granted to a company. The regulation required termination of a policy under the old rate with an option given to the policy holder to replace his policy with the same coverage at the approved increased rate. The regulation as applied by the Insurance Commissioner is consistent with the legislative intent of G.S. 58-251.2. The required termination of

insurance policies as a prerequisite to seeking a rate increase does not constitute a violation of equal protection and due process clauses nor rights pursuant to 42 U.S.C. § 1983.

APPEAL by petitioner from *Bailey, Judge.* Judgment and order entered 3 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 14 January 1983.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Allen, Steed & Allen, by Charles D. Case and R. Bradley Miller, for petitioner appellant.

BECTON, Judge.

This appeal concerns the Insurance Commissioner's statutory authority to issue regulation 11 N.C.A.C. 12.0502 and the constitutionality of this regulation, which, in relevant part, provides:

> With respect to G.S. 58-251.2, entitled Renewability of Individual and Blanket Hospitalization and Accident and Health Insurance Policies, the provisions therein relative to rate increases on such policies is [sic] interpreted by the department to mean that notice of nonrenewal must be given and a public hearing held before the commissioner renders a decision thereon. If a rate increase is approved it may be applied to the period for which notice of nonrenewal has been given, at the end of which the policy will terminate.

I

By letter dated 19 May 1980, petitioner, American National Insurance Company (American) requested a rate increase for three hospitalization and accident and health policies. American sought a 20% premium rate increase effective 1 August 1980 because of alleged loss experience ratios on the three policies and anticipated loss ratios. On 9 June 1980, a letter was sent from the Insurance Commissioner's office to American indicating that, since the policies were renewable at the option of American, the company must comply with N.C. Gen. Stat. § 58-251.2 (1982) which, in relevant part, reads:

> The insurer upon a showing of inadequacy of the rates chargeable on such policies upon which notice of nonrenewal

has been given, and a finding as to the same by the Commissioner of Insurance, may increase such rates with the approval of the Commissioner. Thereafter, such rates shall be applicable to all policies of the same type, the holders of which receive notice of nonrenewal. The policyholder thereafter must pay the increased rate in order to continue the policy in force. The requirements of this provision shall not apply to refusal of renewal because of change of occupation of the insured to one classified by the company as uninsurable nor to increase in rate due to change of occupation of the insured to a more hazardous occupation.

The 9 June 1980 letter stated:

Under this statute, the company must give notice of nonrenewal before applying for a rate increase. After this has been done and a request made to the Department for the increase, a public hearing must be held, after which the Commissioner will rule on your request. If the increase is approved, it may be applied to the period for which notice of nonrenewal has been given at the end of which time the policy must terminate.

Dissatisfied with the interpretation given to G.S. § 58-251.2 by the Insurance Commissioner's office, American filed this action in Wake County Superior Court and, at the same time, filed with the Insurance Commissioner a request for an administrative hearing and a petition for a declaratory ruling pursuant to the North Carolina Administrative Procedure Act (NCAPA), N.C. Gen. Stat. §§ 150A-1 (1983) *et seq.* Subsequently, on 3 November 1980, American filed with the Insurance Commissioner a petition for amendment or repeal of 11 N.C.A.C. 12.0502.

On 20 January 1981, an administrative hearing was conducted before Deputy Commissioner E. D. Nelson. As of November 1981, no order had been entered pursuant to this hearing, nor had the Insurance Commissioner's office responded to American's petition for amendment or repeal of regulation 11 N.C.A.C. 12.0502. American therefore filed amended pleadings in the Wake County Superior Court which included: (i) a petition for a determination that the Insurance Commissioner's refusal to approve a rate increase on American's policies until notice of nonrenewal had been given, was erroneous; (ii) a request for a

declaratory ruling that G.S. § 58-251.2 and 11 N.C.A.C. 12.0502 are unconstitutional and void; (iii) a request for injunctive relief; and (iv) redress for alleged deprivation of civil rights pursuant to 42 U.S.C. § 1983.

At a 30 November 1981 hearing before Superior Court Judge James H. Pou Bailey concerning American's motion for preliminary injunction, counsel for the Insurance Commissioner and for American stipulated that American had exhausted its administrative remedies; that the Insurance Commissioner's failure to issue a declaratory ruling constituted a denial of American's request; and that the Insurance Commissioner's decision was reviewable on the merits under the provisions of the NCAPA. *See* N.C. Gen. Stat. § 150A-17 (1983) and Article IV of the North Carolina Administrative Procedure Act. After hearing arguments from both sides, the Wake County Superior Court entered an order on 3 December 1981 denying the relief sought by American and, thereby, affirming the Commissioner's denial of American's rate increase request. The Superior Court specifically held that the policies in question were properly subject to the challenged regulation and that the regulation itself was valid and enforceable. It is from this order that American appeals. (Interestingly, after the Superior Court issued its 3 December 1981 order, the Commissioner issued an order which, although dated 30 November 1981, also explicitly denied American's rate increase request and upheld the validity of 11 N.C.A.C. 12.0502.)

II

A. Scope of Review

When an appellate court is reviewing the decision of another court—as opposed to the decision of an administrative agency—the scope of review to be applied by the appellate court under G.S. § 150A-52 is the same as it is for other civil cases. That is, we must determine whether the trial court committed any errors of law. *See* N.C. Gen. Stat. § 7A-27(b) (1981) and Rule 10(a) of the North Carolina Rules of Appellate Procedure. The errors of law alleged herein are based on the failure of the trial court properly to apply the judicial review standards of G.S. § 150A-51.

In examining the Insurance Commissioner's decision, the trial court was governed by the scope of review set out in G.S. § 150A-51:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire records submitted; or
>
> (6) Arbitrary or capricious.

American first argues that the Insurance Commissioner contravened subsections (2), (4), and (6) of this statute when he promulgated regulation 11 N.C.A.C. 12.0502 and applied that regulation to American's rate increase request. For the reasons that follow, we disagree.

B. Excess of Statutory Authority

American argues that the Insurance Commissioner exceeded his statutory authority by promulgating a rule which achieves a result not required or authorized by G.S. § 58-251.2: "the requirement that optionally renewable policies be terminated before a rate increase can be granted." American further contends that the paragraph in this statute regarding rate increases applies only to situations in which a company wishes to terminate a set of policies and not when the company is merely seeking a rate increase.

In deciding whether the Insurance Commissioner exceeded his statutory authority, we must first examine G.S. § 58-9(1). This

statute bestows upon the Insurance Commissioner the powers and duties to:

> [s]ee that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies . . . .

In accordance with this statute, regulation 11 N.C.A.C. 12.0502 sets out the required procedures for enforcement of that portion of G.S. § 58-251.2 concerning rate increase requests. Indeed, even though the regulation tracks the wording and plain meaning of G.S. § 58-251.2, American, nevertheless, argues that the provision of the regulation requesting notice of nonrenewal and termination of the policy is injurious to the public and, therefore, in conflict with the statute.

At the hearing before the Deputy Commissioner, American's vice-president emphasized that the requirement of nonrenewal and termination "eliminates necessary medical coverage for a group of policyholders, many of whom may be at advanced ages, making it difficult for them to acquire suitable coverage elsewhere, particularly if any of such insureds have existing medical conditions." Regulation 11 N.C.A.C. 12.0502 does require notice of nonrenewal followed by mandatory termination of the policy when a rate increase is approved. However, this regulation is not injurious to the public when it is viewed in conjunction with (a) the wording of G.S. § 58-251.2, (b) the Insurance Commissioner's prior application of the regulation, and (c) the legislative intent underlying this statute. Simply put, the regulation requires termination of a policy under the old rate with an option given to the policyholder to replace this policy with the same coverage at the approved increased rate. It is the policy *under the old rate* that is nonrenewed and terminated.

G.S. § 58-251.2 expressly provides that notice of nonrenewal must be given when seeking a rate increase request. The only situations expressly excused from this requirement are refusal of

renewal because of an insured's change of occupation to one classified uninsurable and an increase in rate due to the insured taking on a more hazardous occupation. American's request for a rate increase because of losses is not one excused from the required notice of nonrenewal.

G.S. § 58-251.2 further provides that once notice of nonrenewal is given, "[t]he policyholder thereafter must pay the increased rate in order to continue the policy in force." This language clearly protects the policyholder from the injury envisioned by American: the automatic elimination of necessary medical coverage for a group of policyholders who may be of advanced ages and who may have existing medical conditions.

Further, the Record on Appeal in the case *sub judice* contains a November 1981 order allowing a rate increase to another insurance company—Metropolitan Life—which reveals that the regulation, *as applied*, is not inconsistent with the statutory language giving the policyholder an option to pay the increased rate and continue coverage. In that case [Docket No. D-233] the Deputy Commissioner found "[t]hat all North Carolina policyholders are being given an opportunity to replace the present insurance coverage being nonrenewed with coverage that is comparable without proof of insurability or may exercise the conversion privilege in the present insurance policy." The Deputy Commissioner then ordered:

> That the filings by the insurance company for revisions in premium rates for employee benefit plan policy forms 91AH-61 and 91B-61 with rider forms used in connection therewith are hereby approved effective prospectively, provided, however, that no rate increase shall take effect until 30 days after the insurance company has advised all policyholders of this rate increase and has given all policyholders the following alternatives: (1) the opportunity to replace present coverage, without any requirements as to proof of insurability, waiting or contestibility [sic] periods and preexisting conditions; or (2) the opportunity to exercise the conversion privilege in present insured policies.

We point out finally that regulation 11 N.C.A.C. 12.0502 as applied by the Insurance Commission appears to be consistent with the legislative intent of G.S. § 58-251.2. Although the at-

torneys for the parties have affixed different labels to the practice G.S. § 58-251.2 was designed to alleviate,[1] the Attorney General, in a 1969 opinion, gave the following rationale for the statute which, while not necessarily inconsistent with the positions taken by the parties, is compelling.

> The Act was designed to curb the abuse, at that time, of A & H companies collecting premiums, then mass cancelling of policies. In order to prevent companies from being locked in on inadequate rates, however, the General Assembly provided a method whereby the company, after giving the proper notice of non-renewal, could seek a rate increase.

40 Op. Att'y. Gen. 340, 341 (1969). The statute, as interpreted by the regulation, allows the company to recoup some of its losses through a rate increase and gives the policyholders sufficient time to seek alternative coverage, if they so desire, before the policy terminates.

Based on the foregoing, we discern no purpose in the statutory requirement that notice of nonrenewal be given if, in fact, termination of coverage at the old rate was not intended by the Legislature. Consequently, the Insurance Commissioner did not exceed his authority by promulgating Regulation 11 N.C.A.C. 12.0502.

---

1. American's counsel argues that G.S. § 58-251.2 was designed "to stop the previously existing condition of 'skimming', or 'collecting premiums, then mass cancelling of policies.' "

The Insurance Commissioner's counsel argues that the statute was "directed at a practice more properly denominated 'claims underwriting' rather than 'skimming' " and describes claims underwriting as follows:

> An insurer that practices 'claims underwriting' will not incur a lot of expense in the investigation of applicants for insurance or require prior medical exams. It merely waits until a claim is filed and a medical report (which often includes a medical history) is furnished along with the proof of loss. At this point, the insurer makes the underwriting decision whether to continue coverage. Since many claims in the early years of the policy can be denied under the 'pre-existing condition' exclusion, 'claims underwriting' is an economical way (from the standpoint of the insurer) to do business. Too, 'no medical exam required' may be an effective, if somewhat misleading, sales pitch.

C. Arbitrary or Capricious

American next contends that the refusal of the Insurance Commissioner to grant or even review its rate increase request was arbitrary and capricious.

> Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are 'whimsical' because they indicate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning and the exercise of judgment,' (citation omitted), or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements. . . . (Citation omitted.)

Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 420, 269 S.E. 2d 547, 573, *pet. for reh. denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980). The decision of the Insurance Commissioner to deny American's request for a rate increase was not arbitrary or capricious. This decision merely followed the regulation which requires notice of nonrenewal and a public hearing before review of a rate increase request. In addition, these requirements are neither unreasonable nor unfair to the company or its policyholders. By requiring notice of nonrenewal when seeking a rate increase, the regulation gives the policyholder (a) the option to pay the increased rate and continue his coverage with the company, or (b) time to find other insurance. This regulation protects the company by allowing it to recoup some of the losses incurred under the old premium rate.

D. Violations of Due Process of Law and Equal Protection

American's contention that the required termination of its policies as a prerequisite to seeking a rate increase constitutes violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment is groundless, in light of our interpretation of this regulation and its prior application. Moreover, State economic regulatory classifications such as this involve no suspect classification or fundamental freedom and receive only "reasonable scrutiny." *See Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed. 2d 220, 96 S.Ct. 2488 (1976).

> Legislation subject only to reasonable scrutiny, even though it may cause some disparate treatment among similarly

> situated businesses, will not be held violative of the Equal Protection or Due Process Clauses of the Fourteenth Amendment if it bears a 'rational relationship to a permissible state objective.' [Citations omitted.] Such legislation need not be the best resolution of a particular problem. It can, in fact, be seriously flawed and result in substantial inequality and still remain constitutional if it has some reasonable basis. [Citations omitted.] It will not be set aside if "any state of facts reasonable may be conceived to justify it." [Citation omitted.]

Prudential Property and Casualty Co. v. Ins. Commission, et al., 534 F. Supp. 571, 576 (C.D.S.C. 1982), *aff'd*, 699 F. 2d 690 (4th Cir. 1983). Under this test of "reasonable scrutiny," the regulation at issue is deemed constitutional.

E. Claim Under 42 U.S.C. § 1983

American has alleged violations of its rights pursuant to 42 U.S.C.A. § 1983 (West 1981). Recovery under this Act is predicated upon a finding of deprivation of rights, privileges or immunities secured by the Constitution. Since no such violation has been shown, we find this argument unpersuasive.

F. Evidentiary Error

The final argument involves evidentiary matters. American argues that the Deputy Commissioner refused to consider reliable evidence. The record shows that this evidence was eventually admitted at the hearing. American also excepts to the admission of alleged irrelevant testimony. This same testimony was earlier admitted without objection. For these reasons, American was not prejudiced.

The judgment and order appealed from is

Affirmed.

Judges WEBB and PHILLIPS concur.

REYNOLD DAVIS, EMPLOYEE-PLAINTIFF v. EDGECOMB METALS COMPANY, EMPLOYER, AND CRAWFORD AND COMPANY, CARRIER-DEFENDANTS

No. 8210IC662

(Filed 5 July 1983)

Master and Servant § 66— workers' compensation—leg injury—additional compensation for mental condition

The uncontroverted evidence supported findings by the Industrial Commission that plaintiff received compensation for a leg injury sustained by accident arising out of and in the course of employment with defendant employer and that plaintiff subsequently suffered a disabling post-traumatic neurosis with a depressive reaction, first caused by the accident itself, and followed by a regression from his improved mental condition when he was told that his leg would be permanently shorter. These findings supported the Commission's conclusion that plaintiff was entitled to additional compensation for temporary total disability as a result of this neurosis until he reached maximum improvement from such condition, notwithstanding plaintiff's leg injury was a "scheduled injury" under G.S. 97-31(15).

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 8 April 1982. Heard in the Court of Appeals 10 May 1983.

Plaintiff received compensation for a leg injury sustained on 28 November 1979 by accident arising out of and in the course of his employment with defendant employer. The Commission found that he subsequently suffered a disabling post-traumatic neurosis with a depressive reaction, first caused by the accident itself, and followed by a regression from the state of improvement he had achieved in his depression, which regression occurred when he was told that his leg would be permanently shorter. It concluded that he was entitled to additional compensation until he reached maximum improvement from the psychiatric condition, and entered an award accordingly.

Defendants appeal.

No brief filed for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant appellants.

WHICHARD, Judge.

"In appeals from the Commission, the scope of our review under the Workers' Compensation Act is (1) to determine if the Commission's findings of fact are supported by competent evidence in the record, and (2) to determine if the findings of fact reasonably support the conclusions of law." *Chandler v. Teer Co.*, 53 N.C. App. 766, 768, 281 S.E. 2d 718, 719 (1981), *aff'd*, 305 N.C. 292, 287 S.E. 2d 890 (1982) (per curiam). We find ample competent evidence to support the contested findings, and hold that these findings reasonably support the conclusions of law. We thus affirm the award.

The parties stipulated that plaintiff was compensated for his initial injury and the permanent disability to his leg which resulted from it. The findings to which defendant excepts are:

> 6. Plaintiff has suffered a post-traumatic neurosis with a depressive reaction, as a result first of the accident itself after which he has suffered dreams and flashbacks of the recurrence of the injury and then secondly, when he was rated in October of 1980 and told that that was the best he was going to get and that his leg would be permanently shorter, he suffered a regression from his state of improvement he had achieved in his depression. [Emphasis omitted.]
>
> Plaintiff has been and remains temporarily totally disabled as a result of this neurosis, which is directly caused by plaintiff's accident and the residual disability therefrom.
>
> 7. Plaintiff has not been able to work since the injury with the exception of some few days when he worked with a cousin as a housepainter but found that he could not concentrate, felt that his medicine made him act like a zombie, and on the third day he asked his cousin to take him home.
>
> 8. Plaintiff is in need of further psychiatric care, either under the care of Dr. Dovenmuehle if that is the doctor's recommendation or with a local mental health clinic if that is the doctor's recommendation in order to achieve maximum improvement and hopefully have no permanent disability as a result of the psychiatric problems.

The evidence which supports these findings, in some detail, is as follows:

A medical expert specializing in psychiatry testified that he commenced treating plaintiff in July 1980, and that except for a brief period plaintiff had been under his care consistently since that date. When the witness initially saw plaintiff, plaintiff was suffering a great deal of anxiety. He had "poor sleep interrupted by nightmares which were involved with the accident that he had." During the day he had flashbacks when he momentarily visualized himself again being hit by the load of steel that crushed his leg. Sometimes he would visualize more extensive damage than occurred, such as bars of steel "falling and cutting through his body and just chopping him into sections."

Plaintiff at that time had "startled reactions." He was mildly depressed, his concentration was very poor, his recent memory "particularly was poor," and he was irritable with his family. All of this "is typical of the post-traumatic stress reaction which had gone on for some time at that point."

By October plaintiff had attained considerable improvement in his mental condition. He was then informed that his leg would not completely recover, that he would not have the full use or length of it, and that he would need to wear a lift in his shoe. He also had continual pain and swelling in the leg throughout the period the witness treated him, though this was not "a major part of the psychological picture."

When plaintiff learned that his leg would be permanently shorter as a result of the accident, "the very serious depression started in." Throughout the summer of 1980 plaintiff's deficiency in concentration and memory was "so poor that there was no question in [the witness'] mind that he would be unable to hold a job, any kind of job, simply because of the psychological factors involved."

From the initial period of treatment until "near Christmas" plaintiff did fairly well at following the witness' recommendations, particularly regarding his studies at a technical institute. His behavior then became characteristic of severe depression, however. He became much more pessimistic, began to have suicidal thoughts, and "felt without energy." He had to force himself to study, and eventually started dropping courses. He became so suicidal that the witness eventually insisted on hospitalizing him.

At this point plaintiff was "just totally fixed on his worthlessness and the hopelessness of his condition." He "just kept going downhill with the depression," and increases and changes in his medication "did not handle it."

The witness testified that "[p]sychiatrically [plaintiff was] unusually focused on his body as an instrument of his self esteem." He had "always been kind of a super athlete" and had "always maintained [a] belief in his physical power and invulnerability." The witness knew of no evidence of neurotic behavior or character disorder in plaintiff pre-dating the accident, however.

Plaintiff eventually agreed to go to a psychiatric hospital, where he spent six weeks. He was treated there with potent antipsychotic drugs which "rendered him in effect a zombie." His thinking was substantially slowed, and following his release from the hospital he was withdrawn from the drugs, but that only made him more depressed. He was put back on the drugs and had an improved drug reaction, but was still "a long way from being well in terms of the depression." He had tried to work with a friend or relative, but would only last about half a day. The witness had discussed with plaintiff the possibility of rehospitalization, because plaintiff still had suicidal thoughts quite frequently.

As to the cause of plaintiff's psychiatric illness, the witness testified:

> I have seen [plaintiff] now 36 times and there is no question in my mind at all but that all the psychological problems are the proximal result of that accident. The psychological problems started with a severe post-traumatic stress reaction. That this was connected to the accident was very clear in terms of the flashbacks that he was getting of the accident, the nightmares he was having in terms of his body being dismembered by falling steel, and so on. There is no question about that post-traumatic stress reaction being the direct proximal result of that accident on November 28, 1979.
>
> As far as the depression is concerned, this has to do with the damage, the permanent damage to his body. . . . [T]he severity of the psychological insult here does not have to be

equivalent to the physical insult to the body. . . . [H]e only has a three-quarter inch shortening of his leg. I think with one part of himself he knows that that leg is perfectly good to walk on and so on. He cannot play football any more without getting severe pain and swelling, but the psychological insult to him because of that deformation of the leg was just totally devastating because it undercut the prime support for his self esteem which was physical power and invulnerability.

On cross-examination the witness testified that plaintiff's problems "centered primarily on his ability to recognize and accept the extent of the disability to his leg rather than any actual problems he ha[d] been experiencing physically with his leg"; that plaintiff's "psychological problems and depression . . . became more acute when he found out that his leg was not going to get better and would be shorter the rest of his life"; and that "this was the inability of [plaintiff] to accept the permanent injury to his leg psychologically more than the actual permanent injury itself." He stated:

It would be fair to say that the only reason [plaintiff] is not working now is due to his depressive post-traumatic neurosis, based on the factors that I described earlier, that is the anxiety, nightmares, flashbacks, poor memory, and severe depression. That is the main and only reason he is not working now. I would presume that physically he is able to work, but that is outside my field. Psychologically, . . . in my opinion he is not able to work. He tried, I believe it was last month, and did not last more than a couple or three days.

. . . .

I indicated that [plaintiff] knew that his leg was good to walk on but that he could not accept permanent damage to his body. . . . [H]e cannot accept as a person that a part of his body has been damaged. That is one of the primary causes of depression I described earlier. I want to emphasize again that his self esteem, his feeling of worth about himself centered on the intact physical body, powerful and invulnerable to injury . . . .

. . . The depressive reaction that I described is based not so much on an inability to accept that permanent rating

to his leg as that it produces a total destruction of the base for his self esteem. That is why the depression is so severe and hanging on so long.

In letters to plaintiff's attorney, which were introduced as exhibits for plaintiff, this medical witness stated the following:

At the same time the phobic aspect of plaintiff's condition improved, his depression became more severe. The worsening depression coincided with plaintiff's learning that he would always have "some shortening" of the injured leg. Plaintiff was "totally unable to accept this," and ultimately his depression and agitation made hospitalization mandatory.

Plaintiff suffered "a post-traumatic neurosis with a depressive reaction, at times of psychotic proportions, directly caused by the accident." He has "a typical traumatic neurosis with some phobic qualities." The neurosis is quite severe and has resulted in considerable depression. There is "no evidence of malingering or secondary gain from this disability."

Plaintiff testified that prior to the accident he had not had any emotional or psychological problems. He had been quite athletic, had majored in physical education and played football while in college, and had remained physically active after college.

The injury had impacted upon his day-to-day lifestyle. On a rainy day he had constant pain in the injured leg. He was no longer able to participate in sports with his seven year old son. Neither he nor the son could understand or accept this, and it bothered him a great deal.

Plaintiff was afraid to go out of his house, and afraid to ride with his wife when she was driving. He feared passing a truck with a load of steel on it, and would get off the highway to avoid it.

"[E]verything just went haywire" when the doctor told him "about the leg and what was to be expected with the pain and the swelling." He could not accept the fact that he had been in a mental hospital and could not work out his own problems. He got nervous and upset, could hardly drive a car, and "couldn't do anything." He stated that "[t]o get away from it all [he] primarily [slept]."

Plaintiff's wife testified as follows:

She had observed plaintiff go "from a very independent, very competent, very outspoken person to someone who has no motivation at all." He is very withdrawn, and much of the time "just does not want to be bothered." He no longer watches or attends sports events, because he cannot participate. He no longer wants to participate in family events. In her opinion plaintiff "just gave up" when he was told that his leg was permanently injured and that "it was just going to be that way."

The foregoing evidence clearly supports the finding that plaintiff's post-traumatic neurosis with depressive reaction resulted initially from the accident itself. It establishes that plaintiff experienced the described mental condition prior to learning that his leg would be permanently shorter, and, although he had improved from his initial state of depression, he regressed severely when he learned of the permanent nature of his condition. The medical witness testified clearly and repeatedly that plaintiff's mental condition was the proximate result of his industrial accident, and that this condition alone rendered him unable to work. The findings in question thus are amply supported by competent evidence and are therefore conclusive on appeal. *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E. 2d 874, 877 (1968).

The question becomes, then, whether these findings support the conclusion of law that plaintiff is entitled to additional compensation until "under appropriate care [he] reaches maximum improvement from the psychiatric condition." Defendants contend that plaintiff's leg injury is a "scheduled injury" under G.S. 97-31 (15) (1979); that the compensation he received for that injury is, by provision of that statute, "in lieu of all other compensation"; and that the Commission therefore erred in awarding additional compensation for a disabling psychiatric condition which resulted from plaintiff's inability to accept the permanency of the injury to his leg. We hold that the Commission correctly applied the pertinent law to its findings.

> . . . [W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. Dozens of

> cases, involving almost every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom, functional overlay, or personality disorder, have accepted this rule. . . .
>
> There is almost no limit to the variety of disabling "psychic" conditions that have already been recognized as legitimately compensable . . . .
>
> . . . .
>
> As in other connections, a preexisting weakness in the form of a neurotic tendency does not lessen the compensability of an injury which precipitates a disabling neurosis. . . .
>
> . . . .
>
> When the physical injury precipitating the neurosis is itself a schedule injury, no special problems arise, since the case falls easily within the familiar rule that the schedule is not exclusive when the effects overflow beyond the scheduled member. . . .
>
> . . . .
>
> . . . [C]ases denying compensation will usually be found to have done so not on the theory that traumatic neurosis is not compensable as such, but on the ground either that the evidence failed to establish a causal connection between the injury and the neurosis, or that there was no neurosis or disability.

1B A. Larson, *Workmen's Compensation Law* § 42.22, at 7-597 to -622 (footnotes omitted).

> The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive. . . . An increasingly common application of this rule involves schedule-type injuries that produce mental and nervous injury, such as traumatic neurosis; these have generally been found to call for awards going beyond the schedule.

2 *Id.* at § 58.21, at 10-222 to -243 (footnotes omitted).

The following cases from other jurisdictions, because of their similarity to this case, merit mention:

In *LaCalle v. Ashy Enterprises*, 353 So. 2d 439 (La. Ct. App. 1977), *cert. denied*, 355 So. 2d 266 (1978), plaintiff broke his leg in an industrial accident and received compensation for the resulting disability. The treating physician discharged plaintiff as able to return to work with a six percent permanent disability of the leg. A psychiatrist subsequently found him disabled as a result of a severe anxiety-depressive neurosis precipitated by the leg injury. The court upheld an award for total and permanent disability.

In *Fruehauf Corp. v. Prater*, 360 So. 2d 999 (Ala. Civ. App. 1978), *cert. denied*, 360 So. 2d 1003 (1978), plaintiff, a furnace operator in defendant's plant, sustained burns over fifty-five percent of his body. His recovered physical condition was such that he had a five percent disability of the body as a whole. The trial court found permanent disability, *inter alia*, because of the psychiatric consequences of his injury, *viz.*, a depressive neurosis.

The appellate court upheld the award. It stated:

> Depressive Neurosis is defined as "a severe onset of depression due to internal conflict or the loss of an object real or symbolic. It is characterized by morbid sadness, dejection, or melancholy and usually is accompanied by loss of sleep, loss of interest in activities, weariness, inhibitions, and loss of appetite and weight. This reaction is commonly seen in neuroses following trauma."

Id. at 1000-01.

The court recognized the difficulty of establishing the existence or the precipitating cause of any neurosis or psychic disorder, as well as the "distinct possibility of attempted malingering in the absence of objective symptoms." *Id.* at 1001. It believed, though, that the difficulty of proof could be "overcome by use of expert medical testimony and/or objective evidence." *Id.* It also believed that "malingering [could] be minimized by the vigilance of a discerning trial judge." *Id.*

This Court has held in general accord with the foregoing authorities. In *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E. 2d 539 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982), it held that a plaintiff who had received compensation for a back injury, and who subsequently suffered a disabling neurotic depressive reaction, which medical evidence indicated

was directly related to and caused by the back injury, was entitled to additional compensation for the disabling mental condition. A subsequent case described the *Fayne* holding as "that if an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation." *Barnes v. O'Berry Center*, 55 N.C. App. 244, 246, 284 S.E. 2d 716, 717 (1981).

In *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E. 2d 280 (1980), *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980), plaintiff had received compensation for head and back injuries. The Court held that he was entitled to additional compensation for permanent disability from "post-traumatic syndrome, traumatic neurosis, as a result of the injury."

Defendants cite no authority contrary to the foregoing. They attempt to distinguish the opinions of this Court discussed above, as well as other cases from this jurisdiction, but we find the asserted distinctions unavailing.

The principal thrust of defendants' argument is that plaintiff's disability was caused by his idiosyncratic reaction to the permanency of his condition rather than by the injury itself. The uncontroverted evidence, however, fully supports the Commission's finding as to the primacy of the accident itself as a causative factor. The medical witness testified that there was no evidence that plaintiff had exhibited neurotic behavior or character disorder pre-dating the accident. He further testified that plaintiff's psychological problems started with a severe post-traumatic stress reaction, and that it was clear that this was connected to the accident and was the direct proximal result of it. The witness' letter stated that plaintiff suffered "a post-traumatic neurosis with a depressive reaction, at times of psychotic proportions, *directly caused by the accident.*" (Emphasis supplied.)

In sum, the uncontroverted evidence establishes that plaintiff's psychotic condition was directly caused by the accident itself, and that it pre-dated his learning of the permanency of the condition of his leg. That plaintiff's perhaps idiosyncratic reaction to the permanency of his original injury may have caused a regression of his mental condition, and may have been the ultimate factor which acted on the condition itself to render it severe and disabling, is not determinative of his entitlement to

additional compensation. The determinative factors are the primacy of the condition itself, and its causal connection with the accident. These were well established by uncontroverted evidence.

We thus hold, pursuant to the authorities cited above, that the Commission's findings fully justified its conclusions and award of compensation. To hold otherwise would be discordant both with the foregoing authorities and with the well-established principle that "[t]he worker's compensation act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . . [,] and its benefits should not be denied by a technical, narrow, and strict construction." *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 588, 281 S.E. 2d 463, 466 (1981).

Affirmed.

Judges WEBB and BRASWELL concur.

NORTH CAROLINA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION v. C. DAVID McKEE, B. G. MARTIN AND ADRIAN A. ROBERTS, II

No. 8222SC575

(Filed 5 July 1983)

1. **Rules of Civil Procedure § 55— appearance by defendants—no authority in clerk to enter default judgment**

The clerk's entries of default and default judgment against defendants were void where defendants had appeared in the action through settlement negotiations with plaintiff after the action was instituted. G.S. 1A-1, Rule 55(b)(1).

2. **Rules of Civil Procedure § 55— trial court's refusal to enter default judgment—no abuse of discretion**

The trial court did not abuse its discretion in refusing to enter a default and default judgment against defendants where the court found that defendants showed excusable neglect in that defendants had furnished their attorney information sufficient to file answer and were unaware that the attorney had failed to do so, and the court also found that defendants' proposed answer pleaded a meritorious defense of accord and satisfaction.

3. Bills and Notes § 15; Uniform Commercial Code § 32— acceptance of replacement note not payment of original note

Plaintiff bank's acceptance of a corporation's promissory note as a replacement for a note executed by the individual defendants did not constitute "payment and satisfaction" of defendants' note within the meaning of G.S. 25-3-603 so as to discharge defendants from liability for the debt where the evidence showed that plaintiff agreed to accept the corporation's note only on condition that plaintiff retain possession of defendants' note as additional collateral for the corporation's note.

4. Attorneys at Law § 7.4— attorney fees—provisions of note and assumption agreement

A corporation's promissory note providing for the collection of attorney fees if the debt were collected through an attorney and an assumption agreement signed by defendants providing that nothing therein impaired "other remedies provided for under the terms of the note and security agreement provided by law for collection of the debt" placed on defendants liability for attorney fees incurred by plaintiff in an action on the note.

APPEAL by defendants from *Collier, Judge.* Judgment entered 10 March 1982 in Superior Court, IREDELL County. Heard in the Court of Appeals 19 April 1983.

The complaint filed by North Carolina National Bank on 1 October 1981 presented two claims against defendants. The first claim originated from a promissory note in the amount of $61,000.00, executed on 22 September 1978 by Harmon's Food Store, Inc., and delivered to plaintiff. This note was amended by agreement of both parties on 1 April 1981 to extend the final maturity date beyond the date stated in the original note. On 2 April 1981 defendants, by written assumption agreement, personally assumed the then outstanding liability of Harmon's Food Store, Inc. on the 22 September 1978 note. No payment was made on the note after 10 August 1981, leaving a principal balance outstanding of $7,424.69.

The second claim originated from a promissory note in the amount of $50,000.00, executed by defendants on 21 April 1981 and delivered to plaintiff. On 29 July 1981 defendants requested that plaintiff accept a secured note executed by Mid-American Franchise Services, Inc., with its assets constituting the collateral, as a replacement for the 21 April 1981 promissory note under which defendants were personally liable in the event of a default. Plaintiff accepted the secured Mid-American note, but retained possession of the original (21 April 1981) promissory note

as "additional collateral" for the 29 July 1981 Mid-American note. Upon the alleged default of defendants on the 29 July 1981 Mid-American note, plaintiff filed suit requesting attorneys fees and payment of the principal and interest due under the terms of the 2 April 1981 and the 29 July 1981 notes.

During October defendants attempted to negotiate a settlement with plaintiff. On 22 October 1981 defendants were granted an extension of time within which to file responsive pleadings. When defendants failed to answer within the time allowed, a default and default judgment were entered against them by the Clerk of Superior Court. Based upon defendants' motion and affidavits, the trial court set aside entry of default and granted relief from the default judgment on 1 February 1982.

On 2 February 1982 plaintiff moved for summary judgment, which motion was granted on 10 March 1982. Defendants appealed and plaintiff cross-appealed.

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

House, Blanco & Osborn by Reginald F. Combs, for defendant-appellants.

EAGLES, Judge.

On 18 December 1981, subsequent to the entry of default and default judgment against defendants on 15 December 1981, defendants filed an answer and a motion to set aside the entry of default and default judgment. On 26 January 1982 plaintiff filed a motion for entry of default and default judgment under G.S. 1A-1, Rule 55(b)(2), North Carolina Rules of Civil Procedure. An order setting aside the default and default judgment was entered 1 February 1982. Having outlined the sequence of events leading up to the trial court's order of 1 February 1982, we must first address plaintiff's cross-assignment of error that the trial court erred in setting aside the default and the default judgment entered against defendants on 15 December 1981 by the Clerk of Superior Court.

[1] Under G.S. 1A-1, Rule 55(b)(1) the clerk can enter a default judgment against a defendant only if the defendant has failed to appear in the matter. *Roland v. W & L Motor Lines, Inc.*, 32 N.C.

App. 288, 231 S.E. 2d 685 (1977). In the case *sub judice* defendants had made an appearance through their settlement negotiations with plaintiff. *Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975). Plaintiff acknowledged that defendants had appeared in the action prior to the clerk's entry of default and default judgment when plaintiff filed a motion for entry of default and default judgment under Rule 55(b)(2) on 26 January 1982. Since defendants had appeared in the matter prior to the clerk's action, the clerk's entry of default and default judgment were void. *Roland v. W & L Motor Lines, Inc., supra.*

[2] While the clerk's prior entry of default and default judgment of 15 December 1981 were void because of defendants' prior appearance, the trial court, under G.S. 1A-1, Rule 55(b)(2), could have still entered a default and default judgment against defendants under plaintiff's 26 January 1982 motion. *Roland v. W & L Motor Lines, Inc., supra.* Such a motion is addressed to the discretion of the court. *See North American Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E. 2d 794 (1971). In exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law. *Bailey v. Gooding*, 45 N.C. App. 335, 263 S.E. 2d 634 (1980).

Entry of default and judgment by default would be improper where defendants showed 1) excusable neglect in failing to timely file a responsive pleading and 2) a meritorious defense to plaintiff's claim. *See* G.S. 1A-1, Rule 60(b)(1), North Carolina Rules of Civil Procedure. We find no abuse of discretion on the part of the trial court in finding that defendants had shown both excusable neglect and a meritorious defense.

Defendants' attorney submitted an affidavit which stated

> 4. Through mistake and inadvertence, I failed to file an Answer on behalf of the Defendants C. David McKee and B. G. Martin within the time permitted by the Order of October 28, 1981. I also failed to advise Defendants C. David McKee and B. G. Martin that I had not filed an Answer by December 7, 1981.
>
> . . .

6. As the Defendants' attorney of record, I am responsible for the failure to file the Answer within the period prescribed by the North Carolina Rules of Civil Procedure and permitted by Order of the Assistant Clerk of Superior Court of Iredell County. That failure is not fairly inputable [sic] to the Defendants C. David McKee or B. G. Martin, having been occasioned solely by the neglect of counsel.

Both defendants submitted affidavits which stated

2. I was not aware that my attorney in this action, Reginald F. Combs of the law firm of House, Blanco, Randolph & Osborn, P.A. had not filed an Answer to the Complaint within the time permitted until I was served with a copy of the Entry of Default and Default Judgment entered December 15, 1981. After providing my attorneys with information sufficient to file the Answer, I have relied upon them to handle this case.

Defendants' answer contained the allegation that

On or about July 29, 1981, the Plaintiff accepted a note in the principal amount of $50,000.00, made by Mid-American Franchise Services, Inc., a Tennessee Corporation domesticated and authorized to do business in the State of North Carolina, a true copy of which is attached hereto as Exhibit A, in complete accord and satisfaction and in full payment of Defendants' obligations to the Plaintiff.

These affidavits support the trial court's findings of fact that

5. Due to the inadvertence and neglect of counsel for Defendants Martin and McKee, Reginald F. Combs, no answer or other pleading was filed on behalf of the Defendants Martin or McKee by December 7, 1981.

. . .

9. A proposed Answer to Plaintiff's Complaint was attached to Plaintiff's Motion and proffered for filing. Without determining the merits of the defenses asserted therein, the Answer *pleads* a meritorious defense to the claims of the Plaintiff, to wit: the affirmative defenses of accord and satisfaction and payment.

On the basis of the above competent evidence and findings of fact, we find no abuse of discretion in the trial court's refusal to allow an entry of default and default judgment against defendants.

[3] After granting defendants' motion to set aside the entry of default and judgment by default on 1 February 1982, and at the conclusion of all the evidence presented at a hearing on 5 February 1982, the trial court entered summary judgment for plaintiff on both claims. Prior to that time defendants conceded that they had no legal defense as to the principal and interest owed under plaintiff's first claim. Defendants' assignments of error challenge the court's award of the principal and interest on plaintiff's second claim and the court's award of attorney fees on both plaintiff's claims. We will first address the propriety of the summary judgment in relation to the court's award of the principal and interest allegedly due on the $50,000.00 note under plaintiff's second claim.

The promissory note for $50,000.00, which defendants executed and delivered to plaintiff on 21 April 1981, is encompassed in the G.S. 25-3-104 definition of a negotiable instrument. Article 3 of the Uniform Commercial Code controls in determining whether the court properly granted summary judgment for plaintiff here.

G.S. 25-3-603(1) provides that "[t]he liability of any party is discharged to the extent of his payment or satisfaction to the holder . . . ." The question arises as to whether the 29 July 1981 note was executed by defendants and delivered to plaintiff as "payment and satisfaction" of the 21 April 1981 note. While there is, as of yet, no North Carolina case dealing with this issue, it has been suggested that this "is a question of intention whether the taking of the note satisfied the earlier obligation, a question to be determined by all the facts and circumstances (what was the state of the bank's knowledge, what did the bank do with the old notes, etc.)." J. White and R. Summers, *Uniform Commercial Code* § 13-19, p. 447 (1972). See also R. Anderson, 3 *Uniform Commercial Code* § 3-603:7 (2 ed. 1971).

In the present case the record clearly discloses the intent of the parties at the time the 29 July 1981 note was executed and delivered. Notes on the Commercial Loan Memorandum, made by

J. Allen Knox, an employee of plaintiff, stated the intent of plaintiff. Those notes stated

> These comments are to document further the conversion of the $50,000 loan documented 4/21/81 to a term loan. The above individuals operate under the names of two companies (1) Mid-American Franchise Services, Inc. (MAFS) which is a management company that has taken over management and ownership of the stores formerly owned by Harmon's, Mutt's Stores consisting of twelve restaurants and another seafood chain of 21 restaurants, and (2) McRob and McMar, a partnership which is owned by the same individuals. McRob and McMar was to have just the Harmon's stores, but we are now informed by Bob Martin and David McKee that MAFS corporations owns the Harmon's four stores which are located in Statesville, Mooresville and Mocksville. This credit is based largely on the financial strength of the above individuals but the loan must be put in the name of the corporation since it now owns all the assets formerly owned by Harmon's. This is a change from the original intent as explained to me by Darrell McKean and the other partners in May, 1981. It has taken from May 15 until now to get this loan secured. It develops that Adrian A. Roberts, one of the key men in the operation, had not been attending to his responsibilities nor passing the messages along to the other partners that it was necessary to sign a new note and security agreement with NCNB. B. G. Martin, stockholder and attorney for the company, wanted us to replace the $50,000 note signed by all four individuals with the secured note. I told him we could not do this and would have to hold that note as additional collateral to the note. The justification for this was that two of the officers were not present to personally sign the new secured note and that the bank could not release any one of them from liability. This is a matter of getting the $50,000 loan secured and amortized as it was supposed to have been the latter part of May. David McKee states that he has not been able to put together a financial statement on Mid-American Franchise Services, Inc. but will provide one as soon as it is available. We are still keeping the individuals personally responsible for this loan. Approval of this credit as structured is recommended.

By affidavit, J. Allen Knox further stated that

Martin and McKee requested of your affiant on July 29, 1981, that the note of April 21, 1981, be considered paid in full and returned to them; your affiant stated to Martin and McKee that he knew nothing about the ability of the corporation to pay its note for $50,000 and that NCNB would agree to accept the note of the corporation in that amount only on condition that NCNB hold the note of April 21, 1981, as security for the corporate note, such that if the corporate note were not paid NCNB would look for payment from the individuals who had signed the note on April 21, 1981. The note of the corporation dated July 29, 1981, was accepted by NCNB on that condition.

At the 5 February 1982 hearing he further testified

A. Well, their intention was, as expressed by Mr. Martin, to pay that note and for us to cancel it. To start with all of the partners or all of the members, officers of the corporation were not present in order to get personal guarantees or get them personally responsible for corporate debt. One partner had already left the area to parts unknown. It was not our intention, and I so stated, to release the individuals from personal liability. We would have to hold the original note signed by the individuals as collateral to the Mid-American Franchise note, in addition to the collateral that Mid-American Franchise Services owned.

Q. Did either Mr. Martin or Mr. McKee ask you to return to them the note of April 21, 1981?

A. Well, I'm not sure in those words that they did but they fully expected to take it and Mr. McKee did state to the counselor, he said, Counselor, I thought we were bringing that note back with us.

Q. You had previously told them that you had to keep that as security for the corporate debt?

A. Right, uh-huh.

* * *

Q. Why did you not on that occasion, Mr. Knox, just take the note of the corporation and hand them back the note of April 21st, 1981?

A. Well, with the information that they gave me, you know, it is not our policy to lend to a corporation that we have no information, no financial information on. We just don't do that. It was an effort to obtain collateral for the note from the individuals in order that the bank's position would be secure.

At the 5 February 1982 hearing defendant McKee testified

Q. And the suggestion was made on that date that the individual debt incurred by the four of you on April 21, 1981, be transferred to a corporate debt?

A. That was what was on the documents as they were in draft form for our execution.

Q. And it was your purpose in coming here to effect that result, wasn't it?

A. One of them, yes, sir.

Q. And you wanted the old note of April 21st, 1981, returned to you on that date, didn't you?

A. I did, yes, sir.

Q. Mr. Knox said he couldn't return it to you, didn't he?

A. Yes, sir.

Q. He told you that he was going to hold that note as security for payment of whatever new note the corporation signed on July 29th, 1981, didn't he?

A. We did not, to the best of my recollection, we did not discuss that to any great detail. He said, and he listed it on the security statement that he had to keep the note.

Q. And you knew that he was going to keep the note, didn't you?

A. Yes, sir.

Q. And you know, do you not, Mr. McKee, that on July 29th, 1981, Biscuitland signed a note, or Mid-American Franchise, I think, signed a note for $50,000.00?

A. Yes, sir.

Q. And you know that on that date Mid-American Franchises, Inc., did not get from North Carolina National Bank $50,000, don't you?

* * *

Q. You got less than $1,000.00?

A. Yes, sir.

The above evidence, in conjunction with the fact that the 29 July 1981 security agreement listed the 21 April 1981 promissory note as collateral, shows "that there is no genuine issue as to any material fact and that . . . [plaintiff] is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The 29 July 1981 note was not a "payment and satisfaction" under G.S. 25-3-603, and defendants were not released from personal liability for the $50,000.00 debt.

The result under G.S. 25-3-603 is the same as that under the common law principle of novation.

> Defendants' plea of payment, if sustained, would require us to hold that a creditor who accepts from his debtor the obligation of a third person takes it in payment, releasing the debtor from his obligation irrespective of the intent with which the new obligation is assigned and accepted. The law is otherwise. It is, we think, correctly stated by Clark, C.J., in *Grady v. Bank*, 184 N.C. 158, 113 S.E. 667: "The note of a third person given for a prior debt will be held a satisfaction, where it was agreed by the creditor to receive it absolutely as payment, and to run the risk of its being paid. The onus of establishing that it was so received is on the debtor. But there must be a clear and special agreement that the creditor shall take the paper absolutely as payment or it will be no payment if it afterwards turns out to be of no value. A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his

own risk the note of a third person for the debt." [Citations omitted.]

F. D. Cline Paving Co. v. Southland Speedways, Inc., 250 N.C. 358, 361-62, 108 S.E. 2d 641, 643-44 (1959).

Defendants' final assignments of error challenge the trial court's award of attorneys fees on each of plaintiff's claims. As to plaintiff's second claim, defendants allege that since they had paid off the 21 April 1981 promissory note by replacing it with the 29 July 1981 secured note, the trial court erroneously granted summary judgment in favor of plaintiff on their claim for principal, interest and attorney fees. Since we have already held that the 29 July 1981 note did not constitute payment and satisfaction of the 21 April 1981 note, we find no merit in defendants' challenge of the trial court's grant of attorney fees on plaintiff's second claim.

[4] Similarly, we find no merit in defendants' assignment that the trial court erred when it awarded plaintiff attorney fees on its first claim. The original note, signed by Harmon's Food Store, Inc., provided that

> Failure to pay any installment of this note, either principal or interest, as and when due shall, at the option of said Bank or any holder hereof, render the entire balance of principal and interest on this note immediately due and payable. In the event the indebtedness evidenced hereby or liabilities as defined herein be collected by or through an attorney at law, the holder shall be entitled to collect reasonable attorneys' fees.

The assumption agreement, signed by defendants, provided that

> 2. The parties hereto agree that nothing herein shall be understood or construed (a) to amount to a satisfaction or release in whole or in part of any of the obligations in the note or security interest, or of the property conveyed by the security interest from the effect thereof, or (b) to impair the right to power of sale if any, or other remedies provided for under the terms of the note and security agreement provided by law for the collection of the debt.

We hold that the language "or other remedies provided for under the terms of the note and security agreement provided by

law for the collection of the debt," when viewed in conjunction with the original note's provision for attorney fees, is sufficient to place on defendants liability for attorney fees incurred by the plaintiff during collection of the debt. *EAC Credit Corporation v. Wilson*, 281 N.C. 140, 187 S.E. 2d 752 (1972), relied on by defendants, is distinguishable since the defendants in that case merely signed a guaranty for payment, as opposed to the facts here where defendants signed an assumption agreement and in effect became the maker of the original note.

For the above reasons the decision of the Superior Court is

Affirmed.

Judges WELLS and BECTON concur.

JOSEPH D. COKER v. BASIC MEDIA, LTD.

ARTHUR LEE CANFIELD v. BASIC MEDIA, LTD.

No. 8228SC322

(Filed 5 July 1983)

Limitations of Actions § 4.5— instruments not under seal—contract breached—three-year statute of limitations applying—federal court decision determinative

A federal order which found that plaintiffs' cause of action accrued in 1973 when plaintiffs declared the entire amount of two notes due and payable and which found that the three-year statute of limitations for breach of contract barred their action which was not brought until 1980 was proper. Application of collateral estoppel depended on if the issue of whether the instruments were under seal was "raised and actually litigated," and although no explicit findings were made on the seal question, the federal court's decision could not have been made without a determination that the notes were not under seal.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Lewis (Robert D.), Judge.* Judgment entered 20 November 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 10 February 1983.

These separate actions were brought by the plaintiffs for sums allegedly due from the defendant on two promissory notes held by each plaintiff.

Both complaints alleged that the defendant delivered two promissory notes to each plaintiff, one non-negotiable and unsecured and the other negotiable and secured. The alleged date of delivery of the notes was 31 July 1970. The complaints were filed 30 July 1980.

In almost identical answers to the two complaints, the defendant alleged that because the plaintiffs declared all sums due and payable on 6 September 1973 and this action was not brought until 1980, the three-year statute of limitations under G.S. 1-52(1) is a bar to this action. The defendants pled five other identical defenses in each case.

First, an action by these two plaintiffs against the defendant on the same notes that are the subject of this action was filed in the United States District Court for the District of Columbia on 19 June 1979. The judgment of that court, entered on 4 January 1980, held that the defendant only owes the final two payments on each non-negotiable promissory note. That judgment is pled as *res judicata* to this action.

Second, the defendant alleged that it tendered a check to the plaintiffs in the full amount of the federal court judgment and that the check has been paid. That payment is alleged to satisfy any judgment against the defendant and to be a bar to this action. Defendant also argued that acceptance of the check was complete satisfaction under G.S. 1-540.

Fourth, the defendant contended that by accepting the check, the plaintiffs ratified the federal court judgment and are estopped to deny it. Finally, the defendant argued that this action was brought to harass it and that as a result, the plaintiffs should be required to pay punitive damages.

In the order that is the basis of this appeal, the trial judge found that the parties agreed that the federal court judgment is entitled to full faith and credit. But the plaintiffs contended that it should not be given *res judicata* effect because it was not a final judgment on the merits.

The order below held for the defendant on three grounds. First, the federal court's application of the District of Columbia's three-year statute of limitations for breach of contract and fraud necessarily includes a finding that the notes were not under seal.

Second, the federal judgment is *res judicata* to this action. Finally, the statute of limitations in these cases is the same in North Carolina as it is in the District of Columbia.

Both plaintiffs appealed from the order to this Court.

Bennett, Kelly & Cagle, by Harold K. Bennett, for plaintiff-appellants.

Roberts, Cogburn, McClure and Williams, by Max O. Cogburn and Isaac N. Northup, Jr., for defendant-appellee.

ARNOLD, Judge.

The effect of the 1980 order of the District of Columbia federal court determines this action. If we hold that we are bound by the conclusion of that order that the instruments sued upon were not sealed, then the plaintiffs are barred by the three-year statute of limitations under G.S. 1-52(1).

The federal order found that the cause of action accrued on 6 September 1973 when the plaintiffs declared the entire amount of the notes due and payable. We agree.

The three-year statute of limitations for breach of contract begins to run in North Carolina when the contract is breached. *Rawls v. Lampert*, 58 N.C. App. 399, 400, 293 S.E. 2d 620, 621 (1982). The defendants were in default on 6 September 1973 and default on the notes was a breach of contract.

Although the federal order did not state explicitly that the notes were not instruments under seal, it implicitly held this to be true when it applied the three-year statute of limitations for contract actions to bar the plaintiffs' recovery on all the notes, except for the last two installments on the non-negotiable notes. In fact, the seal issue was clearly before the federal court, contrary to what the dissent says. In the plaintiffs' statement in opposition to the defendants' motion for partial summary judgment filed on 16 October 1979, they acknowledge the applicable law.

> In other jurisdictions, these promissory notes would be instruments under seal subject to the provisions of a statute of limitations provision of 12 years or longer, but counsel for the Defendants has directed attention to two cases in the

District of Columbia stating that the corporate seal does not make such an instrument an instrument under seal.

Before we give collateral estoppel effect to the federal order's determination that the notes were not under seal, certain requirements must be met.

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E. 2d 799, 806 (1973); 1B Moore's Federal Practice ¶ 0.443[1] (2d ed. 1982).

The issues here are the same as in the federal action. Whether that action decided that the instruments were not under seal was relevant and necessary to its decision. Thus, three of the four requirements are easily met.

Application of collateral estoppel here depends on if the seal issue was "raised and actually litigated." Although no explicit findings were made on the seal question, the federal court's decision could not have been made without a determination that the notes were not under seal. In such a case, "the court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised and the determination of which was necessary to support the judgment." 1B Moore's, *supra*, at ¶ 0.443(4). We also note King's language that "If the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." *Id.* at 359, 200 S.E. 2d at 807. As discussed above, the record shows that the District of Columbia cases on instruments under seal were before the federal court.

Because the cause of action accrued on 6 September 1973 and the plaintiffs did not file this suit until 31 July 1980, this action is barred by the G.S. 1-52(1) three-year statute of limitations.

For these reasons, we affirm the trial judge's dismissal of the plaintiffs' actions.

Affirmed.

Judge WHICHARD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Collateral estoppel precludes parties from retrying fully litigated issues that were determined in a prior action. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). The majority believes the issue of whether the notes in question were under seal has been fully litigated since it was implicitly decided by the federal court. It is true that an issue will be deemed settled if the record of the former trial shows the matter was necessarily determined by the prior judgment. *King v. Grindstaff, supra*, at 359. The court in the subsequent action may review the pleadings and evidence to discover which issues were determined in the prior action. 1B *Moore's Federal Practice* ¶ 0.443[4] (2d ed. 1982); *King v. Grindstaff, supra; Gunter v. Winders*, 253 N.C. 782, 117 S.E. 2d 787 (1961). *Gunter* states that a party's right to be heard in court is important enough for the doctrine of *res judicata* to be strictly applied, and therefore the matter determined "cannot be left to uncertain inference." *Id.* at 785.

In the present case, the majority infers that the federal court determined the instruments were not under seal from the federal court order stating that a three-year statute of limitations applied. However, examination of the pleadings, exhibits, and memoranda tends to show the parties never litigated the seal issue and the federal court never considered it.

The promissory notes involved here clearly bear the corporate seal of defendant. Defendant admitted that these exhibits were true and accurate copies, and also admitted they bore its seal. D.C. Code § 12-301(6) establishes a twelve-year statute of limitations for instruments under seal. The notes bearing defendant's seal plainly raise a question as to whether the twelve-year limitations period is applicable. Yet the federal court order, which

discusses the facts and law of the case in detail, never broaches the issue of whether the notes were sealed instruments. Instead, the federal court assumed the three-year statute of limitations for contract and fraud actions was applicable. The strongest inference from the record is not that the federal court determined the notes were not under seal, but that it overlooked the issue.

Moreover, the seal issue was not fully litigated by the parties. This may explain why the issue was overlooked by the federal court. Although defendant cited two cases to the effect that their notes were not instruments under seal for purposes of invoking the twelve-year statute of limitations, this point was otherwise ignored in the flurry of memoranda generated by the parties. Plaintiffs argued that irrespective of what was the length of the statute of limitations, their action was timely. All arguments of the parties upon the court's reconsideration of defendant's summary judgment motion concerned the effect of an alleged fraud upon the accrual of plaintiffs' claim. The parties debated when they should have started counting for a three-year statute of limitations without ever litigating whether a twelve-year period applied.

The sealed instrument limitations period issue was not litigated by the parties and apparently was not decided by the federal judge. Consequently, the present action should not be barred by collateral estoppel.

The majority's invocation of collateral estoppel also seems inappropriate due to the equitable nature of the doctrine. *Carolina Power and Light Co. v. Merrimack Mutual Fire Ins. Co.*, 238 N.C. 679, 692, 79 S.E. 2d 167, 175 (1953). The equitable principle of collateral estoppel should bar plaintiffs' subsequent action only if there has been a fair adjudication of the twelve-year statute of limitations issue. It would be inequitable to bar the present action on a prior determination that a three-year limitation period passed before suit was commenced since plaintiffs' colorable claim to a twelve-year limitation period was not litigated in the earlier action.

Finally, a number of well-reasoned cases hold that an adjudication on the statute of limitations is not a disposition on the merits and does not give rise to *res judicata* or collateral estoppel. *Sack v. Low*, 478 F. 2d 360 (2d Cir. 1973), notes the general

rule that a statute of limitations dismissal acts as a procedural bar to plaintiff's remedy, but is not an adjudication on the merits barring future actions in other jurisdictions. *Fricks v. Carroll*, 368 F. 2d 329 (5th Cir. 1966), decided that while a diversity action was barred by the shorter statute of limitations of the forum state, there would not be any *res judicata* effect in other jurisdictions.

Warner v. Buffalo Drydock Co., 67 F. 2d 540 (2d Cir. 1933), *cert. den.* 291 U.S. 678, 78 L.Ed. 1066, 54 S.Ct. 529 (1934), provides a clear rule:

> The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because of the statute of limitations of the forum is not a decision upon the merits and is not a bar to a new action upon the identical claim in the courts of another state. *Id.* at 541.

Judge Hand explained the reason behind the rule:

> All the foreign court adjudicates as a fact is that the action has been brought after the expiration of the statutory period, and, as a matter of law, that the remedy is barred in that court. To be sure, courts might hold that, where a suit is brought in one jurisdiction and fails, the same defendant shall not be vexed by another action. But no such doctrine obtains where the prior decision has merely barred a remedy less extensive than that affirmed by the lex fori. As no rule of law prevents the prosecution of both remedies concurrently, it is hard to see why failure of one should preclude the other where the periods of limitation are different. *Id.* at 543.

Although *Warner* has been questioned in the Second Circuit, *see Sack v. Low, supra*, the reasoning remains sound. In fact, "the carefully considered and overwhelming weight of authority is in accord with the *Warner* rule." (Citations omitted.) 1B *Moore's Federal Practice* ¶0.409[6] (2d ed. 1982). The *Restatement of the Law, Second, Judgments* § 19, comment f., also maintains that where a statute of limitations bars an action in one jurisdiction, it may not bar the action in another jurisdiction with a different limitations period. In the present case, the three-year limit used by the federal court to bar plaintiffs' action in the District of Columbia should not collaterally estop the suit in North Carolina

where the longer limitations period for sealed instruments may apply.

I therefore vote to reverse the judgment appealed from.

IN THE MATTER OF LORETTA DIANE SHUE

No. 8226DC132

(Filed 5 July 1983)

1. **Infants § 18— juvenile hearings—admissibility of written reports**

In juvenile dispositional and review hearings, the trial courts may properly consider all written reports and materials submitted in connection with such hearings. G.S. 7A-640; G.S. 7A-657.

2. **Infants § 16— neglected child—review of custody hearing—burden of proof**

In a hearing to review the custody of a child who had been taken from its mother and placed in the custody of its father because of physical abuse, G.S. 7A-657 permitted custody to be restored to the mother upon showing that the child "will receive proper care and supervision" and that such "placement . . . is deemed to be in the best interest of the [child]." Therefore, the trial court erred in using, in effect, a change of circumstance standard and in requiring the mother to show that it was not in the child's best interest for the child to stay with its father.

3. **Infants § 16— neglected child—review of custody hearing—refusal to hear mother's witnesses**

In a hearing to review the custody of a child who had been taken from its mother and placed in the custody of its father because of physical abuse, the trial court erred in making its custody decision before hearing all of the evidence tendered by counsel for the mother.

Judge HEDRICK dissenting.

APPEAL by respondent from *Jones, W. G., Judge.* Order filed 8 September 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 December 1982.

Richard F. Harris, III, for respondent appellant.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for appellee Mecklenburg County Department of Social Services.

W. Thomas Ray, Guardian Ad Litem for Loretta Diane Shue, Minor.

BECTON, Judge.

This case involves a "neglected child" as defined by N.C. Gen. Stat. § 7A-278(4) (1979), *repealed by* 1979 N.C. Sess. Laws c. 815 § 1, *replaced by* N.C. Gen. Stat. § 7A-517(22) (1981). Following an adjudicatory hearing in October 1979 and dispositional hearings in December 1979 and February 1980, a review hearing was held on 8 June 1981 in the Mecklenburg County District Court. After hearing evidence and after considering psychiatric evaluation reports and home studies done by the Mecklenburg County Department of Social Services (DSS), the trial court entered an order granting custody of the child to Roy Shue, the child's father. The mother, Omega Lee James, appeals from the order granting custody to Roy Shue.

I

Procedural History

On 20 September 1979, DSS filed a juvenile petition alleging physical abuse of Loretta Shue, age three years. Following an adjudicatory hearing on 22 October 1979, the trial court determined that Loretta had suffered a nearly fatal head injury which was not an accident but was the result of an assault upon the child by either the mother or the mother's boyfriend. The trial court granted DSS custody pending final disposition.

On 7 November 1979, Roy Shue filed a motion in which he acknowledged that he was the natural father of Loretta and requested that he be given custody of the child. At the first dispositional hearing on 28 December 1979, the evidence disclosed that Roy and Marilyn Shue were married in 1967. It was the second marriage for both. Mrs. Shue had three children by a previous marriage, one of whom is Omega Lee, the mother of Loretta. In April or May 1975, the Shues separated; they reconciled in June 1978 and have lived together since that time. During the time they were separated, Omega lived with Mr. Shue who fathered her child, Loretta. Upon hearing this and other evidence, the trial court ordered that psychological evaluations be done of Mr. and Mrs. Shue, and that custody remain with DSS.

The second dispositional hearing was concluded on 8 February 1980, and the trial court entered an order directing that DSS retain legal custody of the child, but ordering trial placement

for a year with Mr. and Mrs. Shue. At a review hearing on 8 June 1981, the trial court considered psychiatric evaluation reports and home studies done by DSS of the father's household and the mother's household, both of which recommended that custody remain with the father since the child had adjusted well and it was important that the child have stability in her life. The trial court then stated that, unless the mother could prove that the child was not being properly cared for by the Shues, it would be in the child's best interest to remain where she had lived for a year and a half. Counsel for the mother moved for a mistrial on the grounds that the trial court had formed an opinion without hearing all the evidence. The court, however, denied the motion and, without hearing all of the evidence tendered by counsel for the mother, entered an order granting custody of the child to the father. The mother was given liberal visitation rights.

II

Analysis

Although the mother-appellant makes 29 separate arguments on appeal, the essential, ultimate and dispositive issue to be resolved is whether the trial court erroneously awarded custody of the minor child to Roy Shue, who acknowledged that he was the child's father. To resolve that issue, we must consider some of the assignments of error relating to evidentiary matters, conclusions of law, and the denial of the mother's motion for mistrial. Because we hold that the trial court imposed an erroneous burden of proof on the mother and further erred by not considering all of the evidence in determining what was in the best interest of the child, it is not necessary to address all of the remaining assignments of error.

A. Evidentiary Matters and Burden of Proof

Contending that the trial court had no evidentiary basis to support its order awarding custody to Roy Shue, the mother specifically argues the following:

(i) The trial court erred in its reliance upon DSS reports because the reports contained hearsay and other objectionable matters and afforded the mother no real opportunity to cross examine one of the witnesses who prepared one of the reports;

(ii) The trial court erred in requiring the mother to show that the father had either abused or was not appropriately caring for the child during the trial placement before the court would consider returning the child to the custody of its mother;

(iii) The trial court erroneously excluded evidence of the mother's changed circumstances which would have shown that the child could have received proper care and supervision in her home.

We consider the mother's arguments *seriatim.*

1. Non-testimonial evidence.

[1] The written reports of social workers and psychiatrists, and other written material in the court's file are competent evidence in a dispositional or review hearing in juvenile cases. N.C. Gen. Stat. § 7A-640 (1981) states: "The *dispositional hearing* may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile." (Emphasis added.) With regard to *review hearings*, N.C. Gen. Stat. § 7A-657 (1981) is even more specific: "The court shall consider information from the Department of Social Services; the juvenile court counselor, the custodian, guardian, the parent or the person standing in loco parentis, the foster-parent, the guardian ad litem; and any public or private agency which will aid it in its review." The statutes lead to but one conclusion: In juvenile proceedings, trial courts may properly consider all written reports and materials submitted in connection with said proceedings.

2. Applicable standard and burden of proof under G.S. § 7A-657.

[2] (a) Under the review hearing statute, G.S. § 7A-657, the trial court in this case was required to determine whether the child, previously adjudged neglected by the mother, should remain in the custody of her father, or whether the child should be placed elsewhere "as is deemed to be in the best interest of the [child]." G.S. § 7A-657(7). The trial court erred by using, in effect, a change of circumstance standard and by requiring the mother to show that it was not in the child's best interest for the child to stay with the father. Interestingly enough, the trial court did not intend, initially, to place such a burden on the mother.

In scheduling the review hearing for 8 June 1981, Judge W. H. Bennett, Jr., by order dated 27 April 1981, stated:

> (4) That the primary burden of proof, initially, paticularly because of the past history and custodial determinations in this case, shall lie with Mrs. Omega Lee James, but there shall also rest with all of the parties, including Roy Eugene Shue, the burden of proof to show the court hearing this case what is in the "best interests" of the child, with reference to custody, as more particularly set forth in G.S. § 7A-657. This court understands the key question or criterion to be, "what is in the best interests of the minor child," with reference to custody, rather than any party having the burden of showing that there has or has not been a material or substantial change in circumstances, in order to determine where custody shall be placed, whether in Roy Eugene Shue and his family, or in Mrs. Omega Lee James and her family, or some third party.

During the course of the 8 June 1981 review hearing, however, the presiding judge, William Jones, stated:

> Although the standard is what's in the best interest of the child, and I intend for that to be the standard on which the decision is based, that I would request and instruct even, that all of you focus on the issues in this case as if we were trying a change of custody case, which is to say focus on things which have changed since the entry of the last order . . . placing physical custody of Loretta with her father and her grandmother.

The trial court, before hearing all the evidence, determined that the mother did not, and could not, carry this burden of proof and terminated her custody rights and its jurisdiction.

N.C. Gen. Stat. § 7A-657 contemplates that a child will be returned to the parent from whose custody it was taken *if* the trial court finds sufficient facts to show that the child will receive proper care and supervision from that parent. The quintessential purpose of reuniting child and parent is not inconsistent, however, with custody being placed in the father in this case. Removal from one parent to another parent, simply put, does not

fit neatly into the language in the first paragraph of the statute.[1] Consequently, we must stress the significance of that portion of G.S. § 7A-657 requiring the trial court "[t]o enter an order continuing the placement under review or providing for a different placement *as is deemed to be in the best interest of the [child].*" [Emphasis added.] We must also consider the purposes of the juvenile code and the broader, more flexible, provisions of N.C. Gen. Stat. § 7A-647 (1981), dealing with dispositional alternatives for neglected children. After all, N.C. Gen. Stat. § 7A-516 (1981) provides: "This Article shall be interpreted and construed so as to implement the following purposes and policies:

. . . .

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

The common thread, then, running throughout the juvenile code is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing.

(b) The consensus of all the professionals involved in the case *sub judice* was that the child's greatest need was for stability and trust, which had been provided in the household of the father during the year and a half prior to the review hearing. It is not surprising, then, that the trial court felt, nothing else appearing, that the child's secure environment should not be disrupted and that the child should remain in the custody of her father.

The evidence of the strong emotional bonding between the father and child is critically important. It is not, however, determinative. It is but one factor the trial court must consider in determining what is in the best interest of the child. Simply put, the court erred when it said: "unless Mrs. James is able to prove that [Loretta] is being inappropriately cared for by the Shues,

1. G.S. § 7A-657 states: "In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision."

. . . it would be in Loretta's best interests to remain with them because that is where she's lived for the last year and a half. . . ." It was inappropriate for the trial court, after considering psychiatric evaluations and other testimony from DSS professionals, and without hearing all of the mother's evidence, to conclude that it was in the best interests of the child for her to stay with her father and to require the mother to show that it was *not* in the best interest of the child for her to stay with her father.

The burden placed on the mother—to prove a negative—is almost impossible as a practical matter, and more than G.S. § 7A-657 requires as a legal matter. So, we state the principle applicable to this case. In order to have custody restored to her, G.S. § 7A-657 requires the mother to show only that the child "will receive proper care and supervision" *and* that such "placement . . . is deemed to be in the best interest of the [child]." Consequently, evidence of the mother's own changed circumstances and evidence that the child's welfare is being adversely affected by the child's present environment are both factors in the equation.

3. Refusal to allow the mother's witnesses to testify.

[3] Although the trial court commendably sought to assuage the anticipated wrath of several witnesses who had come to court but were not allowed to testify,[2] the trial court erred in two additional related ways.

2. JUDGE: Let me ask you then to bring everybody in and I'll tell them what I'm trying to do.

(All witnesses return to the courtroom.)

JUDGE: While you folks were waiting impatiently I'm sure, we have taken some testimony and talked primarily about where we are in this case procedually [sic] at this point. And what I have decided to do is to leave Loretta where she is with the Shues, to relieve the Department of her custody, and to vest her custody with Mr. Shue, and I have decided to do that without hearing your testimony, not because I don't care about how Omega and her new husband have adjusted to life in South Carolina and not because I don't care about the quality of their relationship with [Loretta] and not because I think you shouldn't have the opportunity at some point to say what you know about those things in her behalf in court. But because the purpose of this proceeding, as I [e]nvision it, is not to have a custody hearing to decide whether Loretta ought to be placed with her father or with her mother, but rather to decide whether she should continue to stay where she is with one of her parents or whether she should be placed elsewhere, and it's my decision based on

First, the trial court changed the rules during the middle of the game. Six weeks before the review hearing, during which time the mother presumably gathered evidence (and "lined up" witnesses) she deemed important, the trial court, by order dated 27 April 1981, stated that the "key question or criterion [is] 'what is in the best interests of the minor child' . . . rather than any party having the burden of showing that there has or has not been a material or substantial change in circumstances, in order to determine where custody shall be placed. . . ." During the review hearing, the trial court changed its mind and required the mother to prove that it was not in the best interest of the child to stay with the father. The mother was, thus, prejudicially lulled into coming to court on one theory and having to proceed on another. The trial court erred when it refused to hear testimony from the mother's witnesses about the quality of the relationship between the child and mother.

Second, several of the witnesses, whose testimony was read into the record after the trial judge left the courtroom, gave testimony tending, arguably, to show that the father was not appropriately caring for the child. By way of example, the following facts and inferences can be drawn from the excluded evidence:

---

what I've heard and the evidence that's been offered on that point that she's receiving appropriate care where she is and that she should continue to stay there as far as this proceeding is concerned.

Now as I interpret the law, that does not preclude Mrs. James from filing an action in another court asking for custody of the child. Neither would Mr. Shue be precluded from filing a similar action if I had decided to place Loretta with her mother. Now, I don't expect that to make a lot of sense. I'm not sure it makes a lot of sense to me, and I don't expect it to be very comforting, particularly to you Mrs. James. Now, I understand your hostile feelings toward me and toward this whole process. I don't take any comfort in making decisions that affect children and that hurt parents, but I also feel we wouldn't be here if Loretta had not been seriously injured at one point while she was in your custody. We would not be here in fact if that hadn't happened, so I don't assume all the responsibility for this situation. I will think more carefully about what I want the Order to say, and will call those of you and ask you to prepare the Order. I thank you for coming, those of you who have come from some distance to be witnesses and have taken off work and I apologize to you for, in effect depriving you of the opportunity to testify and I can't explain why, any better than I've explained it, and I hope that makes sense to you, if it doesn't, I'm sorry about that too. Thank you.

1. That the child still wets the bed at night and is never bathed by the Shues—"I don't get but one [bath] a week when my mama comes and gets me."

2. That the child does not want to return to the Shues after being with the mother on weekends—"She gets real quiet and she says, 'Mama, take me home with you. I don't want to go back in there.' "

3. That the child is always hungry when her mother picks her up.

4. That the child is always dirty and wears the same dirty clothes when her mother picks her up.

5. That with the Shues, the child is not learning games that a child would learn—"Until the first time that she had been in Gaffney, she had never seen a jump rope, jacks, or anything like that."

6. That the child watches television a lot including horror movies late at night.

7. That a boy named Michael at the baby-sitter's house always picks on, and punishes, the child.

8. That the mother had to take the child to the hospital because the Shues apparently did nothing about a bad yeast infection which the child had.

9. That the child on one occasion had visible belt marks on her from a spanking administered by the Shues a day earlier.

Although the trial court may not have given credence to the testimony of all of the mother's witnesses, the trial court was, nevertheless, required to consider it *before* determining what was in the best interest of the child.

No rule of law requires the fact finder to believe evidence of experts and not to consider evidence from other witnesses. The trial court erred by making its custody decision before hearing all of the evidence tendered by counsel for the mother.

III

It is not necessary to discuss the mother's remaining assignments of error. For the reasons stated, the trial court's order granting custody to the father is reversed and this matter is remanded to the District Court for a new review hearing.

Reversed and remanded.

Judge WEBB concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

While the trial judge may have erred in some of his rulings with respect to the admission or exclusion of evidence, and in particular in not hearing certain witnesses, I am not prepared to agree with the majority that the appellant was prejudiced to such an extent that there should be another hearing. The facts found by the trial judge are supported by competent evidence in the record, and these findings support the conclusions drawn therefrom, and these conclusions support the order entered.

I vote to affirm.

PHYLLIS C. SNUGGS, JUNE C. ALMOND, AND CAROL F. TROUTMAN v. STANLY COUNTY DEPARTMENT OF PUBLIC HEALTH, AN AGENCY OF THE COUNTY OF STANLY; HAROLD LITTLE, CHAIRMAN, AND FLOYD HUNEYCUTT, ALTON CROWELL, DR. CLAUDE N. BALLENGER, SHIRLEY LOWDER, ERNEST A. WHITLEY, DAVID A. CHAMBERS, IDA STOVALL, AND DR. TOMMIE NORWOOD, MEMBERS, STANLY COUNTY BOARD OF HEALTH; COUNTY OF STANLY, A BODY POLITIC; BEECHER R. GRAY, INDIVIDUALLY, AND IN HIS FORMER REPRESENTATIVE CAPACITY AS DIRECTOR OF STANLY COUNTY DEPARTMENT OF PUBLIC HEALTH; CARLTON B. HOLT, R. C. HINKLE, DR. MAX GARBER, MATTIE LITTLE, AND EVELYN HATLEY, FORMER CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE STANLY COUNTY BOARD OF HEALTH

No. 8220SC859

(Filed 5 July 1983)

Administrative Law § 2; Constitutional Law § 17— exhaustion of administrative remedies

Where plaintiffs were employees of defendant Department of Public Health, where each plaintiff appealed her dismissal to the State Personnel Commission, where decisions have not yet been rendered by the State Personnel Commission, and where plaintiffs instituted the present 42 U.S.C. Section 1983 actions seeking to recover compensatory and punitive damages and reinstatement in the state court, the trial court properly allowed defendants' motions and dismissed plaintiffs' actions for lack of jurisdiction over the subject matter. Plaintiffs had a choice of forums in which to bring their Section 1983 actions; the federal courts, or the North Carolina courts. In the North Carolina courts, the opinion of *Presnell v. Pell*, 298 N.C. 715 (1979) controls in compelling the Court to find that the trial court properly dismissed plaintiffs' actions in that they had failed to exhaust their state administravtive remedies before bringing an action in the state courts.

APPEAL by plaintiffs from *Hairston, Judge.* Judgment entered 12 May 1982 in STANLY County Superior Court. Heard in the Court of Appeals 7 June 1983.

Plaintiffs Phyllis C. Snuggs, June C. Almond, and Carol F. Troutman had been and were employees of the defendant Stanly County Department of Public Health prior to September 27, 1979, when they were each dismissed by Beecher R. Gray, Director, on that date. Each plaintiff was served a written notice of termination at the time of her discharge and, almost eight months thereafter in response to plaintiffs' motions, each was served with a supplemental statement of charges for dismissal. Plaintiffs' dismissals were widely publicized among the citizens of Stanly County, North Carolina, and throughout most of the counties in

the Piedmont section of North Carolina by publication of numerous newspaper articles. Plaintiffs alleged in their complaints that said articles were false, defamatory, and had caused plaintiffs to suffer embarrassment, humiliation, anxiety, public ridicule and scorn, and had made it virtually impossible for plaintiffs to obtain similar or comparable employment.

In apt time, each plaintiff appealed her dismissal to the State Personnel Commission. Some of the charges were dismissed on plaintiffs' motions for summary judgment and evidence on other charges was taken before the State Personnel Commission in the Fall of 1981. Decisions have not yet been rendered by the State Personnel Commission on the charges still pending. These actions were instituted on September 25, 1981 pursuant to 42 U.S.C. Section 1983, plaintiffs seeking to recover compensatory and punitive damages and reinstatement. On March 3, 1982, defendants filed motions to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the ground that the court lacks jurisdiction of the subject matter of the actions.

The primary basis of defendants' motions to dismiss as to each plaintiff was the contention that plaintiffs' claims under 42 U.S.C. Section 1983 are foreclosed by the recent United States Supreme Court decision of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), in that plaintiffs had not exhausted all of their administrative remedies before the State Personnel Commission, which remedies defendants contend are constitutionally adequate.

When defendants' motions to dismiss were heard at a consolidated hearing before the court on May 12, 1982, the court allowed defendants' motions and dismissed the actions for lack of jurisdiction over the subject matter.

Plaintiffs have appealed to this Court from the trial court's orders dismissing their actions.

Morton and Grigg, by Ernest H. Morton, Jr., for plaintiff Phyllis C. Snuggs.

Gerald R. Chandler for plaintiffs June C. Almond and Carol F. Troutman.

Hopkins, Hopkins & Tucker, by Frank B. Aycock, III, for defendants.

WELLS, Judge.

We begin our analysis of these cases by emphasizing that the sole question before the trial court, as raised by defendants' motions in each case, was whether the trial court had subject matter jurisdiction, defendants only motions being motions to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure. Therefore, the question of whether plaintiffs' complaints have stated claims upon which relief can be granted is not before us. The briefs of the parties to this appeal speak also to the issue of whether plaintiffs have stated claims upon which relief may be granted.

The subject matter of plaintiffs' claims is their wrongful discharge from employment in alleged violation of the laws and Constitution of the State of North Carolina and in alleged violation of the Constitution of the United States, constituting a deprivation of plaintiffs' civil rights under 42 U.S.C. Section 1983, to plaintiffs' injury and damage.

Section 1983, derived from the Act of April 20, 1871, provides that every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiciton thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

It is well established that State courts have concurrent general subject matter jurisdiction to hear Section 1983 claims. In *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), *reh. denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed. 2d 606 (1980), this footnote appears:

> We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where " 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.' " *Testa v. Katt*, 330 U.S. 386, 391, 91 L.Ed. 967, 67 S.Ct. 810, 172 A.L.R.

> 225, quoting *Claflin v. Houseman*, 93 U.S. 130, 137, 23 L.Ed. 833. See also *Aldinger v. Howard*, 427 U.S. 1, 36, n. 17, 49 L.Ed. 2d 276, 96 S.Ct. 2413 (Brennan, J., dissenting); *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 476, 74 L.Ed. 972, 50 S.Ct. 374. We have never considered, however, the question whether a State *must* entertain a claim under Section 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. *Testa v. Katt, supra*, 394, 91 L.Ed. 967, 67 S.Ct. 810, 172 A.L.R. 225.

The policy enunciated in the footnote in *Martinez* was re-stated in the following footnote contained in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980):

> Petitioners also argue that jurisdiction to hear Section 1983 claims rests exclusively with the federal courts. Any doubt that state courts may also entertain such actions was dispelled by *Martinez v. California*, 444 U.S. 277, 283-284, n 7, 62 L.Ed. 2d 481, 100 S.Ct. 553 (1980). There, while reserving the question whether state courts are *obligated* to entertain Section 1983 actions, we held that Congress has not barred them from doing so.

See also Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E. 2d 562 (1981), and *Williams v. Greene*, 36 N.C. App. 80, 243 S.E. 2d 156, *rev. denied*, 295 N.C. 471, 246 S.E. 2d 12 (1978), cases where our appellate courts have recognized that our courts have such concurrent jurisdiction over Section 1983 claims. Recognizing such general subject matter jurisdiction does not, however, reach the dispositive issue presented in this appeal.

In their argument before the trial court, as here, defendants asserted that plaintiffs' complaints show on their respective faces that an administrative remedy for their wrongful discharge is not only available under North Carolina law, but also show that plaintiffs have availed themselves of such remedy and that plaintiffs had not exhausted such remedy when they instituted the action under review by us. Defendants, in their argument before the trial court, and here, insisted that unless and until plaintiffs can show that they have, in fact, exhausted their state administrative remedy, the superior court cannot have subject matter jurisdic-

tion. At the trial level, defendants apparently relied heavily upon the opinion of the United States Supreme Court in *Parratt v. Taylor, supra.* The record before us indicates clearly that Judge Hairston perceived that *Parratt* was controlling on the issue.[1] We do not find *Parratt* to be apposite to, much less dispositive of, the issue in this case, for reasons as will appear as our analysis progresses. For reasons different than ours, plaintiffs contend that *Parratt* does not apply here, but contend that the opinion of the Supreme Court in *Patsy v. Florida Board of Regents,* --- U.S. ---, 102 S.Ct. ---, 73 L.Ed. 2d 172 (1982) is controlling. For reasons we will state, we do not agree that *Patsy* controls the issue in this case.

Parratt involved a claim brought, pursuant to Section 1983, by an inmate in the Nebraska penal system, in which the inmate alleged that he had been deprived of his property (a hobby kit ordered through the mail) when it was negligently lost or misplaced by prison officials, without due process of law. The inmate brought his suit in the United States District Court, which entered summary judgment for the inmate. The Supreme Court reversed, holding, in essence, that the inmate *had failed to state a claim for relief* under Section 1983 on the basis that the negligent deprivation of his property was not without due process because he had available to him a tort action in the Nebraska courts under Nebraska law. Thus, whatever else *Parratt* stands for, it is limited to negligent acts of State officials and it was before the Court on summary judgment, not a subject matter jurisdiction motion.

While we have not been able to determine the procedural context in which *Patsy* reached the Court, the majority, concurring, and dissenting opinions in *Patsy,* and in *Parratt,* as well, trace the history and development of Section 1983 law in such a

1. It is also clear from Judge Hairston's remarks that although he considered *Parratt* to be controlling in these cases, he perceived that the effect of *Parratt* was to convince him that plaintiffs had failed to "state a cause of action under Section 1983," that plaintiffs "simply have a case which doesn't come under Section 1983," "that this is simply not a violation of civil rights, as long as the State has provided an adequate remedy for them which in fact they are pursuing." Thus, it would appear that the trial court resorted to principles of Rule 12(b)(6) law, *i.e., failure to state a claim upon which relief can be granted, in ruling on defendants' Rule 12(b)(1) subject matter motion.*

way as to make two aspects of that law quite clear: one, that Section 1983 was intended to provide citizens of the respective States access to the *federal* courts for protection of their federally protected rights; and two, that the *federal* courts should not require a Section 1983 plaintiff to show exhaustion of administrative remedies available under State law as a requisite to maintaining a Section 1983 claim in the *federal* courts. A quote in *Parratt* from *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), aptly illustrates the point:

> "[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the State agencies."

See also Haring v. Prosise, --- U.S. ---, --- S.Ct. ---, --- L.Ed. 2d --- (13 June 1983).

We recognize, therefore, that plaintiffs in this case had a choice of forums in which to bring their Section 1983 actions: the federal courts, or the North Carolina courts. In the federal courts, it is obvious that at the Rule 12(b)(1) stage, plaintiffs would have been able to survive the hurdle of exhaustion of state administrative remedies. Under North Carolina law, however, their problem is quite different. The opinion of our Supreme Court in *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979), controls our decision here and compels us to affirm the judgments below. *Presnell*, a remarkably analagous case, clearly holds to the long-established North Carolina rule that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell* involved an action for wrongful discharge from employment by the Surry County Board of Education. Defendants moved to dismiss plaintiff's wrongful discharge claim and under Rule 12(b)(1) for lack of subject matter jurisdiction. The trial court allowed the motions, and our Supreme Court affirmed because the complaint showed on its face that the plaintiff had not exhausted her administrative

remedies. We must reach the same result here on plaintiffs' Section 1983 actions for wrongful discharge.

For the reason stated, the judgment of the trial court in each of these cases is

Affirmed.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. W. C. EDWARDS

No. 8226SC746

(Filed 5 July 1983)

Burglary and Unlawful Breakings § 4; Criminal Law § 26.5— acquittal of larceny—evidence of larceny in breaking and entering case—double jeopardy—collateral estoppel

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking and entering, the State was precluded by double jeopardy and collateral estoppel from presenting evidence of defendant's guilt of larceny in his retrial for breaking and entering. The case of *State v. Baker*, 34 N.C. App. 434 (1977) is no longer authoritative on this point.

Judge WEBB dissenting.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 25 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 January 1983.

During the night of September 22, 1981, Field's Jewelry Store at the corner of North Tryon and Fifth Street in Charlotte was broken into and property valued in excess of $20,000 was stolen. Entry was accomplished by breaking the glass out of the front door. In February 1982, defendant was tried upon a felony indictment charging him with that breaking and entering and larceny. The jury found him not guilty of the larceny, but was unable to reach a verdict on the breaking and entering charge, and a mistrial as to it was declared. Before that trial occurred, James Edward Moore, also charged with the offense, pled guilty and was serving his prison term. From the time Moore was apprehended near the scene with most of the stolen jewels in his

possession, he admitted the break-in and larceny, but denied that defendant was involved.

In that trial the State's evidence pertinent to the defendant's involvement in the break-in and larceny was to the following effect: Charlotte police officer Zencon, approaching the store by car in response to a police broadcast a few minutes earlier that a burglary alarm at Field's was sounding, saw a black male near the store run across Tryon Street and down Fifth Street, where he entered an alleyway. The man wore a dark jacket and light-colored pants and ran with his hands clutched to his sides, bent over, and Zencon identified him as the defendant. Zencon watched the alley entrance as he waited for assistance and made no attempt to apprehend other individuals he saw near the store, including two or three known criminals. Several other police officers soon arrived and apprehended the defendant as he sat on the stoop of a building. A search of the alleyway and area where defendant was sitting was unproductive, but a search of the general area that defendant ran through uncovered two ring display cases, a few rings, and other articles, which were scattered over a wide area. During the course of these and other searches, several other suspects were taken into custody, including James Edward Moore, who was carrying a shopping bag full of stolen rings and jewelry. While the defendant was being taken to a local hospital for treatment of a cut on his hand, an officer observed him picking pieces of glass from his clothing. Defendant's clothes and shoes were examined by the Charlotte Crime Lab, and the tests revealed that some of the particles taken from defendant's clothing were indistinguishable from those taken from the broken door at Field's Jewelry, but some of the glass particles were not similar to those taken from the broken door.

For the defendant, James Edward Moore testified that he committed the break-in and larceny with a man named David, and that the defendant, who he first met in jail after the robbery, was not a part of the crime.

Before his second trial for breaking and entering began defendant moved that the State not be permitted to introduce evidence of the larceny following the break-in, since he had been tried for that charge and acquitted. His motion was denied and the evidence presented during the trial was almost identical to

that presented during the first trial, when both the break-in and the larceny were being contested. A verdict of guilty was rendered and following the entry of judgment thereon the defendant appealed.

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

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

PHILLIPS, Judge.

The main question for our consideration is whether in trying the defendant for breaking and entering the defendant's constitutional rights were violated by the State presenting evidence which tended to show that defendant was also guilty of larceny. Ordinarily, in trying one for breaking and entering, evidence showing that the defendant also committed larceny in connection with the break-in is admissible, even though the defendant is not indicted for larceny. Such evidence is usually received in such cases because it tends to establish the defendant's intent or motive in perpetrating the break-in. *State v. Harlow*, 16 N.C. App. 312, 191 S.E. 2d 900 (1974).

But, as the defendant rightly maintains, this is not the ordinary breaking and entering case and in permitting the State to prove the defendant's intent and motive by evidence connecting him with the Field's Jewelry Store larceny, prejudicial error was committed. The issue of defendant's participation in the Field's theft was tried and forever set at rest in the first trial. Having safely run that "gantlet" the defendant had a constitutional right not to again be jeopardized by that evidence. Though the crime that defendant was tried for this time, breaking and entering, is not the same crime that he was acquitted of by the first trial, larceny, defendant's former jeopardy rights were nonetheless violated to the prejudice of his liberty, since the *truth* of the larceny evidence was again put in issue against him and no doubt contributed greatly to his conviction.

Though time was when a defendant in a State criminal proceeding could successfully plead former jeopardy only when he was being prosecuted a second time for the selfsame crime that

he had been acquitted of before, when no refuge could be found in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and when the states, unlike other litigants, could, under one nomenclature or another, relitigate in criminal cases factual issues that they had tried and lost, that time is no more. Since *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969), the Double Jeopardy Clause has been enforceable against the states through the Fourteenth Amendment. And since *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970), the benefits of the collateral estoppel doctrine have been available to defendants in state criminal proceedings. This doctrine, the Court said, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 90 S.Ct. at ---, 25 L.Ed. 2d at 475.

The collateral estoppel doctrine had long been available to civil litigants in state and federal courts alike and had been available to defendants in federal criminal proceedings at least since *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916), when the Supreme Court rejected the government's claim that the doctrine of *res judicata* had no application to criminal cases except to the limited extent expressly recited in the Fifth Amendment. In doing so, the Court, through Justice Holmes, unanimously declared with characteristic incisiveness: "It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S. at 87, 37 S.Ct. at 69, 61 L.Ed. at 164. As has so often been the case, the soundness of Holmes' ruling has proven itself, it now being too plain to miss, since he pointed the way, that there is no good reason and never was for depriving only defendants in criminal proceedings of the full benefit of their adjudications, or for exempting the state from the universal ban against relitigating issues that are contested and lost.

The authoritative impact of *Ashe v. Swenson, supra*, was recognized by our Supreme Court in *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977), though the defendant there was held to have waived his double jeopardy rights by failing to timely

assert them. In that case, the Court, through Justice Exum, pointed out that determining whether the State had relitigated any issue *necessarily* decided in the defendant's favor in an earlier case would sometimes be difficult. In this case that is no problem.

Notwithstanding that the State tried the defendant for the Field's Jewelry larceny and lost, it put identically the same larceny proof in evidence again just as though the first trial had never occurred. Since a larceny of jewelry worth more than $20,000 had clearly occurred, his alleged co-defendant Moore admittedly committed it and the break-in as well, and both crimes were committed almost simultaneously, the jury's not guilty verdict can only mean that they found that the defendant did not act in concert with Moore with respect to either crime and did not commit larceny on his own. Under the Court's "acting together with a common purpose" instruction, had the jury believed that the defendant assisted Moore in any manner, he would have been found guilty of both charges, there being no conceivable basis in the evidence for an assumption that he helped Moore in one part of the crime and disassociated himself from him in the other. By using evidence linking defendant to the larceny and Moore, the State openly relitigated the defendant's participation in the larceny and his association with Moore; that this was done only for the purpose of convicting him of breaking and entering, rather than larceny, neither alters the relitigation nor lessens its baleful effect. Since the first verdict established that defendant did not commit or participate in the larceny, under basic principles of law and *Ashe v. Swenson, supra,* the State was estopped from ever again contending against him to the contrary, in any proceeding, for any purpose. Consequently, the defendant's conviction must be set aside and if he is retried, it must be without using any evidence which tends to connect him with the Field's larceny or James Edward Moore.

We are aware that in *State v. Baker,* 34 N.C. App. 434, 238 S.E. 2d 648 (1977), another panel of this Court under similar circumstances reached a contrary result. This may have happened, as the briefs and record in that case reveal, because the appellant there mentioned neither the Double Jeopardy Clause of the Fifth Amendment, collateral estoppel, *Ashe v. Swenson,* nor *State v. McKenzie,* decided shortly before then, but relied only upon the

North Carolina doctrine of former jeopardy, which was found to be inapplicable because breaking and entering is not the same crime as larceny. But whatever the reason was for that case being decided as it was, it is no longer the law on this point and cannot be followed, for the reasons above-stated.

Apart from the constitutional inhibition against relitigating the defendant's participation in the larceny, permitting one to be imprisoned because of evidence that has been rejected by an earlier jury would conflict with other bedrock principles of our jurisprudence. Under our system the whole purpose of a trial is to establish the truth and a verdict fairly arrived at is accepted by all who serve the law as the very embodiment of truth. Our rules of evidence evolved and developed as they have because of their believed utility in rejecting evidence that is untrustworthy and in receiving evidence that is trustworthy. "The purpose of the rules of Evidence is to assist the jury to arrive at the truth." *State v. Vestal*, 278 N.C. 561, 589, 180 S.E. 2d 755, 773 (1971). So inherent is our law's dependence upon and regard for evidence that is trustworthy and so strong is its aversion to evidence that is not, convictions obtained by using evidence known to be unreliable or by withholding evidence known to be reliable are routinely set aside. These principles and practices cannot be reconciled with offering and accepting as worthy of belief evidence that just a month before had been solemnly determined by an earlier jury to be unreliable.

The defendant's earnest contention that the evidence was insufficient to justify conviction and that a directed verdict should have been entered is rejected, but only because in making this determination we are required to consider all of the evidence that was before the trial judge, including evidence that should not have been admitted. *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). What evidence, if any, the State would have introduced had the larceny evidence not been admitted or what evidence will be presented during the next trial, if any, we do not know. But we do know, of course, and do not hesitate to say, that evidence which shows only that one was standing outside a store that had been broken into, ran upon the approach of a police car, and had particles of glass in his clothing, some of which were indistinguishable from the broken glass in the store's door and some of which were not similar thereto, is not sufficient under our law to

establish that that person had broken into and entered the store with the intent to commit larceny therein.

The judgment appealed from is therefore reversed and the case remanded to the trial court for further proceedings in accord with this opinion.

New trial.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I do not believe double jeopardy or collateral estoppel prevents the State from introducing evidence relevant to the crime with which defendant is charged. This is so even if the defendant has been acquitted of another crime which the evidence tends to prove.

I believe we are bound by *State v. Baker*, 34 N.C. App. 434, 238 S.E. 2d 648 (1977). That case considered and rejected the double jeopardy argument of defendant under similar circumstances and I believe it governs.

I vote to find no error in the trial.

STATE OF NORTH CAROLINA BY AND THROUGH ITS NEW BERN CHILD SUPPORT AGENCY, EX REL., SADIE W. LEWIS v. JAMES DANIEL LEWIS

No. 823DC402

(Filed 5 July 1983)

1. Judgments § 37.3— paternity—collateral estoppel applying

By reason of a prior criminal judgment against defendant for willful nonsupport, defendant should have been precluded from raising a paternity issue in his wife's subsequent civil action for child support. *A fortiori*, defendant's counterclaim for recovery of sums he had previously paid for the support of the children was properly dismissed for failure to state a claim upon which relief could be granted when the present action was brought for indemnification for public assistance.

2. Rules of Civil Procedure § 12— motion to dismiss—ruling on merits erroneous

Where the matter being considered before the trial court was the State's motion to dismiss defendant's counterclaim because it failed to state a claim for relief, the trial court erred in directing defendant to pay weekly child support and to pay back support as ordered by a previous criminal judgment. A ruling on the merits cannot be made on a motion to dismiss for failure to state a claim for which relief could be granted.

APPEAL by plaintiff and defendant from *Rountree, Judge.* Order entered 7 January 1982 in District Court, CARTERET County. Heard in the Court of Appeals 17 February 1983.

Charles H. Turner, Jr., for plaintiff appellant.

Mason & Phillips, P.A., by L. Patten Mason, for defendant appellant.

BECTON, Judge.

I

The State instituted this action against defendant seeking (i) indemnification for public assistance paid for the support of two children born to defendant and Sadie W. Lewis, and (ii) an order directing defendant to provide continuing support. In response, defendant raised the defenses of collateral estoppel and *res judicata* as to paternity, counterclaimed for reimbursement of child support paid by him under a prior criminal court order, and moved for blood grouping tests. Replying to the counterclaim, the State alleged that defendant is estopped from denying paternity and moved for a dismissal of the counterclaim and a denial of the request for blood grouping tests.

In a 7 January 1982 order, the district court judge allowed the State's motions and ordered defendant to pay child support arrearages. Both parties appeal from this Order. An examination of the prior legal actions involving the State, defendant and his wife, Sadie Lewis, is necessary for an understanding of this appeal.

II

Procedural and Factual History

On 23 March 1976, defendant was served with criminal summons charging him with willful neglect and refusal to support his

four children, a violation of N.C. Gen. Stat. § 14-322 (1981). These children were born to Sadie W. Lewis during her marriage to the defendant. Defendant was found guilty of this charge on 27 April 1976 and was ordered to pay weekly child support of $45.00.

On 15 October 1976 Ms. Lewis instituted a civil action against defendant for divorce from bed and board, custody of the four children and child support. No answer was filed. A default judgment was entered in this action on 3 December 1976 granting Ms. Lewis a divorce and custody and ordering defendant to pay weekly child support of $75.00. On 1 September 1977, Ms. Lewis filed a motion requesting the court to order defendant to appear and show cause why he should not be adjudged in contempt for failure to comply with the 3 December 1976 judgment. Upon receiving the show cause order, defendant moved the court to vacate the default judgment on grounds that he was never served with copies of the complaint, summons and judgment in the case. Defendant further alleged as a defense to his wife's action that blood grouping tests would show that the four children were not his but the "by-product of the vile and lascivious conduct of the Plaintiff [Ms. Lewis] throughout the marriage." After considering defendant's motion, the district court set aside the December 1976 judgment and allowed defendant time to file answer to his wife's complaint. In his answer defendant realleged that he was not the father of his wife's four children. On 19 January 1981 this civil action was dismissed with prejudice as a result of Ms. Lewis' failure to appear and prosecute.

On 14 January 1981, five days prior to the dismissal of the civil action between Ms. Lewis and defendant, the State, by and through the New Bern Child Support Agency, filed the action on appeal, seeking, among other things, indemnification for past public assistance paid for support of two of the parties' children.

III

Issues and Summary of Holding

Did the trial court err (i) in concluding that defendant was estopped from denying paternity, (ii) in denying defendant's request for blood grouping tests, and (iii) in dismissing defendant's counterclaim for reimbursement of monies paid for child support pursuant to the 1976 criminal court order?

Relying on *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976) and *Smith v. Burden*, 31 N.C. App. 145, 228 S.E. 2d 662 (1976), defendant first contends that his prior criminal conviction of failure to support illegitimate children is not conclusive as to paternity in a subsequent civil action for support of the same children. On the basis of the analysis in Part IV, *infra*, neither *Tidwell* nor *Smith* provides support for defendant.

Defendant next contends that the dismissal with prejudice of his wife's subsequent civil action for divorce, custody and child support constitutes a judicial determination of paternity in defendant's favor since he filed an Answer specifically denying paternity in that civil action. Defendant relies upon the following language in *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E. 2d 203, 204 (1974) as support for this contention:

> 'Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective *not only on the immediate parties but also on their privies.*' [Emphasis added.] (*Quoting* 9 Wright & Miller, Federal Practice and Procedure § 2367 (1971) p. 185-86.)

Although defendant correctly states the rule, he still can find no "Balm in Gilead."

IV

Analysis

[1] The dismissal, with prejudice, of the wife's civil action would ordinarily have resolved the issue of paternity in defendant's favor as well, since defendant denied paternity, and paternity was necessarily at issue in that civil action for child support. However, defendant's paternity of the children in question had previously been established in the criminal action for willful nonsupport. The doctrine of collateral estoppel, not *res judicata*, barred defendant from relitigating the issue of paternity. Defendant's paternity, therefore, could not have been one of the issues resolved against Ms. Lewis with prejudice in her civil action for child support.

Because appellate courts have sometimes used *res judicata* and collateral estoppel interchangeably, we set forth the confusing similarities and crucial distinctions between the two. Both *res*

judicata and collateral estoppel serve to further the "doctrine of preclusion" by prior adjudication. Subsequent actions are precluded when a court of competent jurisdiction has already reached a final judgment on the merits of a controversy. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962). The crucial distinction between *res judicata* and collateral estoppel concerns what, precisely, is barred from being the subject of future litigations between the parties or their privies.

Res judicata, or claim preclusion, prevents a party, or one in privity with that party, from suing twice on the same claim or cause of action when a final judgment on the merits was entered in the first suit. Further, splitting a claim for relief or cause of action is prevented by the use of *res judicata*. That is, neither party nor a privity may sue again on any claim omitted from the original action. *In re Appeal of McLean Trucking Company*, 285 N.C. 552, 206 S.E. 2d 172 (1974).

Collateral estoppel, or issue preclusion, prevents the relitigation of specific issues actually determined in a prior action between the same parties or their privies. The key question always concerns the issue(s) *actually litigated and decided* in the original action. Consequently, collateral estoppel may be raised in a subsequent action even though that action involved a claim for relief or cause of action different from the first. *See generally*, Note, *Collateral Estoppel*, U. of Rich. L. Rev. 341 (1982).

Traditionally, as suggested, the application of both *res judicata* and collateral estoppel was governed by the rule of mutuality, which prevented the determination of a claim or an issue from being conclusive in a subsequent proceeding if the second action involved different parties. Our appellate courts have made exceptions, however, to the strict mutuality rule in cases which, when properly analyzed, are collateral estoppel cases.

Therefore, since mutuality is not always necessary for application of collateral estoppel doctrines and since the claims for relief were different in each of the three proceedings at issue in the case *sub judice*—(i) criminal prosecution for willful nonsupport; (ii) divorce from bed and board, custody and child support; and (iii) indemnification for public assistance—collateral estoppel is the doctrine to be applied. It remains, then, for us to apply these rules to the instant controversy.

Defendant is bound by the 23 April 1976 criminal judgment determining him to be guilty of willful nonsupport of his children. The issue of defendant's paternity of the children was necessarily, if by implication, litigated and decided. In *Tidwell v. Booker*, our Supreme Court said:

> An affirmative answer to the question of paternity is, however, an indispensable prerequisite to the defendant's conviction on the criminal charge. G.S. 49-7. The finding by the court in the criminal action that the defendant is the father . . . was, therefore, not a mere dictum or the determination of an insignificant matter. It was the judicial determination of an issue properly and necessarily before the court in the criminal proceeding to which the defendant was a party and in the trial of which he had his 'day in court.'

290 N.C. at 110, 225 S.E. 2d at 823. The *Tidwell* Court reached a conclusion different from the one we reach in this case, but, significantly, *Tidwell* was decided on traditional *res judicata* principles requiring strict mutuality of parties. In this case, defendant is precluded from relitigating the paternity issue pursuant to the doctrine of collateral estoppel.

As indicated, our courts have allowed an exception to the strict mutuality rule in at least two instances. In *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655 (1958), the issue involved was the validity of an assignment of an insurance policy. There, the insurance company paid the proceeds of a life insurance policy to the wife of the deceased president of Crosland-Cullen. Crosland-Cullen sued the insurance company in federal district court, alleging that the assignment was an *ultra vires* act and that the proceeds should have been paid to the company. The trial court agreed, but the Fourth Circuit Court of Appeals reversed, ruling the assignment valid. Crosland-Cullen then sued the wife in a North Carolina State court, again alleging that the assignment was invalid. The wife, a stranger to the federal proceeding, asserted the prior judgment in defense, arguing that Crosland-Cullen was collaterally estopped from again raising the assignment issue. Although there was no mutuality or parties present, our Supreme Court held that the wife had properly invoked collateral estoppel.

Judge Hedrick, writing for this Court in *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 195 S.E. 2d 45, *pet. for cert. denied*, 283 N.C. 393, 196 S.E. 2d 275 (1973), recognized that mutuality is sometimes sufficient but not always necessary for application of collateral estoppel. Citing *Crosland-Cullen* with approval, he stated:

> [T]he question before us is whether the requisite identity of issues exists between plaintiff and defendant in the present case and between plaintiff and [stranger to the action] in the former case.

17 N.C. App. at 548, 195 S.E. 2d at 47. *See*, Note, *Recent Developments in North Carolina Case Law—Offensive Assertion of a Prior Judgment as Collateral Estoppel*, 52 N.C.L. Rev. 836 (1974).

Crosland-Cullen and *Gillispie* suggest that the following test, proposed long ago by Justice Traynor in *Bernhard v. Bank of America*, 19 Cal. 2d 807, 813, 122 P. 2d 892, 895 (1942), be used to determine the validity of a plea of collateral estoppel: "(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Indeed, in *Crosland-Cullen*, our Supreme Court referred to the *Bernhard* case as a well-considered opinion. And, as the *Bernhard* Court said: "It would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries." 19 Cal. 2d at 813, 122 P. 2d at 895.

By reason of the April 1976 criminal judgment against defendant in this case, defendant should have been precluded from raising the paternity issue in his wife's subsequent civil action for child support. *A fortiori*, defendant's counterclaim for recovery of sums he had previously paid for the support of the children was properly dismissed for failure to state a claim upon which relief could be granted in the matter on appeal—the action by the State ex rel. New Bern Child Support Agency. For similar reasons, the trial court did not err in denying defendant's motion for blood grouping tests.

V

[2] Defendant's remaining assignments of error concern portions of the trial court's order directing defendant to pay weekly child support and to pay back support as ordered by the criminal judgment. We agree with defendant that the trial court exceeded its authority by directing defendant to make these payments. At the beginning of his order, the trial judge noted that the matter being considered was the State's motion to dismiss defendant's counterclaim because it failed to state a claim for relief and the State's motion to deny defendant's request for blood grouping tests. A ruling on the merits cannot be made on a motion to dismiss for failure to state a claim for which relief could be granted. *Wilkes v. Board of Alcoholic Control*, 44 N.C. App. 495, 261 S.E. 2d 205 (1980).

VI

The one assignment of error brought forward by the State also relates to the trial court's consideration of matters outside the scope of the State's motions. The State argues that the trial court erred in dismissing its claim for indemnification of public assistance paid. As discussed, the merits of the State's action were not before the trial court for determination. Accordingly, that portion of the trial court's order dismissing the State's action in this regard must be vacated.

VII

For the reasons stated herein, we affirm the trial court's order dismissing defendant's counterclaim for failure to state a claim upon which relief can be granted and denying defendant's motion for blood grouping tests. Those portions of the order, dismissing the State's claim for public assistance paid to defendant's children and directing defendant to pay weekly child support of $22.50 and back support accumulated pursuant to the criminal judgment, are vacated.

Affirmed in part; vacated in part. Each party is to bear its own cost.

Judges ARNOLD and PHILLIPS concur.

IN THE MATTER OF: HOUSE OF RAEFORD FARMS, INC. v. JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA

No. 8210SC951

(Filed 5 July 1983)

1. **Master and Servant § 114— OSHA violation—statute requiring notice to employer only**

G.S. 95-137(b)(1) only requires notice to the employer by certified mail by the Labor Department of an OSHA violation. It does not require that the notice be addressed to a particular "individual or officer in responsibility at the . . . corporation."

2. **Master and Servant § 114— OSHA violation—constitutionality of notice statute**

The notice provision in G.S. 95-137(b)(1) is virtually identical to that contained in its counterpart in the federal act, 29 U.S.C. § 659(a), and the notice required by the statute satisfies the constitutional due process requirement that notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. G.S. 1A-1, Rule 4(j)(6)c, Art. I, Sec. 19 of North Carolina Constitution, and XIV Amendment of U.S. Constitution.

3. **Administrative Law § 8; Master and Servant § 114— OSHA violation—review of superior court proper**

Although G.S. 150A-51 provides that a trial judge must set out in writing the reasons for reversal or modification of an agency decision, there is no similar provision governing affirmance of agency decisions. Therefore, there was no basis for disturbing the judgment where the judgment expressly stated that the court considered the arguments and briefs of counsel.

APPEAL by petitioner, House of Raeford Farms, Inc., from *Hobgood (Robert H.), Judge.* Judgment entered 5 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 10 June 1983.

On 8 January 1981 the North Carolina Department of Labor (hereafter Department) cited petitioner for alleged violations of the Occupational Safety and Health Act (hereafter the OSHA), G.S. 95-126 to -155 (1981). The Department mailed the citation, together with a "Notification of Proposed Penalty" in the sum of $720.00, by certified mail, return receipt requested, in an envelope addressed to "House of Raeford Farms, Inc., Post Office Box 100, Raeford, North Carolina 28376."

The citation advised petitioner of its right to contest both it and the proposed penalty by notifying the Director of the Office

of Occupational Safety and Health within fifteen working days following its receipt. *See* G.S. 95-137(b)(1) (1981). Petitioner's assistant controller acknowledged receipt of the citation on 14 January 1981. The period of fifteen working days thereafter expired on 4 February 1981. Petitioner did not mail a notice of contest until 11 March 1981. The Department received that notice on 13 March 1981.

Respondent, Commissioner of Labor, moved to dismiss petitioner's notice of contest on the ground that it was not filed within the "15 working days" limitation imposed by G.S. 95-137(b)(1). The hearing examiner granted the motion and directed petitioner to comply with the citation as originally issued.

On review the Safety and Health Review Board concluded that the citation and proposed penalty were properly served on petitioner on 14 January 1981, and that petitioner's notice of contest filed on 11 March 1981 was barred as untimely. It therefore affirmed the hearing examiner.

The superior court affirmed the Board's decision "in its entirety." The judgment recited that the court had considered the arguments and briefs of counsel and was of the opinion that the decisions of the hearing examiner and the Board were supported by competent, material, and substantial evidence, and that the conclusions of law were correct.

From this judgment, petitioner appeals.

Jordan, Brown, Price & Wall, by Henry W. Jones, Jr., for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General Elaine J. Guth, for respondent appellee.

WHICHARD, Judge.

In accord with the directive of *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 19, 273 S.E. 2d 232, 235 (1981); *see also Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 463-64, 276 S.E. 2d 404, 407-09 (1981), we first state the applicable standard and scope of our review. Although G.S. 150A-1 (1983) expressly exempts the Occupational Safety and Health Review Board from the provisions of the APA, G.S. 95-141 (1981) expressly provides that

judicial review on appeal from contested cases under the OSHA shall be in accordance with General Statutes Chapter 150A, the Administrative Procedure Act. G.S. 150A-51 (1983) specifies the scope of judicial review of an administrative agency decision and the dispositional alternatives available to the court.

The contentions here relate to interpretation, application, and constitutionality of G.S. 95-137(b)(1), the governing notice statute. Error in statutory interpretation is an error of law. *See Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580, 281 S.E. 2d 24, 29 (1981). On judicial review of an agency decision the court may reverse or modify if the decision is "[a]ffected by . . . error of law." G.S. 150A-51(4). It may also reverse or modify if the decision is "[i]n violation of constitutional provisions." G.S. 150A-51(1). The function of our review here is to determine whether the interpretation given to the notice provisions of G.S. 95-137(b)(1) is affected by error of law, and whether that statute, either on its face or as interpreted and applied, is in violation of constitutional provisions.

G.S. 95-137(a) (1981) requires that the Director of the Office of Occupational Safety and Health issue a citation to an employer if, upon inspection or investigation, he or his authorized representative has reasonable grounds to believe the employer has violated any standard, regulation, rule, or order promulgated under the OSHA. G.S. 95-137(b)(1) provides that if the Director issues a citation, "he shall . . . notify the employer by certified mail of any penalty, if any, he has recommended to the Commissioner [of Labor] . . . and that the employer has 15 working days within which to notify the Director that he wishes to contest the citation or proposed assessment of penalty." It further provides that if notice of contest is not given within the requisite "15 working days," "the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court."

[1] "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E. 2d 386, 388-89 (1978). The foregoing statutes are clear and unam-

biguous, leaving no room for judicial construction. G.S. 95-137(b)(1) only requires notice to the employer by certified mail. It does not, as petitioner contends it should, require that the notice be addressed to a particular "individual or officer in responsibility at the . . . corporation."

The Department mailed its citation and notice of proposed penalty by certified mail addressed to petitioner at its corporate headquarters. In so doing it fully complied with the applicable notice requirement. No basis appears for finding error of law in the interpretation and application of G.S. 95-137(b)(1), the governing notice statute. The superior court thus properly affirmed the Review Board unless the governing statute, on its face or as applied, is "[i]n violation of constitutional provisions." G.S. 150A-51(1).

[2] Petitioner contends that requiring notice to be addressed merely to the corporation, and not to a specific "individual or officer in responsibility at the . . . corporation," violates its rights under the due process clause of the fourteenth amendment to the Constitution of the United States and the "law of the land" clause of article I, section 19, of the Constitution of North Carolina. As the party challenging the constitutionality of the statute, petitioner has the burden of establishing its unconstitutionality. *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 668-69, 174 S.E. 2d 542, 548 (1970). "The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *Ramsey v. Veterans Commission*, 261 N.C. 645, 647, 135 S.E. 2d 659, 661 (1964). "Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears . . . ." *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E. 2d 631, 633 (1968), *aff'd*, 275 N.C. 234, 166 S.E. 2d 686 (1969).

The notice provision in G.S. 95-137(b)(1) is virtually identical to that contained in its counterpart in the federal act, 29 U.S.C. § 659(a), which also requires only that the employer be notified by certified mail of any proposed penalty. Cases construing the federal notice provision are thus instructive.

In *Capital City Excavating Co., Inc. v. Donovan*, 679 F. 2d 105 (6th Cir. 1982), a clerical employee received an OSHA citation and notice of proposed penalty at the employer's corporate head-

quarters on 13 September 1978. This employee was not an authorized agent, managing officer, or official of the corporate employer. The secretary of the corporate employer received the document on 15 September 1978. On 6 October 1978 the corporate employer prepared and mailed a notice of contest, which was postmarked 7 October 1978 and was received by the Review Commission on 10 October 1978.

The employer argued that the period for filing notice of contest did not commence until the date the citation and notification was received by a corporate agent or officer specified in Rule 4(d)(3), Federal Rules of Civil Procedure, who had authority to disburse funds. (Petitioner here makes the same argument pursuant to G.S. 1A-1, Rule 4(j)(6)c (Cum. Supp. 1981).) The court rejected this argument, stating:

> The short answer to [the employer's] argument is that Congress has adopted a "different rule" with respect to notification. Congress provided for notification by certified mail, and when notification is effected by certified mail addressed to corporate headquarters, Rule 4(d)(3) does not apply.

679 F. 2d at 111. It further stated:

> In the absence of circumstances not present here when a citation and notice of penalty is delivered to corporate headquarters by the statutory means and delivery is accepted by an agent of the corporation possessing authority to do so, there has been "receipt" of the document within the meaning of 29 U.S.C. § 659(a). It is reasonable to believe that such delivery will bring the document promptly to the attention of an officer or manager in position to take steps either to abate the charged deficiencies or give notice of protest. Because a citation and penalty proposal involves a determination that workers are in danger of injury the act provides an extremely short time for protest. This period is not to be extended merely because of delay in the internal routing of the notification document after its delivery to corporate headquarters.

679 F. 2d at 110.

Buckley & Company, Inc. v. Secretary of Labor, 507 F. 2d 78 (3d Cir. 1975), which is cited and relied on by petitioner, is

distinguishable. The notice there was mailed to the superintendent of a garage and maintenance shop of a large construction company rather than to the corporate headquarters. The recipient was the person responsible for the alleged violations. In holding the notice deficient the court stated:

> If the test of adequate notice is the probability that appropriate corporate officials will receive notice, it is as reasonable to conclude that [the superintendent] would attempt to cover up any derelictions as it is to conclude that he would forward the citations to his superiors.

507 F. 2d at 81. It further stated that proper notification within the congressional intent required "at the very least, a notice to the officials at the corporate headquarters, not the employee in charge at the particular worksite." *Id.*

We find the reasoning of the court in *Capital City Excavating Co., Inc., supra,* persuasive. Here, as there, the legislative authority "has adopted a 'different rule' with respect to notification," 679 F. 2d at 111, *viz.*, the procedure provided by G.S. 95-137(b)(1). The notice requirements of G.S. 1A-1, Rule 4(j)(6)c are thus statutorily inapplicable.

Constitutional due process requires only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Randleman v. Hinshaw*, 267 N.C. 136, 140, 147 S.E. 2d 902, 905 (1966) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 873, 70 S.Ct. 652, 657 (1950)). *See also* 16A Am. Jur. 2d, Constitutional Law § 831 (1979). The notice here satisfies this requirement. It was mailed, in full accord with the applicable statute, by certified mail addressed to the employer at its corporate headquarters. The citation contained in bold lettering the words, "IMPORTANT INFORMATION—PLEASE READ CAREFULLY." It advised the recipient, *inter alia*, of its right to contest the citation or proposed penalty "within 15 working days." The return receipt was signed by an assistant controller who had attended the opening and closing conferences conducted by the OSHA inspector. As in *Capital City*, "[i]t is reasonable to believe that such delivery will bring the document promptly to the attention of an officer or manager in

position to take steps either to abate the charged deficiencies or give notice of protest." 679 F. 2d at 110.

We thus hold that petitioner has failed to carry its burden of establishing that the notice provision of G.S. 95-137(b)(1), either on its face or as applied, is unconstitutional. The superior court therefore properly declined to find the decision of the hearing examiner and the Board "[i]n violation of constitutional provisions" pursuant to G.S. 150A-51(1).

[3] Petitioner contends the superior court erred in failing to address in its judgment all issues presented for review. It argues that the judgment should have expressly indicated the court's "decision as to whether the Board's findings, inferences, conclusions and decisions were in violation of the United States and North Carolina Constitutions, or were affected by error of law, or were arbitrary and capricious."

G.S. 150A-51, in pertinent part, provides: "If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification." The statute contains no similar provision governing affirmance of agency decisions. "Under the APA, a reviewing court's power to affirm the decision of the agency . . . is not circumscribed." *Savings and Loan League, supra,* 302 N.C. at 463, 276 S.E. 2d at 408.

The judgment here expressly states that the court considered the arguments and briefs of counsel. The briefs submitted below, which are part of the record on appeal, set forth the applicable standard of judicial review, together with the errors of law and constitutional violations alleged by petitioner. It is at least implicit in the judgment that the superior court considered and ruled on all matters presented by petitioner, and we find no basis for disturbing the judgment.

Affirmed.

Judges JOHNSON and EAGLES concur.

MEAGHAN CAMPBELL v. LILLIE CAMPBELL

No. 823DC934

(Filed 5 July 1983)

1. **Parent and Child § 6.1— finding concerning best interest of child—supported by evidence**

A trial court's finding that the best interest of the minor child would be promoted by his remaining with his grandmother was supported by sufficient evidence where the evidence tended to show that the mother was a 23-year-old college student living in California when the minor child was born in 1969; she never married the father but lived with him until the baby was 15 months old; at that time she and the minor child returned to North Carolina and stayed for five months with her parents; she asked her parents to take the minor child for a short period while she returned to California and got settled; the mother admitted she was emotionally unstable during this time; in 1971 and 1972 the mother visited the minor child over Christmas and summer breaks; over spring break in 1973 plaintiff and defendant argued over custody of the minor child; plaintiff did not visit her son in 1974; in 1975 plaintiff tried to take her son from her parents' home; she did not see her son again until she was married in 1977; in 1978 and 1979 plaintiff had medical problems and did not see her son at all; she saw her son at her father's funeral in March 1980 at which time she tried to take her son back with her; in 1981 she and her new husband "snatched" her upset and unwilling son and took him with them to Washington where they were to catch a plane for California but the son, then 12 years old, escaped from their motel room and hitchhiked to North Carolina where defendant met him and took him back to her home. The evidence further showed that the minor child was a well-mannered and normal child who did well in school.

2. **Parent and Child § 7.3— award of child support—failure to determine living expenses of child—error**

Where the trial court failed to make any finding determining the living expenses of the minor child pursuant to G.S. 50-13.4(c), the order did not contain findings sufficient to support its judgment on child support, and that part of the judgment must be vacated.

APPEAL by plaintiff from *Rountree, Judge.* Judgment entered 23 August 1982 in District Court, PITT County. Heard in the Court of Appeals 9 June 1983.

In this action plaintiff sought custody of her minor child, Timothy Derek Velazquez (Derek). Defendant is the mother of plaintiff and Derek's grandmother. Derek was born on 3 May 1969; plaintiff was never married to Derek's father. When Derek was 20 months old, plaintiff asked defendant to take care of her child while she finished college and earned a master's degree.

Plaintiff has resided in California since 1965; defendant lives in Farmville, North Carolina. Plaintiff visited her son on an infrequent basis. In 1981, when Derek was 12 years old, plaintiff, after attempting to get defendant to relinquish custody of Derek, physically took the child from defendant. Derek returned to defendant's home by hitchhiking, and plaintiff then instituted this action. She appeals from the judgment allowing defendant to retain custody and requiring her to contribute to the child's support.

Speight, Watson and Brewer by W. Walton Kitchin, Jr., for plaintiff appellant.

Owens & Rouse by Mark W. Owens, Jr., for defendant appellee.

BRASWELL, Judge.

[1] Plaintiff has abandoned all but two of her ten original assignments of error. She first argues that the court's Finding of Fact No. 19, that the best interests of the minor child will be promoted by his remaining with defendant, was not supported by sufficient evidence. The best interest of the child, in light of all the surrounding circumstances, is the paramount consideration which must guide the court in awarding custody of a minor child. *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974); 3 R. Lee, N.C. Family Law § 224 (4th ed. 1981); G.S. 50-13.2(a). The trial judge has broad discretion in custody cases, since he has an opportunity to see and hear the parties and witnesses. *Blackley v. Blackley, supra.* His decision will not be disturbed on appeal, absent an abuse of discretion. *Wilson v. Williams,* 42 N.C. App. 348, 256 S.E. 2d 516 (1979).

The court made no finding concerning plaintiff's fitness to have custody of Derek; it did find that plaintiff was a fit and proper person to have visitation rights with the minor child. There appears to be no evidence in the record that plaintiff is unfit to have custody of Derek, nor is there any evidence that defendant is unfit to have custody. This Court has held that:

> "[W]hile the fitness of a natural parent is of paramount significance in determining the best interests of the child in custody contests, it is not always determinative in itself. It is

> entirely possible that a natural parent may be a fit and proper person to care for the child but that all other circumstances dictate that the best interests of the child would be served by placing custody in a third party. Thus, we hold that the trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person."

In re Kowalzek, 37 N.C. App. 364, 368, 246 S.E. 2d 45, 47, *disc. rev. denied*, 295 N.C. 734, 248 S.E. 2d 863 (1978).

In making custody decisions between a parent and a grandparent or other third party, the court must balance two doctrines. The first, the "parental right" doctrine, holds that "ordinarily and in the absence of particular circumstances the custody of a child should be given to the parent in preference over the grandparent if the parent is found to be fit to have custody and can supply a proper home." 3 R. Lee, N.C. Family Law § 228.4 at 97 (4th ed. 1981), *quoting* Annot. 31 A.L.R. 3d 1187, 1190-91 (1970). The second doctrine, the "best interests of the child" doctrine, holds that "custody should be awarded in accordance with the best interests of the child regardless of the fitness of the parents." *Id.* From our review of the record and transcript, we believe that Judge Rountree diligently attempted to follow these principles and to balance the two sometimes-conflicting doctrines.

The evidence showed that plaintiff was a 23-year-old college student living in California when Derek was born in 1969. She never married Derek's father, Joe Velazquez, but lived with him until the baby was 15 months old. At that time she and Derek returned to North Carolina and stayed for five months with her parents, defendant and defendant's now-deceased husband (plaintiff's father). She asked her parents to take Derek for a short period of time to allow her to return to California to get settled with an apartment, a job, and school and to prepare to take her son. She viewed this as a temporary situation and felt it was the best thing for Derek at the time. Plaintiff admitted that she was emotionally unstable during this time; prior to Derek's birth she had made several suicide attempts and had been institutionalized in a California state hospital for a week in 1966 or 1967.

In 1971 and 1972 plaintiff visited Derek over Christmas and summer breaks from college. Over spring break in April of 1973,

plaintiff and defendant argued over custody of Derek. Since they were not on friendly terms after the argument, plaintiff did not visit Derek in 1974. Again in 1975 plaintiff tried to take Derek from her parents' home. She did not see Derek again until after she was married in August 1977. By this time plaintiff had earned a bachelor's degree and a master's degree in communication. In 1978 and 1979 plaintiff had medical problems and did not see Derek at all. The next time she saw Derek was at her father's funeral in March 1980, at which time plaintiff and her husband tried to take Derek back with them. For a year plaintiff and her husband planned a way to "snatch" Derek from defendant. In 1981 they put their plan into action, taking the upset and unwilling Derek with them to Washington, D. C., where they were to catch a plane for California. Derek, then 12 years old, escaped from their motel room and hitchhiked to the North Carolina state line, where defendant met him and took him home to Farmville. Plaintiff then began this custody action.

Many witnesses testified on defendant's behalf concerning the loving relationship which exists between defendant and Derek. The evidence showed that Derek was a well-mannered and normal child who did well in school. Plaintiff had provided very little financial support for Derek over the years, and defendant for several years had been receiving welfare payments to help with Derek's living expenses. The record displays a picture of a well-adjusted child who has been well cared for by a loving grandmother.

In her brief plaintiff relies heavily on the case of *In re Jones*, 14 N.C. App. 334, 188 S.E. 2d 580 (1972), in which this Court removed the minor child from the mother's aunt and uncle and awarded custody to the mother. The mother was a 17-year-old unmarried girl at the time the child was born. She allowed her aunt and uncle to keep her child while she attended college. After the mother married, she sought custody of the child. We distinguish *Jones* from the case here presented for several reasons. In *Jones* the minor child was six years old; here, the minor child was almost thirteen at the time of the hearing. As shown in the court's first conclusion of law, the judge spoke with the child in private. While the substance of their conversation does not appear in the record, the judge states that Derek told him that it was his desire to live with his grandmother. Derek's affection for

and devotion to defendant is clearly demonstrated by his flight from plaintiff and her husband in Washington when they attempted to force him to go to California with them.

A child who has attained the age of discretion has a right to be heard in a proceeding which will determine his own custody. *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969). While not controlling, the judge may consider the preferences and wishes of the child to live with a particular person. *Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E. 2d 129, 142 (1978); 3 R. Lee, N.C. Family Law § 224 at 43-45 (4th ed. 1981). The trial judge determines the weight to be attached to the child's preference. *Kearns v. Kearns, supra.* It is evident that Judge Rountree attached great significance to Derek's preference to live with his grandmother.

We also think the relative ages of the mothers in *Jones* and in this case are important. In *Jones* the mother was a 17-year-old high school student when she gave birth and was 23 years old when she filed the action to regain custody of her child. In contrast plaintiff was 23 years old when Derek was born and 35 years old at the time of the hearing. Although she had expressed a desire to have Derek with her during the ten years he lived with defendant, she made very little attempt to act on this desire and provided only a negligible amount of support for the child, forcing defendant to seek public assistance in order to provide for Derek.

For the foregoing reasons, we hold that the court's finding that it was in Derek's best interests for custody to remain with defendant was supported by competent, substantial evidence. We find no abuse of the judge's discretion, and we therefore overrule this assignment of error.

Plaintiff's only other assignment of error is to entry and signing of the judgment on the grounds that it is not supported by the findings of fact and conclusions of law. The only finding and conclusion in controversy are those dealing with the custody of the child, leading to the court's conclusion that the best interests of the child would be served by the custody, care, and control of the child being placed and remaining with defendant. In light of our discussion of the plaintiff's first assignment of error, we find that the trial court's conclusions are adequately supported by the

facts and that entry of the judgment was proper as to the custody issue.

[2] We do note, however, that the court's order that plaintiff pay $100 per month child support is not supported by specific findings and conclusions. Pursuant to G.S. 50-13.4(c), an order for child support must contain findings and conclusions 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 v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). The court did find as a fact that plaintiff is capable of supporting her minor child. It also concluded that defendant had limited funds and resources for upkeep of the minor child, in that her income is $375 per month from social security and $167 per month from aid for dependent children. However, the court failed to make any findings determining the living expenses of the child. "To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance . . ., the Court must make findings of specific facts as to what actual past expenditures have been." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 469 (1978). Since the order appealed from does not contain findings on the reasonable needs of the child sufficient to support its judgment on child support, that part of the judgment is vacated. This cause is remanded to the Pitt County District Court for proceedings consistent with this decision.

Affirmed in part; vacated and remanded in part.

Judges ARNOLD and WEBB concur.

GLADYS LEACH AND PRISCILLA LEACH, PLAINTIFFS v. FRANK ALFORD, DEFENDANT

No. 8216DC665

(Filed 5 July 1983)

Bastards § 9.1— judgment of paternity—subsequent revelation that not father—no res judicata

The G.S. 110-132(b) provision that the "judgment as to paternity shall be *res judicata* as to that issue and shall not be reconsidered by the court" ap-

plies to child support proceedings thereunder, and does not establish an absolute bar to relief, pursuant to G.S. 1A-1, Rule 60(b)(6), from the underlying acknowledgment (judgment) of paternity.

APPEAL by defendant from *Gardner, Judge.* Order entered 28 May 1982 in District Court, ROBESON County. Heard in the Court of Appeals 10 May 1983.

Defendant appeals from an order in effect denying his motion, pursuant to G.S. 1A-1, Rule 60(b)(6) (1969), for relief from an acknowledgment of paternity, which had been approved by a district court judge and thus, by virtue of G.S. 110-132(a) (Cum. Supp. 1981), had "the same force and effect as a judgment."

McLean, Stacy, Henry & McLean, P.A., by William S. McLean, for plaintiff appellees.

Lumbee River Legal Services, Inc., by T. Diane Phillips, for defendant appellant.

WHICHARD, Judge.

I.

The issue is whether, as a matter of law, the G.S. 110-132(b) (Cum. Supp. 1981) provision that in a child support proceeding thereunder "[t]he prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court," establishes an absolute bar to relief pursuant to G.S. 1A-1, Rule 60(b)(6), from an acknowlegment of paternity which, by virtue of G.S. 110-132(a), has the force and effect of a judgment.

We hold that it does not.

II.

On 13 December 1978 plaintiff Priscilla Leach (hereafter plaintiff) executed a sworn affirmation of paternity which stated that she was the mother and defendant was the father of a minor child. On 16 March 1979 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 has the force and effect of a judgment. G.S. 110-132(a) (Cumm. Supp. 1981).

On 16 March 1979 defendant also executed a sworn voluntary support agreement in which he consented to pay support for the child. On the same date the court entered an order which, by virtue of G.S. 110-133 (Cum. Supp. 1981), had the force and effect of a court order of support, approving this agreement.

On 30 March 1982 defendant filed a verified motion in the cause, pursuant to G.S. 1A-1, Rule 60, seeking relief from the judgment of paternity. He alleged the following:

Several months after entry of the judgment the child became seriously ill and was subsequently tested for sickle cell disease. He and plaintiff were also tested to determine whether they had the disease. His tests results were negative, indicating that he had neither sickle cell trait nor sickle cell disease. Plaintiff's tests were positive, indicating that she has either sickle cell trait or sickle cell disease. He believed the child's tests were positive, and that she has sickle cell disease.

For a child to have sickle cell disease, both natural parents must have the sickle cell trait. Since the child has the disease, and the defendant has neither the disease nor the trait, he cannot be the father of the child.

Defendant also filed a verified motion requesting that the court order the Robeson County Health Department to produce a copy of the test results on plaintiff and the child; or, alternatively, that the court order him, plaintiff, and the child to submit to a blood examination. He filed a third verified motion requesting that the court order him, plaintiff, and the child to submit to a sickle cell test to be conducted by a named physician at Duke Medical Center.

On 29 April 1982 plaintiff replied to the motion in which defendant sought relief from the judgment. She alleged her execution of the affirmation of paternity, defendant's execution of the acknowledgment of paternity, and the court's approval of these documents, which, by virtue of G.S. 110-132(a), gave them "the same force and effect as a judgment of that court." She then stated that G.S. 110-132(b) further provides that "[t]he prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court." On the basis of these allegations she asserted conclusively "[t]hat the relief requested

by [defendant] is unavailable in that the judgment of paternity is res judicata."

On 28 May 1982 the court entered an order denying the motion that plaintiff, defendant, and the child be directed to submit to a sickle cell test. The pertinent portions of the order are as follows:

> It . . . appearing that [G.S.] 110-132(a) provides that [the] approval and order of paternity shall have the same force and effect as a judgment and;
>
> It . . . appearing that [G.S.] 110-132(b) provides that a judgment of paternity shall be res judicata as to that issue and shall not be reconsidered by the court and;
>
> It . . . appearing that the relief requested by the defendant would involve a reconsideration by the court of the issue of paternity and that the acknowledgment, affirmation and order of paternity is res judicata as to paternity . . .;
>
> . . .;
>
> Now, therefore, it is ordered that the relief requested by defendant be and it is hereby denied for the reason that the issue of paternity is res judicata and may not be reconsidered by this Court . . . .

From this order, defendant appeals.

III.

The purpose of the motion which the court denied is to produce evidence in support of the motion in which defendant seeks relief from the acknowledgment (judgment) of paternity. The motion denied is thus a subsidiary motion, and the court has yet to rule upon the main motion.

An appeal from denial of a subsidiary motion, while the main motion is pending, would ordinarily be dismissed as interlocutory. Here, however, the court expressly denied the subsidiary motion on the basis that it did not have authority to grant the relief sought in the main motion. The ruling was therefore equivalent to a denial of the main motion. The order thus "in effect determines the action," and is therefore immediately appealable. G.S. 1-277(a) (1969).

IV.

This Court recently held, in a case similar but distinguishable, that G.S. 110-132(b) prohibits relitigation of the paternity issue in passing on a motion pursuant to G.S. 1A-1, Rule 60(b)(6), seeking relief from a voluntary support agreement. *Beaufort County ex rel. King v. Hopkins*, 62 N.C. App. 321, 302 S.E. 2d 662 (1983). That decision was expressly grounded, however, on the fact that relief was sought from the support agreement (in effect an order, G.S. 110-133 (Cum. Supp. 1981)), not from the underlying acknowledgment (in effect a judgment, G.S. 110-132(a) (Cum. Supp. 1981)) of paternity. The Court stated:

> 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.*

62 N.C. App. at 323, 302 S.E. 2d at 663 (emphasis supplied). It further stated:

> 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.*

Id. (emphasis supplied).

Durham County v. Riggsbee, 56 N.C. App. 744, 289 S.E. 2d 579 (1982), is also distinguishable. Defendant there responded to a motion seeking garnishment of his wages to enforce a child support order by filing a motion, pursuant to G.S. 1A-1, Rule 35(a) (Cum. Supp. 1981), for a tissue typing test. He thus, like the defendant in *Beaufort County,* attempted to attack a paternity judgment in the course of a subsequent proceeding related solely to support; and he, too, was barred by the established rule that judgments of paternity are res judicata in support proceedings. *See, e.g., 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).

V.

Defendant here, unlike the defendants in those cases, expressly seeks relief from the underlying acknowledgment (judgment) of paternity, not merely from an agreement or order for support. A different issue is thus presented, which we believe requires a different answer.

The provision that the "judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court" appears in G.S. 110-132(b), which relates solely to proceedings for support of the child who is the subject of the acknowledgment (judgment) of paternity. No such directive appears in G.S. 110-132(a), which relates, *inter alia*, to the initial determination of paternity.

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. G.S. 50-13.7(a), 110-133 (Cum. Supp. 1981). The support issue thus may be before the court on numerous occasions during a child's minority.

The apparent legislative purpose in enactment of the "shall be res judicata . . . and shall not be reconsidered" provision in the portion of the statute relating solely to support proceedings was to avert costly consumption of the finite time resources of the trial courts by relitigation, in proceedings relating solely to support, of the underlying paternity issue. The absence of such a provision from the portion of the statute relating to the paternity issue itself (G.S. 110-132(a)), together with the manifest potential for substantial injustice which would result from inability, regardless of the circumstances, to obtain relief from an acknowledgment (judgment) of paternity, persuade us that the General Assembly did not intend to render court approved acknowledgments of paternity a unique category of judgments, peculiarly immune from the "grand reservoir of equitable power to do justice in a particular case" provided by G.S. 1A-1, Rule 60(b)(6).

See Baylor v. Brown, 46 N.C. App. 664, 670, 266 S.E. 2d 9, 13 (1980). If such were the case, relief would not be possible, for example, even from an acknowledgment (judgment) entered under extreme duress, such as a threat of death issued with the apparent means and intent to effectuate it.

Judgments of paternity clearly impact heavily on the property interests, liberty interests, and family relationships of the purported father. If the General Assembly intends that such judgments, once entered, are unalterable, regardless of the circumstances, it should expressly so state. We are unwilling, by judicial fiat in the process of statutory interpretation, to impose a rule so inflexible and with such potential for manifestly unjust results.

In further support of our decision, we note that acknowledgments (judgments) of paternity are obtained by the same procedure as are ordinary consent judgments; and that consent judgments may be set aside for fraud, mutual mistake, or lack of consent. *E.g., Becker v. Becker*, 262 N.C. 685, 690, 138 S.E. 2d 507, 511 (1964); *Ledford v. Ledford*, 229 N.C. 373, 375-76, 49 S.E. 2d 794, 796 (1948); *King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945); *State Board of Registration v. Testing Laboratories, Inc.*, 52 N.C. App. 344, 347-48, 278 S.E. 2d 564, 565-66 (1981); *Hazard v. Hazard*, 35 N.C. App. 668, 242 S.E. 2d 196 (1978); Annot., 139 A.L.R. 421, 422 (1942). The alleged ground for the relief sought here is mutual mistake as to the fact of paternity.

VI.

We thus hold that the G.S. 110-132(b) provision that the "judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court" applies to child support proceedings thereunder, and does not establish an absolute bar to relief, pursuant to G.S. 1A-1, Rule 60(b)(6), from the underlying acknowledgment (judgment) of paternity. Because the trial court expressly grounded its denial of the motion in question on the misapprehension that it lacked authority to grant the ultimate relief requested, the order denying the motion is vacated, and the cause is remanded for further proceedings consistent with this opinion.

VII.

We expressly do not decide the merits of defendant's motions or of the constitutional issues argued in his brief. The trial court has not ruled on these matters, and they thus are not before us.

"Courts have the power to vacate judgments when such action is appropriate, yet they should not do so under Rule 60(b)(6) except in extraordinary circumstances and after a showing that justice demands it." *Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E. 2d 499, 501 (1978). We hold only that defendant is entitled to his day in court for the purpose of attempting to show that the requisite extraordinary circumstances exist, and that justice demands relief from the acknowledgment (judgment) of paternity. We direct only that the trial court rule on his subsidiary motions, and ultimately his main motion, in light of this holding.

Vacated and remanded.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA v. ANDREW MORRISON

STATE OF NORTH CAROLINA v. RICKY TEMPLETON

No. 8222SC903

(Filed 5 July 1983)

Criminal Law § 114.5— prejudicial statement of opinion in charge to jury

The trial judge erroneously and prejudicially expressed an opinion as to defendant's guilt by instructing the jury that "I do not know and cannot explain to you why [defendant] is not charged with the felonious breaking or entering, after hearing the testimony." The statement suggests (1) that the trial judge assumed that certain facts had been established; (2) that the trial judge believed the unindicted "codefendant turned State's evidence"; and (3) that the trial judge, after hearing the evidence, believed that defendant should have been charged with the offense of felonious breaking or entering. G.S. 15A-1232.

Judge PHILLIPS dissenting.

State v. Morrison and State v. Templeton

APPEAL by defendants from *Washington, Judge.* Judgment entered 28 April 1982 in Superior Court, IREDELL County. Heard in the Court of Appeals 17 February 1983.

After a joint jury trial, both defendants were found to be guilty as charged in the separate bills of indictment against them—defendant Andrew Morrison of felonious larceny and defendant Ricky Templeton of felonious breaking and entering, and felonious larceny. The place broken into and entered was H & B Company in Statesville, and the merchandise stolen was plywood belonging to the company. The evidence as to the guilt of both defendants included the eyewitness testimony of George Knox, an accomplice, who admitted participating in that crime and many other thieveries as well. Knox testified that defendant Morrison approached him about stealing the lumber; that they went to see Templeton, who agreed to participate; and that he went with the two defendants to the lumber company's place of business, saw them break and enter the premises and haul off two small truck loads of plywood, which were taken to Lexington and sold to a remodeler of dilapidated houses for $800.

Attorney General Edmisten, by Associate Attorney John R. Corne, for the State.

C. David Benbow, for defendant appellant Morrison.

Constantine H. Kutteh, for defendant appellant Templeton.

BECTON, Judge.

Only two assignments of error have been brought forward for our consideration, one relating to the trial judge's instruction to the jury and the other relating to the district attorney's closing argument.

Defendant Morrison, who was not tried for breaking and entering as was codefendant Templeton, contends that the trial judge erroneously and prejudicially expressed an opinion as to his guilt by instructing the jury as follows:

> As to Andrew Morrison, the issues as to him deal with felonious larceny. I do not know and cannot explain to you why Andrew Morrison is not charged with the felonious breaking or entering, after hearing the testimony; but it is

not my function nor yours to decide what the charges should have been. . . .

Believing that an expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, we agree with defendant and hold that the trial judge's remarks were erroneous and prejudicial.

> G.S. 15A-1232 imposes upon the trial judge the duty of absolute impartiality and forbids *any intimation* of the judge's opinion *in any form whatsoever.* [Emphasis added.] [Cite omitted.] As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury *directly* or *indirectly*. . . . [Emphasis added.]

State v. Whitted, 38 N.C. App. 603, 605, 248 S.E. 2d 442, 443-44 (1978).

The State implicitly suggests that the only new thing the jury learned from the judge's statement was that the judge did not know either why Morrison had not also been indicted for the break-in by arguing that the statement's "probable impact upon the jury was to articulate a question already in the minds of the jury." The statement, however, suggests much more—for example, (i) that the trial judge assumed that certain facts had been established; (ii) that the trial judge believed George Knox, the unindicted "codefendant turned State's evidence"; and (iii) that the trial judge, after hearing the evidence, believed that Morrison should have been charged with the offense of felonious breaking or entering.

The trial judge's remarks were especially damaging considering the fact that the State called only three witnesses to prove its case: Frank Early, president of the building supply company; George Knox, the unindicted codefendant; and Sgt. Howard Brown, the police officer who took a statement from Knox. Knox's testimony was the sole evidence linking defendants to the crime. Sgt. Brown testified that there was no "other investigation other than the statements given by Knox with regard to Andrew Morrison and Ricky Templeton in this particular case."

Further, Knox's statement was fraught with inconsistencies. For example, his statement, given at a time[1] when the State apparently had no leads and when even Sgt. Brown knew that Knox "expected less than active time" on pending charges in another county, refers, on several different occasions, to four people's involvement in the planning, breaking, entry and larceny of the building supply company. Knox steadfastly maintained at trial, however, that he, Morrison and Templeton were the only people involved.

Moreover, although Knox admitted to the breaking, entering and larceny of ten to twelve other business establishments in Iredell County in July 1981, as of April 1982 he testified that he had not been charged with any of those offenses.

The jury, considering (i) Knox's admissions of prior bad acts; (ii) Knox's several prior convictions; (iii) Knox's prior inconsistent statement; and (iv) the lack of other evidence indicating that defendants were involved, may not have given much credence to Knox's testimony. Thus, the trial court's remarks and the inferences they suggest were prejudicially erroneous.

Because we grant defendant a new trial based on the foregoing analysis, it is not necessary to address defendant's assignment of error relating to the district attorney's closing argument.

New trial.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though, in my belief, there is no more salutary and necessary rule in our system of jurisprudence than that which enjoins a trial judge from prejudicing a litigant by expressing an opinion or manifesting a leaning adverse to his interests before the jury, I am nevertheless constrained to conclude that the trial

1. The crime allegedly occurred on 1 March 1981; Knox's first statement was given on 7 July 1981; the defendants' preliminary hearing was held in October 1981; and defendants' trial was held in April 1982.

judge's comments in this instance were not of that character and did not have that effect. Had the remarks been made in a different context, such as Morrison being tried by himself, the effect may well have been very prejudicial, indeed, but in the context of this case I cannot believe that the remarks prejudiced Morrison in any way.

The two defendants, Morrison and Templeton, were being tried together for the same criminal incident. But though the evidence that the jury had heard and was to consider tended to show that Morrison had been just as active, if not more active, than Templeton in both the break-in and the larceny, and that the criminal undertaking was his idea and he invited Templeton to participate in it, Templeton was charged with both crimes while Morrison was charged only with larceny. In winding up his instruction to the jury as to Templeton, after covering both crimes charged, and in beginning his instructions as to Morrison, the judge's complete remarks were as follows:

> Those are the issues as to Ricky Templeton, there being four. You will answer either the first or the second issue, and you will answer either the third or the fourth issue.
>
> As to Andrew Morrison, the issues as to him deal with felonious larceny. I do not know and cannot explain to you why Andrew Morrison is not charged with the felonious breaking or entering, after hearing the testimony; but it is not my function nor yours to decide what the charges should have been. It is our function to try the case on the evidence presented here in this Court; and, as to Andrew Morrison, the first issue is whether he is guilty of felonious larceny of goods belonging to H and B Company of Statesville, Inc., on or about March 1, 1981; and I must repeat what I have told you about Mr. Templeton as to the issues there.

Having heard the evidence, which, if anything, was stronger against Morrison on all points than it was against Templeton, and but a moment before having heard the judge explain and apply the law of breaking and entering, but only to Templeton, the jury already knew that Morrison *could* have been charged with breaking and entering like Templeton was. Jurors are not automatons who think only when programmed. Being of normal intelligence the jury could not have helped but been wondering why Morrison

wasn't being tried for everything that Templeton was, and the only new thing that they learned from the judge's remarks was that he didn't know either. Telling the jury that and directing their attention away from that problem to the one offense that Morrison was being tried for and reminding them of their duty in regard to it, as the judge did, if not necessary, was certainly not inappropriate, in my opinion, and was more likely beneficial, rather than detrimental, to Morrison.

The judge said nothing in my view that could have led the jury to believe that he accepted the evidence as true or thought that they should. My conviction that the remarks were harmless is buttressed by the fact that Templeton, who was not burdened with any untoward remarks by the judge, was also found guilty, though the evidence against him was not quite as strong as it was against Morrison.

Therefore, I vote no error.

IN THE MATTER OF: BILLY WADE MASH

No. 8223DC844

(Filed 5 July 1983)

Infants § 18— revocation of probation—insufficiency of evidence

The trial court erred in finding respondent participated in breaking, entering and damaging a building and in damaging chickens, and in finding that respondent had violated the conditions of his probation where the evidence was insufficient to establish that respondent committed any of the offenses for which he was tried.

APPEAL by respondent from *Ferree, Judge.* Judgment entered 18 June 1982 in District Court, WILKES County. Heard in the Court of Appeals 11 February 1983.

Before the incidents involved in this appeal occurred, Billy Wade Mash, a juvenile, was adjudicated a delinquent upon findings that he had stolen a motorcycle and wrongfully damaged it and some fourteen different mailboxes. His commitment for a term not to exceed his eighteenth birthday was suspended and he was placed on probation for one year upon the condition, among

others, that he not violate any state or federal criminal law. A few days thereafter, by three different petitions, the respondent was charged with violating several other criminal statutes and the terms of his probation. The first petition charged him with breaking and entering a chicken house belonging to Ernest Pierce and wantonly and wilfully damaging the chicken house and Pierce's chickens; the second charged that he violated probation by breaking and entering the chicken house of Jack Pierce and wantonly and wilfully damaging his chickens and house; the third charged him with wantonly and wilfully damaging mailboxes belonging to John McNeil, Bud Huffman, Kyle Huffman, Odell Church and Allen Staley. The breakings and entries were alleged to violate G.S. 14-54, damaging the chicken houses and mailboxes G.S. 14-127, damaging the chickens G.S. 14-160.

Respondent pleaded not guilty to all charges and at trial only two witnesses testified. Deputy Sheriff Shumate, who investigated the charges, testified that:

> The majority of the damage it actually was in a pretty wide area in Millers Creek area, most of it occurred on some side roads such as Fish Dam Creek Road off of Old 421 West and some of the chicken houses were off near West High there and also there was a chicken house and some mailboxes damaged up 16 North.

He went to the various places referred to in the petitions and observed the damage alleged; Ernest Pierce's chicken house screen door had been torn and approximately fifteen of his chickens decapitated; there was blood on the chicken house floor, but it was dried and he couldn't determine whether it was fresh or not; some of the mailboxes belonging to those named in the petition had been dented by beating on them with something and some had been pulled up; he interviewed the respondent, who signed the following written statement:

> David Mash and I met Jason Wolfe at Millers Creek at the Discount House on Highway 421. Jason asked us to go riding around and we got in the car with him. It was his sister's green Pinto. After riding around for sometime, we stopped at Holbrook's Motel and Jason bought two six packs of beer and drove some more and Jason drank some beer. We went past West High School towards Millers Creek and

turned left and drove to some chicken houses and Jason got out and went into the chicken house. When he came out, he had a chicken which he threw down and got in the car and drove up 16 North and he went into another chicken house and Jason was cutting chicken's heads off and I picked one up and threw it. Later we pulled up some signs and damaged some mailboxes.

At the end of the officer's direct examination, the Court questioned him as follows:

THE COURT: A couple of questions, Mr. Shumate. In conversing with Billy Wade Mash, did the names of Ernest Eller, Ernest Pierce, John McNeil, Bud Huffman, Kyle Huffman, Odell Church, Allen Staley or Jack Pierce come up?

A. No, sir. In fact, Billy did not even know the name of the roads they were on, but he did admit to being involved in this, but as I said he didn't know whose mailboxes they were and through the investigation or through talking to the other boys that were picked up, we came to the conclusion . . .

THE COURT: All right. Based on his statements that relate to his action to these particular names that I've just now called. That's by virtue of his telling you which road they turned off of and which road they were riding on.

A. No, sir. As I said, about the only way he could describe it, he said he turned off on to some dirt roads and the only statement to the mailboxes as I said or read in his statement he said later we pulled up some signs and damaged some mailboxes. That's the extent of his statement about the mailboxes.

Jack Pierce testified that: a four-foot screen on the door to his chicken house was torn off, enabling 100 to 150 chickens to go outside, and ten to twelve chickens were lying there dead, but he did not know whether they were killed "or whether they died."

From the evidence the Court found that respondent participated in breaking, entering and damaging buildings owned by Ernest Pierce and Jack Pierce and in damaging their chickens, and entered an order committing him to the Division of Youth Services, Department of Human Resouces. No findings were made

one way or the other as to damaging the mailboxes and no disposition was made of those charges.

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

Gregory & Joyce, by Edgar B. Gregory, for the respondent appellant.

PHILLIPS, Judge.

The only question requiring our determination is whether the evidence presented against the respondent juvenile was sufficient to prove that he committed the offenses for which he was tried. In resolving the question, we have been guided by the legal principles stated below, all of which are familiar to the profession and basic to our system of jurisprudence.

While charges against juveniles are not processed the same way criminal charges against adults are, the constitutional and legal requirements for proving them are the same. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). The first step in convicting one of crime in this country is to prove that the crime charged has been committed by somebody—the second that the defendant committed it—and the failure to prove the first proposition is no less fatal to the prosecution than failing to prove the second. *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977); 23 C.J.S., Criminal Law § 916(1) (1961); 1 Wharton's Criminal Law § 28 (14th ed. 1978). The State had the burden to prove respondent's guilt beyond a reasonable doubt by substantial evidence covering all material elements of the offenses charged. *Matter of Meaut*, 51 N.C. App. 153, 275 S.E. 2d 200 (1981); *In re Vinson*, 298 N.C. 640, 260 S.E. 2d 591 (1979). If the respondent's conviction was not based on evidence, but was arrived at by mere surmise and speculation, it cannot stand. *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1967).

Though the evidence shows plainly enough that on the night involved the respondent engaged in considerable activity of a criminal nature, and there is some indication in the record that other evidence could have been introduced against him, the evidence that was introduced, which is all that we can consider and rest our decision upon, is not sufficient, in our judgment, to

establish that respondent committed any of the offenses that he was tried for. Therefore, the judgment appealed from is vacated and upon return of the matter to the District Court, judgments of acquittal will be entered in all three cases.

First of all, except for Jack Pierce's testimony showing that his chicken house had been broken into and damaged, the evidence failed to establish that any of the many crimes alleged had been committed. The demise of Jack Pierce's chickens was not shown to be due to any criminal act by anybody, since the only evidence relating thereto was his testimony that he did not know whether they were killed or just died. None of the other alleged property owners testified, nor did anyone else who *knew* that the properties had been violated or damaged by someone other than the owners, and without their consent. The officer's testimony that he saw the damaged properties did not establish that the crimes had been committed, but only what their results were. The absence of such evidence in these cases was as fatal as the State's failure to show that accident was not the cause in a burning case. *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983). In that case, it should be noted, the State had a full confession, whereas here there was only the beginning of one.

Secondly, since the trial judge made no finding that respondent damaged any of the mailboxes referred to in the third petition, that was tantamount to a finding of not guilty as to those charges, and a judgment of acquittal would have to be entered as to them, in any event.

Thirdly, though the recorded evidence does establish that on the night involved the respondent visited two chicken houses that were vandalized by his companion, and the evidence supports the inference that he aided and abetted whatever crimes were committed there, it is, nevertheless, insufficient to show that either of those places belonged to either Ernest Pierce or Jack Pierce, the property owners designated in the other two petitions. Proving that respondent broke into two chicken houses was not enough on this point—what the State had to prove was that he broke into the chicken houses of Ernest and Jack Pierce, and that was not done.

According to the investigating officer's testimony, several chicken houses scattered over a "wide area" of Wilkes County

were vandalized that night; yet the respondent's statement, read into evidence and apparently relied upon as a confession, refers to only two such places and does not identify either, even indirectly. Earlier in his testimony, by affirmatively answering a question put to him by the District Attorney, the officer seemingly filled this gap by saying that he had determined in his discussion with Billy Wade Mash that the property that he had investigated and observed the damage on was the same property as related to him by Billy Wade Mash. But that was not evidence, it was surmise, as the officer's answers to the questions asked him by the Court make plain, his testimony, without qualification or later contradiction, being that respondent could not identify or locate any of the places that he went to, or even the roads that they were situated on. Thus, the officer's "determination" that the chicken places that Mash went to were the same ones that he investigated is devoid of legal effect. If the State had evidence that the places were the same, it was not presented. From the evidence that was presented, it is just as likely that the two chicken houses that respondent went to belonged to two other people in that wide area involved, whose places were damaged that night, as that they belonged to either Ernest Pierce or Jack Pierce.

Though the respondent may deserve punishment for the pointless and wanton destruction of the property of others, as there are few crimes that are less excusable, under the legal principles that govern his case, he is nevertheless entitled to be acquitted of all charges, and it is so ordered.

Reversed and remanded.

Judges WEBB and BECTON concur.

ORANGE GROCERY COMPANY v. CPHC INVESTORS, A NORTH CAROLINA GENERAL PARTNERSHIP

No. 8215SC943

(Filed 5 July 1983)

Easements § 6.1— easement by prescription—insufficiency of evidence

Plaintiff failed to show an easement by prescription in a 20-foot corridor over defendant's property where plaintiff's evidence failed to show any claim of right and hostile or adverse use. The evidence showed that the public used a portion of the disputed right-of-way over defendant's property until 1967 as an access to public streets and to a bank's drive-in window, and there was never any use by the public of the right-of-way to gain access to plaintiff's property. Further, plaintiff neither orally nor by its actions ever expressed any claim of right.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 15 May 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 June 1983.

For a number of years plaintiff's lessee, Fowler's Food Store, used a 20-foot corridor over defendant's property as a means of ingress and egress to plaintiff's property. The properties are adjacent to one another and located in the Town of Chapel Hill. Plaintiff's property is used as a parking lot for Fowler's employees. Defendant also uses its property as a parking lot and leases spaces. Plaintiff's lot is bordered on the east by Fowler's Food Store, on the south by a brick wall and property owned by a third party, on the north by a store building and landscaped area and on the west by defendant's parking lot. Defendant's lot is entered by way of Rosemary Street. Fowler's Food Store faces south onto Franklin Street which is parallel to Rosemary Street.

On 2 April 1981 plaintiff initiated this action alleging that defendant planned to barricade the right-of-way to plaintiff's parking lot, thus depriving plaintiff of its only access to its property. Plaintiff alleged that its use of this right-of-way was made without permission of defendant and its predecessors in title; and that such use had been adverse, hostile, open, notorious, continuous and uninterrupted for over 20 years. In its answer defendant responded that plaintiff had used defendant's property as a means of access with the permission and license of defendant's predecessors in title.

After hearing the evidence of both parties, the jury found that plaintiff had acquired an easement over the land of defendant "by adverse use of a 20 foot corridor through the parking lot exiting onto Rosemary Street . . . for a period of 20 years." The trial court, thereafter, granted defendant's motion for entry of judgment notwithstanding the verdict and alternative motion for new trial. Plaintiff appeals.

Mount, White, King, Hutson, Walker & Carden, by Richard M. Hutson, II, and James H. Hughes, for plaintiff appellant.

Northen, Little & Bagwell, by Ken Bagwell for defendant appellee.

BRASWELL, Judge.

The sole issue before this Court is whether the trial court erred in granting defendant's motion for judgment notwithstanding the verdict after the jury had returned a verdict in favor of plaintiff. After careful examination of the applicable law and the evidence in the record on appeal, we find no error and affirm the lower court's decision.

In passing on motions for either a directed verdict or judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the nonmovant. The motion may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. denied*, 279 N.C. 727, 184 S.E. 2d 886 (1971). In the case before us, the trial court was confronted with the task of determining whether plaintiff had introduced substantial evidence of each and every element required to establish an easement by prescription.

Our Supreme Court in *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E. 2d 897, 900-01 (1974), set out the following four elements which must be proved by the greater weight of the evidence before a prescriptive easement is established: (1) The use must be adverse, hostile or under a claim of right. (2) The use must be open and notorious. (3) The adverse use must be continuous and uninterrupted for 20 years. (4) There must be substantial identity of the easement claimed. The burden of proving these essential elements is on the party claiming the ease-

ment. This party also has the burden of rebutting a presumption that its use is permissive and not adverse. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981).

Plaintiff's evidence tends to show that it purchased the property at issue in the 1940's. Since then this land has been used as a parking lot for Fowler's Food Store employees. The sole access to plaintiff's lot is from Rosemary Street through defendant's parking lot. Neither defendant nor its predecessors ever gave plaintiff permission to use this access across its property nor did plaintiff request permission. In 1959 plaintiff paved its parking lot. The newly paved area encroached upon defendant's parking lot about 12 inches. In December 1980 defendant purchased the parking lot adjacent to plaintiff's lot, and informed plaintiff that the access over defendant's lot would be closed as of 6 April 1981.

Plaintiff's President, Marvin Barnes, testified on cross-examination that in the past a bank with a drive-in window was housed in a building on defendant's lot. He admitted that while the bank possessed this property there was "an actively used entrance and an exit to and from the CPHC [defendant] lot to Franklin Street . . . ." He further admitted, "That way through the CPHC [defendant] lot along the driveway to Franklin Street was open to the public for years. I'm not sure it was closed to the public about 1967 when CCB [Central Carolina Bank] moved out of that location and sold its building, but that's probably right." Defendant presented evidence confirming that a bank was predecessor in title to its property; that the public used an access through the property from Franklin Street to Rosemary Street and that access to the drive-in window from Franklin Street was closed when the bank vacated the property in 1967. A witness for defendant further testified that defendant decided to block plaintiff's access to its lot after plaintiff refused to rent that portion of defendant's lot which was used as the access. The witness calculated that approximately 6 parking spaces were being utilized for this purpose.

This evidence fails to support the essential elements of use that is adverse, hostile or under a claim of right for an uninterrupted period of 20 years. A "hostile" use has been defined as "a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim

of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E. 2d 873, 875 (1966). "The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence." *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912). In addition, adverse use implies use that is exclusive as against the community or public at large. 28 C.J.S. *Easements* § 15 (1941).

In the case before us, there is no testimony that the plaintiff believed the right-of-way over defendant's parking lot belonged to it or that it possessed any claim of right. We find no merit to plaintiff's argument that its one-time paving of the parking lot behind Fowler's Food Store and its paved "encroachment" of 12 inches onto the defendant's lot constitutes maintenance of the right-of-way over defendant's property which put defendant on notice of any adverse use or claim of right. Even assuming that defendant was given notice of a claim of right, the uncontradicted evidence in the record shows there was no claim of right or hostile or adverse use of defendant's property for the required 20-year period. Witnesses for both parties testified that a portion of the disputed right-of-way was used by the public as a driveway connecting Franklin Street and Rosemary Street for years and was closed to the public about 1967.

Plaintiff would have us find that the facts here are so similar to the facts in *Dickinson v. Pake*, *supra*, *Potts v. Burnette*, *supra*, and *Newsome v. Smith*, 56 N.C. App. 419, 289 S.E. 2d 149 (1982), that the verdict finding a prescriptive easement in favor of plaintiff must be affirmed. Our comparison of these cases with the instant case discloses fatal differences.

The plaintiffs in *Dickinson*, *Potts* and *Newsome*, like the plaintiff here, used a right-of-way over defendant's land as their sole means of access to their land for over 20 years. No permission had ever been requested or given. The similarity between these three cases and the case on appeal ends here. The plaintiffs in *Newsome* maintained the road over defendant's land by smoothing, upgrading and graveling it; and there was evidence that they believed they owned the road. In *Potts*, the plaintiffs on at least one occasion also smoothed, graded and graveled the

road. They "considered their use of the road to be a *right* and not a privilege." *Potts v. Burnette, supra,* 301 N.C. at 668, 273 S.E. 2d at 289. The plaintiffs in *Dickinson* performed "what slight maintenance was required" to keep defendants' road passable. *Dickinson v. Pake, supra,* 284 N.C. at 583, 201 S.E. 2d at 901. One of the plaintiffs testified that she and the other plaintiffs thought it was their road and that they had a right to use it. In *Newsome* and *Dickinson,* the roads at issue were used by plaintiffs to gain access to their homes. In *Potts,* the plaintiffs and the public used the road to reach plaintiffs' land for social and agricultural purposes and to attend funerals at a cemetery located on plaintiffs' property.

Plaintiff has shown no evidence of any claim of right and hostile or adverse use. The uncontradicted evidence shows that the public used a portion of the disputed right-of-way over defendant's property until 1967 as an access to public streets and to the bank's drive-in window. There was never any use by the public of the right-of-way to gain access to plaintiff's property. Finally, plaintiff neither orally nor by its actions ever expressed any claim of right.

The judgment entered for defendant is

Affirmed.

Judges ARNOLD and WEBB concur.

WALLACE T. PORTER AND WIFE, POLLY P. PORTER, PLAINTIFFS v. MATTHEWS ENTERPRISES, INC. AND VAN MATTHEWS, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. R. K. ADAMS AND L.A.B., INC. THIRD-PARTY DEFENDANTS

No. 8212SC624

(Filed 5 July 1983)

1. Contracts § 21.2— breach of contract to move building—summary judgment improper

Affidavits on the part of third-party defendant house movers accomplished no more than to elaborate on the defenses raised by them in their answer, and did not entitle them to judgment as a matter of law on third-party

plaintiff's breach of contract claim that the house movers failed to complete the terms of their contract when the building they were to move collapsed.

2. Negligence § 2— negligence in moving building—summary judgment improper

Based upon third-party defendants' representations as to their experience, expertise, and capability to move a building, such defendants were under a duty to third-party plaintiffs to protect the building from harm while it was in their care. Thus, the trial court erred in entering summary judgment for third-party defendants since third-party plaintiffs forecasted sufficient evidence to withstand the motion for summary judgment on their claim of negligence.

APPEAL by defendants Matthews Enterprises, Inc., and Van Matthews from *Herring, Judge.* Summary judgment entered 1 March 1982 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 21 April 1983.

Defendants agreed to purchase a shop building from plaintiffs and to remove the building from its location, as plaintiffs were selling the land on which the building was located. Plaintiffs commenced this action to recover $8,850.00 in actual damages and $8,850.00 in punitive damages of defendants for defendants' alleged failure to remove the building. Defendants answered, denying liability and asserting defenses and a counterclaim. By their counterclaim, defendants asserted that plaintiffs had fraudulently misrepresented that the building could be moved and that plaintiffs were liable to defendants for $15,117.00 in actual damages and $25,000.00 in punitive damages.

Defendants, as third-party plaintiffs, filed a verified complaint against third-party defendants, alleging two causes of action. In their first claim for relief, third-party plaintiffs, in summary, alleged that they entered into a contract with third-party defendants to remove the building from its original location to another place; that defendant R.K. Adams, acting for himself and as agent for defendant L.A.B., Inc., represented and warranted to third-party plaintiff that Adams had thoroughly inspected the building, that he possessed the requisite skill and ability to remove the building to its new location in such a manner as not to damage the building; that third-party defendants failed to properly prepare the building before attempting to move it, and that as a result of that failure, when third-party defendants attempted to move the building, it collapsed; and that as a result of third-party defendants' "negligence and failure to com-

plete the terms of the contract" third-party plaintiffs suffered damages.

In their second claim for relief, third-party plaintiffs alleged, in summary, that third-party defendant Adams, acting for himself and as agent for defendant L.A.B., Inc., made the representation to third-party plaintiffs that the building could be successfully moved; that Adams made this representation without first having taken reasonable steps to insure that such representations were truthful; that Adams made his representation recklessly when he knew or should have known that such representation was false; that Adams' act was fraudulent; that Adams intended to deceive third-party plaintiffs and to induce third-party plaintiffs to rely on such representations; that such representations were materially false; that third-party plaintiffs reasonably relied on such representation; and that, because of such circumstances, third-party plaintiffs were damaged.

Third-party defendants answered, denied all essential allegations, and as an additional defense, alleged that defendant Adams, together with third-party plaintiff Van Matthews, made a visual inspection of the building "and there was no apparent defect"; that when the building was moved a few inches off the ground, it collapsed because the wall sections were put together with staples instead of nails; and that such latent defects, being unknown to third-party defendants, were the cause of the collapse of the building.

Third-party defendants moved for summary judgment as to defendants' third-party claim. The trial judge, upon reviewing the verified pleadings and the affidavits offered by third-party defendants, found that there was no genuine issue of material fact as to either of defendants' third-party claims and granted summary judgment in favor of third-party defendants. Defendants, as third-party plaintiffs, appealed.

Hutchens & Waple, P.A., by H. Terry Hutchens, for appellants.

A. Maxwell Ruppe for appellee.

WELLS, Judge.

The first issue we must decide is whether defendants' appeal is premature. G.S. 1A-1, Rule 54(b) of the Rules of Civil Procedure provides:

> (b) *Judgment upon multiple claims or involving multiple parties.*—
>
> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

It is clear that the judgment from which defendant has appealed adjudicated fewer than all of the claims in this case and was final as to less than all of the parties. It is also clear that in his judgment, the trial judge did not certify that there was no just reason for delay. Under such circumstances, an appeal will not lie unless the judgment affects a "substantial right" under either G.S. 1-277 or 7A-27(d). *See Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980). In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E. 2d 593 (1982), our Supreme Court held that the right to avoid separate trials on separate issues is not such a "substantial right." As noted by the Court in *Green*, "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by

different juries in separate trials rendering inconsistent verdicts on the same factual issue." Although it is not reflected in the record proper, in their statement of the case in their brief, third-party plaintiffs assert that at the term of court following entry of summary judgment against them, judgment was entered against them in favor of plaintiffs Wallace T. and Polly P. Porter in the sum of $6,000.00. In their brief, defendants do not contest this statement, and we therefore accept it as correctly reflecting the status of this case. Under these circumstances, third-party plaintiffs' only remaining rights in this action are at stake in this appeal and the entry of summary judgment against them is therefore appealable under G.S. 1-277(a) and G.S. 7A-27(d).

The rules and principles under which summary judgment may be properly entered are well-established and need not be repeated here. *See generally Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); *and McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

[1] To begin our analysis, we must determine the nature of third-party plaintiffs' claims against third-party defendants. The first claim is obviously for breach of contract and requires no further analysis or discussion. In support of their motion, third-party defendants offered the affidavits of four persons: R. K. Adams, R. K. Adams, Jr., Steve Turbeville, and Bruce Motz. In his affidavit, Adams stated, in summary, that he had been in the house-moving business for 15 years; that he had moved several thousand houses, including several hundred located on concrete slabs, as was the building he attempted to move for third-party plaintiffs; that "never before has a building collapsed when it was being moved"; that his company not only had the training and experience to move houses, but all the necessary equipment; that when approached by Van Matthews, he examined the building as fully as possible and saw no apparent defect or signs of instability. Adams further testified that when his crew attempted to move the building it collapsed; that it was only after the collapse that it was discovered that the wall sections of the building had been fastened together with staples instead of nails; and that this unstable condition could not have been detected by visual examination of the building.

R. K. Adams, Jr., Turbeville, and Motz, in their affidavits, stated that they attempted to move the building, described the equipment and methods used by them, and described the condition of the building before the attempted move and its collapse while they were attempting to move it.

The foregoing representations on behalf of third-party defendants accomplished no more than to elaborate on the defenses raised by them in their answer, and do not entitle them to judgment as a matter of law on the breach of contract claim. The probative value of all of these statements depends upon the credibility of the affiants, and the question of credibility is for the trier of fact. Third-party defendants' mere assertions that they were not on notice of any defect in the building, that they could not have known of any defect, and that the building's construction was what caused it to collapse, did not establish those matters conclusively as to entitle third-party defendants to summary judgment. There remain in this case genuine issues of material fact as to third-party plaintiffs' first claim.

[2] Third-party plaintiffs' second claim raises more difficult questions. Ordinarily, an action in tort may not be founded on a failure by one party to a contract to carry out a contractual duty to another party to the contract. *See* 86 C.J.S. Torts, Sections 1-3; *see also Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893 (1955); *compare Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). In *Ports Authority*, our Supreme Court recognized a number of exceptions to this general rule, one of them being where

> The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee. *See*: *Insurance Co. v. Parker*, 234 N.C. 20, 65 S.E. 2d 341 (1951) (automobile stolen from a parking lot inviting public patronage).

The duty of third-party defendants in this case was closely analogous to those duties under a contract of bailment. Based

upon third-party defendants' representations as to their experience, expertise, and capability to move the building, defendants were under a duty to third-party plaintiffs to protect the building from harm while it was in their care. Thus, we hold that third-party plaintiffs have forecasted sufficient evidence to withstand third-party defendants' motion for summary judgment as to their second claim. Third-party defendants' affidavits, as we have noted earlier, do no more than raise a defense against such a claim and do not establish such defense as a matter of law. *See Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982).

For the reasons stated, the judgment of the trial court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges BECTON and EAGLES concur.

IN RE: GRAHAM, TWO MINOR CHILDREN

No. 8219DC726

(Filed 5 July 1983)

Parent and Child § 1— termination of parental rights—sufficiency of the evidence

Respondent's lack of involvement with his children for a period of more than two years established a pattern of abandonment and neglect which is encompassed by G.S. 7A-289.32(2) and G.S. 7A-517(21).

APPEAL by petitioner Cabarrus County Department of Social Services from *Grant, Judge.* Judgment entered 24 March 1982 in District Court, CABARRUS County. Heard in the Court of Appeals 12 May 1983.

On 2 October 1981 the Cabarrus County Department of Social Services filed a petition to terminate the parental rights of Danny Ray Graham as to his two minor children. At the hearing on this matter the parties stipulated that the issues to be determined by the court were whether the respondent Graham had neglected his children within the meaning of G.S. 7A-289.32(2), whether he had

failed to pay a reasonable portion of the costs of care of his children for six months preceding the filing of the petition within the meaning of G.S. 7A-289.32(4), and whether it was in the best interests of the children that the respondent's parental rights be terminated. The court concluded that although it was in the best interests of the minor children that respondent's parental rights be terminated, the circumstances authorizing such termination did not exist. From denial of its petition, petitioner appeals.

Williams, Willeford, Boger, Grady & Davis, by Samuel F. Davis, Jr., for petitioner-appellant.

Johnson, Belo and Plummer, by Franklin R. Plummer, as Guardian Ad Litem for the minor children, Bradley Thomas Graham and Christy Autumn Graham.

Koontz & Hawkins, by Timothy M. Hawkins, for respondent-appellee.

EAGLES, Judge.

Petitioner argues that the trial judge erred as a matter of law in not terminating the respondent's parental rights. Its argument is also adopted by the Guardian Ad Litem of the minor children. The only finding of fact excepted to in the order is actually a conclusion of law in which the trial judge states that grounds for termination of parental rights as set forth in G.S. 7A-289.32 do not exist. The remaining twenty-five findings of fact which detail the evidence presented at the hearing bear no exceptions. They are therefore deemed to be supported by competent evidence and are binding on appeal. *In re Wilkerson*, 57 N.C. App. 63, 291 S.E. 2d 182 (1982).

The findings of fact reveal the following:

Respondent Danny Ray Graham is the father and Myra Sue Honeycutt Graham is the mother of Bradley Thomas Graham, born 3 February 1977, and Christy Autumn Graham, born 10 May 1979. The Cabarrus County Department of Social Services first obtained custody of the children on 30 July 1979 when an immediate custody order was entered based upon a petition alleging neglect by the parents. On 1 August 1979 an Order was entered adjudging the children to be neglected children and, with the agreement of the respondent, temporary custody was placed with

petitioner. Following this hearing, respondent was told by the Department of Social Services that he would be responsible for the payment of support for the children. The respondent and his wife Myra Sue left the State of North Carolina. Respondent obtained work but was arrested for simple burglary on 16 October 1979 and was incarcerated in Louisiana. Petitioner wrote to respondent in jail on 19 November 1979 and received a return letter on 27 December 1979 in which respondent stated that he wanted his children when he was released from prison. On 27 December 1979 petitioner again wrote to respondent with information about his children. The mother returned to Cabarrus County and temporary custody of the children was given to her on 18 April 1980, with permanent custody being granted on 19 September 1980. On 20 March 1981 custody was again placed with petitioner pursuant to another immediate custody order. On 10 April 1981 temporary custody of the children was given to the petitioner. Following repeated attempts to contact the respondent, petitioner sent a certified letter to Mr. Graham on 27 March 1981 at his place of imprisonment in Louisiana which was acknowledged by return receipt by the prison officials although respondent denied receiving the correspondence. On 2 June 1981 Graham was released from prison. Mrs. Graham voluntarily released her children to the petitioner for adoption on 17 August 1981. In August respondent violated his parole in Louisiana by coming to the State of North Carolina where he resumed living with his wife and learned that she had given up the children for adoption. On 12 October 1981 respondent was arrested for trespassing and was subsequently transferred to the Cabarrus County jail for the probation violation of leaving the state. Graham telephoned the Cabarrus County Department of Social Services for information about his children on 21 October 1981.

Other pertinent facts found by the trial judge are:

> 14. That the respondent did not write or otherwise contact the petitioner after the letter received December 27, 1979, until after the petition in this proceeding had been filed; that the respondent had no knowledge that the children were placed with the mother from April 18, 1980, until March 20, 1981; that to the knowledge of the respondent, said children had been in foster care in the custody of the petitioner continuously from August 1, 1979; and that the respondent

had no contact with the children and did not attempt to obtain any information regarding the children.

. . . .

23. That except for the letter received by petitioner on December 27, 1979, the respondent has demonstrated no interest or concern for his children; that the respondent has not written to his children or tried to contact them; that he has not contacted the petitioner or tried to obtain any information from the petitioner about his children until October 21, 1981; that respondent feared that if he contacted the petitioner, he would be arrested and reimprisoned; and that it was not until after his arrest and reimprisonment that he decided to contact the petitioner.

24. That the respondent has in the past abused alcohol and is an admitted alcoholic; and that the respondent is a convicted felon and has not demonstrated social stability or socially acceptable behavior.

25. That both of the children are developmentally delayed; that the child Bradley Thomas Graham is mildly mentally retarded; that the children are in need of a home with parents who have above average parenting abilities; and that the children are in need of a home which is both permanent and stable.

Petitioner contends that the above evidence established as a matter of law the requisite grounds under G.S. 7A-289.32 to terminate respondent's parental rights. G.S. 7A-289.31(a) provides that:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

The parties stipulated that the issues before the trial judge were alleged violations of G.S. 7A-289.32(2) and (4). Inasmuch as the court did determine that the best interests of the children would

be served by termination of respondent's parental rights, the question to be resolved is whether the facts found do indeed show a violation of the applicable statutes. If either of the two grounds stated is supported by these findings of fact, termination of parental rights would be proper. *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982).

G.S. 7A-289.32(2) provides that a court may terminate parental rights if it finds that:

> The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-278(4).

G.S. 7A-278(4), now G.S. 7A-517(21), defines a neglected juvenile as follows:

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

"Abandonment" as contemplated by G.S. 7A-517(21) has been characterized as:

> "any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . ."
>
> "Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child . . . ."

In re Apa, 59 N.C. App. 322, 324, 296 S.E. 2d 811, 813 (1982), *quoting In re Cardo*, 41 N.C. App. 503, 507-508, 255 S.E. 2d 440, 443 (1979).

We have no difficulty in concluding that respondent's lack of involvement with his children for a period of more than two years establishes the pattern of abandonment and neglect which is encompassed by G.S. 7A-289.32(2). One communication in a two year period does not evidence the "personal contact, love, and affection that inheres in the parental relationship." *Id.* The fact that the respondent was incarcerated for a good portion of this period does not provide any justification for his all but total failure to communicate with or even inquire about his children for whom he professes such concern at this late date. *See, In re Burney,* 57 N.C. App. 203, 291 S.E. 2d 177 (1982).

Since we find that the findings of fact would support the termination of respondent's parental rights under G.S. 7A-289.32(2), we need not reach the issue of whether termination would be proper under G.S. 7A-289.32(4). *See, In re Moore,* 306 N.C. 394, 293 S.E. 2d 127 (1982).

We conclude that the circumstances of this case would indeed justify termination of parental rights and would be in the best interests of the minor children. The order of the trial court is hereby

Reversed and remanded.

Judges WELLS and BECTON concur.

WILLIAM R. COATS v. LOUIS A. JONES AND WIFE, ALICE JONES

No. 8210SC928

(Filed 5 July 1983)

Contracts § 6.1— construction contract—plaintiff not licensed contractor—issue as to plaintiff's representations—summary judgment improper

In an action in which plaintiff sought to recover sums from defendants for supervising the construction of their residence, the trial court erred in entering summary judgment for defendants on the ground that plaintiff was engaged in general contracting without a license pursuant to G.S. 87-1. Under the forecast of evidence, there remained to be tried genuine material issues as to plaintiff's contractual relationship with defendants, particularly as to whether plaintiff undertook to construct defendants' residence as a general

contractor within the statutory definition or whether plaintiff was engaged as a job supervisor for a salary, not within the statutory definition.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 25 May 1982 in WAKE County Superior Court. Heard in the Court of Appeals 9 June 1983.

In his unverified complaint, plaintiff set out four causes of action. In his first cause, plaintiff alleged, in summary, that in July, 1978, plaintiff and defendants entered into an agreement wherein defendants agreed to pay plaintiff a fee of $5,500.00 to supervise the construction of a resident for defendants, and that after credit for all payments made by defendants, there was an outstanding balance due plaintiff of $1,900.00, which defendants had failed and refused to pay.

In his second cause, plaintiff alleged further that pursuant to his performing the agreement alleged in his first cause, plaintiff purchased materials, hired subcontractors, and provided labor for defendants' residence "which were outside the terms of the agreement," and that certain of these expenses and obligations incurred by plaintiff on defendants' behalf, in the sum of $766.08, had not been paid by defendants.

In his third cause, plaintiff alleged that in addition to furnishing supervision of the construction of defendants' residence, plaintiff provided and performed "extra labor and services" to defendants, the value of which was in the sum of $1,694.00, which defendants had failed and refused to pay.

In his fourth cause, plaintiff alleged that plaintiff had replaced defective paneling in defendants' residence; that the supplier of the defective paneling paid to defendants the sum of $1,560.00 for plaintiff's labor in replacing the paneling; but that defendants had failed and refused to pay said sum to plaintiff for his labor.

In their verified answer, defendants denied all plaintiff's essential allegations, and raised additional defenses in which they alleged that plaintiff had falsely represented to defendants that plaintiff was a licensed contractor, and that the contract between plaintiff and defendants being for more than $30,000.00 was in vio-

lation of law and was therefore unenforceable; that plaintiff had breached his contract with defendants; and that if plaintiff was entitled to any recovery, defendants were entitled to set-offs against defendants. Defendants also counterclaimed for breach of contract and for plaintiff's negligence in carrying out his contractual duties. Plaintiff replied to defendants' counterclaims, denying defendants' essential allegations.

After the pleadings were joined, the trial court granted defendants' motion for summary judgment as to all of plaintiff's claims, reserving defendants' counterclaim for trial. In his judgment, the trial court certified that there was no just reason to delay entry of final judgment as to plaintiff's claims.

Manning, Fulton & Skinner, by Michael T. Medford and Charles E. Nichols, Jr., for plaintiff.

Blanchard, Tucker, Twiggs, Denson & Earls, P.A., by Doug B. Abrams and Margaret S. Abrams, for defendants.

WELLS, Judge.

The issue presented in this appeal is whether the materials before the trial court showed conclusively that plaintiff was engaged in general contracting without a license and was for that reason barred from any recovery under his agreement with defendants. We answer the issue for plaintiff and against defendants, and reverse the judgment of the trial court.

At the time the agreement in dispute here was entered into, the statutory definition of a general contractor was as follows:

> Sec. 87.1. *"General contractor" defined; exemptions.*
>
> For the purpose of this Article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand ($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 ($30,000) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

> This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments.[1]

The general rule is that when an unlicensed person contracts with an owner to construct a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. *See Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *see also Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *Revis Sand and Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E. 2d 580 (1980).

It is not disputed in this case that at the time the agreement between the parties was entered into, plaintiff was not licensed as a general contractor. Neither is it disputed that defendants' residence cost in excess of $30,000.00 to build. The dispute in the heart of this case is whether plaintiff undertook to contract, or contracted, with defendants to construct their residence *as a general contractor.* In his complaint, plaintiff did not assert that he was a general contractor, but alleged that he was employed for a fixed amount to provide supervision of the construction of defendants' residence. Our courts have held that the issue of whether a general contractor status has been agreed upon must be determined by the cost of the undertaking by the contractor, *Vogel v. Supply Co., supra, Fulton v. Rice*, 12 N.C. App. 669, 184 S.E.2d 421 (1971), and that the statutory definition must be strictly construed and its scope not extended beyond the statutory definition. *Vogel, supra; Fulton, supra.*[2]

A defendant is entitled to summary judgment only when he can produce a forecast of evidence, which when viewed most favorably to plaintiff would, if offered by plaintiff at trial, without more, compel a directed verdict in defendant's favor, *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982) or if defendant can show through discovery that plaintiff cannot support his claim, *see Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). Defend-

1. This statutory definition was substantially amended, effective 1 January 1982. *See* Ch. 783, 1981 Session Laws.

2. The General Assemby, in its 1981 amendment, *see* footnote 1, *supra*, has broadened the definition of a general contractor so as to include those who superintended or managed a project for another, the cost of which is $30,000.00 or more.

ants' forecast of evidence consisted of the deposition of defendant Louis Jones, who stated, in summary, the following events and circumstances involving the construction of defendants' residence. Defendants met plaintiff through their architect, Robert Andron, who told defendants that plaintiff was a licensed contractor and that plaintiff had built a house for Andron. At their first meeting, Andron told defendants that plaintiff preferred not to build under contract because plaintiff did not have the financial backing necessary for a "turnkey operation," that plaintiff preferred to supervise the construction and that plaintiff "would participate in the planning, estimating costs, hiring and supervising subcontractors and things of this nature." Plaintiff and defendants reached an agreement, but "there were no terms—we didn't get a price from Mr. Coats as to his service at that time." Later, on 24 August 1978 defendants agreed to pay plaintiff $5,500.00. This agreement was noted in writing on a copy of a cost itemization for defendants' residence submitted to Raleigh Savings and Loan Association, signed by defendant Louis Jones as "owner" and by plaintiff as "builder." The notation of agreement as to plaintiff's compensation was as follows: Salary, William R. Coats, $5,500.00; paid $500.00; due $5,000.00. Defendant Louis Jones obtained and paid some contractors for various phases of construction; plaintiff obtained others and ordered supplies and materials, but defendants paid all the bills. Defendants were present at the site on a daily basis, providing their own supervision of the construction.

In his deposition, plaintiff generally stated that he was not employed as a contractor, but as an estimator and supervisor, and that he did not perform as a general contractor, but that defendants did their own contracting for the various phases and parts of the construction of their residence.

Under this forecast of evidence, there remain to be tried genuine material issues as to plaintiff's contractual relationship with defendants, particularly as to whether plaintiff undertook to construct defendants' residence as a general contractor within the statutory definition or whether plaintiff was engaged as a job supervisor for a salary, not within the statutory definition. Summary judgment for defendants was incorrectly entered.

Reversed and remanded.

Judge HEDRICK dissents.

Judge PHILLIPS concurs.

Judge HEDRICK dissenting.

In my opinion, summary judgment for defendants was proper. *See Phillips v. Parton*, 59 N.C. App. 179, 296 S.E. 2d 317 (1982) *aff'd*, 307 N.C. 694, 300 S.E. 2d 387 (1983), and cases cited therein.

THE SALVATION ARMY v. W. F. WELFARE, JR., WACHOVIA BANK & TRUST COMPANY, N.A., EXECUTOR OF THE ESTATE OF PETRUS M. KOENS, AND AMERICAN SAVINGS & LOAN ASSOCIATION

No. 828SC627

(Filed 5 July 1983)

Banks and Banking § 3; Contracts § 12.1 — joint savings account — property passing outside will

Where the decedent and the individual defendant signed a signature card creating a joint savings account with right of survivorship, the signature card was a contract which in clear and unambiguous terms expressed the intent of the parties as to entitlement to the funds remaining in the account upon the death of either. It needed no extrinsic evidence to explain its expression of intent. Therefore, the trial judge properly dismissed a count in plaintiff's complaint which alleged that at the time decedent signed the signature card he did not understand or intend that his signing the card would allow the individual defendant to be the sole owner of the entire deposit upon the death of decedent.

APPEAL by plaintiff and defendant W. F. Welfare, Jr. from *Llewellyn, Judge*. Order entered 5 May 1982 in WAYNE County Superior Court. Heard in the Court of Appeals 21 April 1983.

Plaintiff Salvation Army is the beneficiary under the will of Petrus M. Koens, the decedent. Defendant W. F. (Billy) Welfare, Jr. asserts survivorship rights to a joint savings account at American Savings and Loan Association opened by the decedent on 17 November 1978 in the names of Petrus M. Koens and W. F. Welfare, Jr., the signature card being signed by both Koens and Welfare.

Salvation Army v. Welfare

The Salvation Army brought this action to have the funds in the savings account, over $50,000.00, declared the property of decedent's estate and distributed under Koens' will. Plaintiff's complaint sets out three alternative counts in support of plaintiff's claim. Count one alleges that at the time Koens signed the signature card he did not understand or intend that his signing the card would allow Billy Welfare to be the sole owner of the entire deposit upon the death of Koens. Count two alleges that at the time he signed the signature card, Koens lacked sufficient mental capacity to understand the effect of his signing. Count three alleges that the account was opened by Koens as a result of the undue influence of a third person who influenced Koens to open a joint account with Billy Welfare for the purpose of enabling Welfare to withdraw funds from said account for the benefit of the decedent, such other person not realizing that Welfare would become the owner of the funds in the account in the event Koens should die.

After discovery, defendant Welfare moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. After reviewing the materials before him, the trial judge found that no genuine issue of material fact existed as to Count one of plaintiff's complaint and granted summary judgment for defendant Welfare on that count. Finding that genuine issues of material fact existed as to both Count two and Count three, the trial judge ordered that the action be tried by a jury on those counts. Plaintiff appealed from the partial grant of defendant's motion and defendant Welfare appealed from the partial denial of the motion. Subsequent to the filing of this case in this Court, plaintiff moved this court to dismiss defendant Welfare's appeal as an interlocutory order under G.S. 1A-1, Rule 54(b) as not affecting a substantial right under G.S. 1-277 or G.S. 7A-27. This Court dismissed defendant Welfare's appeal by an order of 23 August 1982. Thereafter, defendant Welfare petitioned this Court to rehear plaintiff's motion to dismiss defendant's appeal. Defendant's petition to rehear was denied by order of this Court dated 24 September 1982.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith, for plaintiff.

Spence & Spence, by Robert A. Spence, Sr., for defendant.

WELLS, Judge.

This case reaches us in an unusual procedural context. First, we note that the judgment below did not finally determine all of the claims raised by the pleadings, two of plaintiff's claims being left for trial by the trial court's judgment. Defendant Welfare's appeal from the trial court's denial of his motion for summary judgment as to plaintiff's second and third counts was the subject of a motion to dismiss, in this Court. A previous panel having granted that motion, we are bound by that action and cannot further consider defendant Welfare's appeal. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983).

The sole issue we determine in this opinion is whether the trial court properly granted defendant Welfare's motion for summary judgment as to plaintiff's first count. Plaintiff strongly contends that the materials before the trial court indicate or raised a triable issue as to whether Koens *intended* to make a gift to Welfare of the funds on deposit in the joint account. We now deem it appropriate to comment on another unusual procedural aspect of this case. It is well established that on a motion for summary judgment the burden is on the movant to (1) show to the trial court that an essential element of the opposing party's claim is nonexistent, or (2) of showing to the trial court through discovery that the opposing party cannot produce enough evidence to support an essential element of his or her claim. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). If the moving party satisfies this burden, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The record before us shows that there were four depositions considered by the trial court: those of defendant Welfare, Ruby Blackmon, Viola McIlhenny, and Louise Langston. While the record does not indicate who sponsored these depositions upon the hearing on defendant Welfare's motion, it is clear from the context of the depositions that all four were taken by plaintiff's counsel. In addition to these depositions, the trial court had before it a stipulation by the parties as to the joint account agreement, through which the agreement card itself was placed before the trial court. We can only assume from the nature of the record before us that it was the judgment of the trial court that the production of the agreement itself, by stipulation, was sufficient to meet defendant Welfare's burden on his motion for sum-

mary judgment as to plaintiff's first count, and that the trial court then considered the depositions taken by plaintiff in the context of responding to defendant's proof (or evidence) of the joint account agreement. It is in this context that we consider and dispose of plaintiff's contention that the trial court erred in granting defendant Welfare's motion.

The heart of plaintiff's argument is that it is entitled to have the issue of Koens' *intent* to make a gift to Welfare submitted to a jury. We disagree. G.S. 41-2.1, in pertinent part, contains provisions under which joint accounts with rights of survivorship may be established in banking institutions.

> Sec. 41-2.1. *Right of survivorship in bank deposits created by written agreement.*—
>
> (a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.
>
> (b) A deposit account established under subsection (a) of this section shall have the following incidents:
>
> (1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.
>
> . . .
>
> (3) Upon the death of either or any party to the agreement, the survivor, or survivors, become the sole owner, or owners, of the entire unwithdrawn deposit . . . .
>
> . . .

The signature card in evidence in this case closely conforms to the provisions of the statute, and contains a provision that "in case of the death of either or any of [the owners] the survivor or survivors shall be the sole owner or owners of the entire

account." While it is settled law that the heart of a contract is the intention of the parties, *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973), it is also settled law that when a contract is in writing and free from any ambiguity which require resorting to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law to be determined by the Court. *Id.* The contract in dispute in this case, in clear and unambiguous terms, expresses the *intent* of the parties as to entitlement to the funds remaining in the account upon the death of either. It needs no extrinsic evidence to explain its expression of intent; and indeed, to allow extrinsic evidence on the issue of intent expressed in such agreements would substantially defeat and frustrate the very purpose of such agreements.

The judgment of the trial court is, in all respects,

Affirmed.

Judges BECTON and EAGLES concur.

BOBBY LEE MOORE v. DR. JOYCE REYNOLDS

No. 8221SC831

(Filed 5 July 1983)

1. Evidence § 50— medical opinion testimony properly admitted

The trial court properly allowed the video tape testimony of a medical doctor who, in response to a question on cross-examination, answered that after review of defendant's deposition and the medical report, he felt the treatment rendered by defendant was appropriate. Plaintiff did not inform the court of his objection to the question prior to trial, as provided in G.S. 8-81, the medical expert was allowed to testify without objection prior to the opinion question that he had reviewed the X-ray reports and read the emergency room records and defendant's deposition, and after the objected testimony, the medical expert repeated his opinion that the treatment was appropriate in response to a hypothetical question to which there was no objection.

2. Physicians, Surgeons and Allied Professions § 17.3— failure to properly diagnose shoulder dislocation—sufficiency of evidence for malpractice

The evidence was insufficient to establish medical malpractice on the part of a doctor who treated plaintiff and failed to discover a shoulder dislocation where the evidence tended to show that as a result of an injury, a large knot

formed on plaintiff's shoulder, but he continued to work; two days later he went to the emergency room and was examined by a woman; an X-ray was taken of his shoulder while he was in a horizontal position; the defendant informed plaintiff that blood deposits had formed in his shoulder; she gave him a prescription to dissolve the blood deposits, recommended he use a heating pad and advised him that he could return to work; the plaintiff consulted another physician several weeks later, and after having an X-ray taken in a vertical position, the new physician discovered that plaintiff had a dislocated collarbone and performed surgery.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 25 March 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 May 1983.

This action involves a medical malpractice claim brought by plaintiff against defendant-physician for negligent treatment rendered by defendant in the Forsyth Memorial Hospital on 19 February 1977. Plaintiff appeals from judgment granting defendant's motion for a directed verdict.

Lewis and Bowden by Michael J. Lewis and Teresa G. Bowden for plaintiff appellant.

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

BRASWELL, Judge.

[1] Plaintiff first argues that the trial court erred in admitting testimony of the medical expert witness on cross-examination in response to a question containing facts unsupported by the evidence. Dr. Robert Underdal, an orthopedic surgeon, treated plaintiff and performed surgery on him after his accident. Dr. Underdal testified by means of a video tape deposition. After Dr. Underdal had testified extensively on direct examination, he was asked this question by defense counsel on cross-examination:

> "Q. All right. Dr. Underdal, based upon the deposition of Dr. Reynolds and the emergency room record and the X-rays and the X-ray report, do you have an opinion, satisfactory to yourself, as to whether or not the treatment rendered by Dr. Reynolds was in accord with the standard and accepted medical practice and procedures in emergency rooms in Winston-Salem and similar communities?"

Dr. Underdal answered that after review of defendant's deposition and the medical report, he felt the treatment rendered by defendant was appropriate. Plaintiff points out that the hospital records were not introduced into evidence until the direct examination of defendant, which occurred after the doctor's testimony, and that defendant's deposition was never introduced into evidence.

The record shows that plaintiff offered into evidence the two depositions of Dr. Underdal in their entirety. It does not appear from the record that plaintiff informed the court of his objection to the question prior to trial, as provided in G.S. 8-81. It was particularly important that prior objection be made in this case since it was a video tape deposition and an objection would have to be edited out so the jury would not hear it. In addition, Dr. Underdal was allowed to testify without objection prior to the opinion question that he had reviewed the X-ray reports and read the emergency room records and defendant's deposition. Further, the record shows that after the objected testimony, Dr. Underdal repeated his opinion that the treatment was appropriate in response to a hypothetical question to which there was no objection. The admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979); *Shelton v. R.R.*, 193 N.C. 670, 139 S.E. 232 (1927); 1 Brandis on North Carolina Evidence § 30 (1982).

Some of this problem arises solely because of the nature of the video tape deposition, since at the time of the depositions, defense counsel could not ask Dr. Underdal if he had heard Dr. Reynolds' testimony at trial. Plaintiff decided when to introduce the hospital records, and the order of evidence which he chose should not prevent the expert witness from testifying that he based his opinion on a review of the medical records and deposition. Finally, plaintiff was not prejudiced by admission of this testimony since the case was not decided by a jury. We find no merit to this assignment of error.

[2] Plaintiff next contends that the court erred in granting defendant's motion for a directed verdict. A motion for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure presents the question of whether the evidence was suffi-

cient to entitle the plaintiff to have a jury pass on it. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). The question before this Court is the same as was before the trial court: whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). In a negligence case, the evidence, taken in the light most favorable to plaintiff, must tend to support all essential elements of actionable negligence. *Id.*

Pursuant to G.S. 90-21.12, the standard of proof necessary to establish medical malpractice is as follows:

> "In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

In malpractice cases, the plaintiff must show by testimony from a qualified expert "that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the same or similar communities *and* that defendant's treatment proximately caused plaintiff's injury." *Tripp v. Pate*, 49 N.C. App. 329, 332, 271 S.E. 2d 407, 409 (1980); *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978).

Applying these principles to the evidence presented at trial, we find that plaintiff's evidence tended to show the following. Plaintiff was injured on the job on 17 February 1977. As a result of the injury, a large knot formed on his shoulder, but plaintiff continued to work. Two days later plaintiff went to the emergency room at Forsyth Memorial Hospital. His initial examination was conducted by a woman in a white uniform. An X-ray was then taken of his shoulder while he was in a horizontal position. Dr. Reynolds, the defendant, informed plaintiff that blood deposits had formed in his shoulder. She gave him a prescription to

dissolve the blood deposits, recommended he use a heating pad and advised him that he could return to work. Plaintiff continued to experience severe pain and weeks later consulted Dr. Underdal, an orthopedic surgeon. Dr. Underdal ordered a stress X-ray in which the patient remains in a vertical position. He discovered that plaintiff had a dislocated collarbone and performed surgery on plaintiff on 14 April 1977. The operation was unsuccessful, and Dr. Underdal performed additional surgery on 10 April 1978. Plaintiff continued to have limited use of his arm, pain and sleeplessness and was unable to perform his job to the same extent he had prior to the accident.

Dr. Underdal stated that if an orthopedic surgeon had seen plaintiff in the emergency room, he would have recommended that plaintiff be admitted to the hospital and that surgery be performed the following day. If this treatment had been performed, plaintiff would probably have a lesser degree of disability than he has and the second operation would not have been necessary.

In response to plaintiff's hypothetical questions, Dr. Underdal stated that he felt the treatment and examination of plaintiff deviated from generally accepted medical practice in Winston-Salem because the initial examination should have been conducted by a physician and because the type of X-ray used was improper. However, he admitted on cross-examination that his answers depended upon the facts given in the hypothetical questions. Plaintiff presented mere speculation that he was initially examined by a nurse rather than a physician. Plaintiff called defendant as an adverse witness for the limited purpose of introducing the emergency room records. Her testimony indicated that she initially examined plaintiff, that she personally took his history, requested the X-rays, made the diagnosis and ordered treatment. The hospital records were entirely in her handwriting. The hospital records were introduced into evidence by plaintiff, and there has been no question raised as to their authenticity. Plaintiff's testimony that he did not see defendant before the X-rays were taken conflicts with the uncontradicted physical evidence that defendant wrote the results of her examination of plaintiff and ordered that X-rays be taken. In such a case, the undisputed physical facts control. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977); *Jones v. Schaffer*, 252 N.C. 368, 114 S.E. 2d 105 (1960).

Defendant stated that she believed plaintiff had contusion of the right shoulder and that she never suspected that he had a dislocated shoulder. Dr. Underdal stated that the treatment performed by defendant was sufficient for contusion. He also stated that in some cases, a standard X-ray would reveal dislocation. He concluded that defendant's treatment of plaintiff was not inappropriate. Since plaintiff called defendant to testify as his own witness in order to prove his case-in-chief, he cannot complain when her testimony fails to do so. *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972).

We find, as did Judge Wood, that plaintiff's evidence failed to establish negligence by Dr. Reynolds and failed to show that any action by her was a proximate cause of any injury to plaintiff. Plaintiff failed to show through expert testimony that defendant failed to exercise due care in her treatment of plaintiff or to use her best judgment in advising the course of treatment. Plaintiff merely speculated that his initial examination was conducted by a nurse but he admitted that he did not know who the person was or her professional capacity. Plaintiff presented no evidence that another emergency room physician who conducted an examination of plaintiff and read the X-rays would have diagnosed the injury different from that done by defendant. He failed to prove through expert testimony that the treatment administered by defendant violated the standard of medical care in the community and that such treatment proximately caused injury to plaintiff. *Ballenger v. Crowell, supra.* Evidence which raises only a conjecture of medical malpractice should not be submitted to the jury. *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *disc. rev. denied*, 301 N.C. 89 (1980).

Judgment granting a directed verdict for defendant is

Affirmed.

Judges ARNOLD and WEBB concur.

ZICKGRAF ENTERPRISES, INC., D/B/A NANTAHALA LUMBER COMPANY v. WAYNE YONCE, DENNIS HURST AND WIFE, LILLIAN HURST, WILLIAM O. BUTLER AND WIFE, EMILY J. BUTLER, JOHN EDWIN HENSON, TRUSTEE, CEDAR HIGH CORPORATION, H. S. WARD, JR., TRUSTEE, AND CLYDE SAVINGS AND LOAN ASSOCIATION

No. 8230SC845

(Filed 5 July 1983)

Contracts § 6.1 — unlicensed contractor — not preventing subcontractor from recovery on contract

The inability of a general contractor, because of noncompliance with a licensing requirement, to recover on a contract with a property owner will not prevent a subcontractor as subrogee from recovery on the rights created by that same contract.

APPEAL by defendants Butler from *Gaines, Judge*. Order entered 7 June 1982 in Superior Court, JACKSON County. Heard in the Court of Appeals 20 May 1983.

Plaintiff instituted this action alleging that it was owed money for building materials which it delivered pursuant to a contract with the general contractors for the defendants Butler to be used in the construction of the Butlers' home. Attached to the verified complaint was a claim of lien filed against the Butler property by plaintiff as a first tier subcontractor. The defendants Butler filed a motion for summary judgment which was denied by the trial judge. A further motion for rehearing was also denied. From denial of their motions, defendants appeal.

Coward, Coward & Dillard, by Orville D. Coward, Jr., for plaintiff-appellee.

Downs & Henning, by James U. Downs, for defendants Hurst-appellees.

Siler & Philo, by Steven E. Philo, for defendants Butler-appellants.

EAGLES, Judge.

Defendants argue but one issue from the trial judge's denial of their motion for summary judgment. They contend that summary judgment should have been granted as a matter of law because plaintiff is a first-tier subcontractor claiming rights from the owners of property through subrogation under an unlicensed general contractor.

As a general rule, an order which denies a motion for summary judgment is not appealable. *Hill v. Smith*, 38 N.C. App. 625, 248 S.E. 2d 455 (1978). However, in our discretion we have chosen to review the trial judge's order because of the significance of the legal issue presented. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975).

The pertinent provision of the trial judge's order denying defendants' motion for a rehearing on summary judgment states as follows:

> 6. The failure of the defendant general contractors to be licensed as general contractors as is required by Article I, Chapter 87 of the North Carolina General Statutes is a defense which may be asserted by the defendant land owners Butler against said general contractors on any claim asserted by said general contractors against the defendant land owners based on the construction and work; however, such is not a defense which the defendant land owners Butler may assert against the plaintiff claiming rights of subrogation accorded a first tier subcontractor under Article II of Chapter 44 of the North Carolina General Statutes.

There is no dispute that defendants Yonce and Hurst were general contractors who undertook to construct a house for the defendants Butler at a price exceeding $30,000. It is also acknowledged that the general contractors had not at any time substantially complied with the applicable mandatory licensing requirements of G.S. 87-10. Our courts have uniformly held that a general contractor within the meaning of G.S. 87-1, who is not licensed pursuant to statute, may not recover against the owner of the property for breach of the construction contract itself or on *quantum meruit*. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977). However, since G.S. 87-13 provides a criminal penalty for violation of the licensing requirements, the statute must be strictly construed. Its scope may not be extended by implication beyond the clear meaning of the statutory language so as to impose sanctions upon offenses by those persons not intended to be regulated. *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). Consequently, the court in *Vogel* concluded that the licensing requirements of G.S. 87-1 *et*

seq. do not apply to subcontractors. The *Vogel* court also held that the licensing statutes do not affect the rights and liabilities between contractors and subcontractors where the public interest is not involved.

We must now resolve the question before us of whether the inability of a general contractor, because of noncompliance with a licensing requirement, to recover on a contract with a property owner will also prevent a subcontractor as subrogee from recovery on the rights created by that same contract. We hold that there is no bar on this ground to the subcontractor's legitimate claim. The failure of a general contractor to be licensed does not render "void" the contract between the contractor and the owner. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). The nature of the transaction is still extant, with the *proviso* that in an action brought against the owner by the general contractor, the owner may assert against the general contractor the affirmative defense of failure to be properly licensed. This fulfills the purpose of the licensing statute which is the protection of the public against incompetent builders. *Cf., Sand and Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E. 2d 580 (1980). The licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party. Our courts will not impose penalties for the failure to comply with licensing requirements in addition to those specifically set out in the statute. We perceive no injury to the public, as contemplated by the licensing statutes, which will arise from the enforcement of a lien by a subcontractor where the lien arises out of a valid contract between an unlicensed general contractor and a property owner. We therefore hold that the trial judge was correct in his denial of defendants' motion for summary judgment on this ground.

The order below is

Affirmed.

Judges WHICHARD and JOHNSON concur.

Casstevens v. Casstevens

GRACE H. CASSTEVENS (WIDOW); MARTHA JANE CASSTEVENS, SINGLE; DOROTHY JEAN C. KING AND HUSBAND, FRED F. KING; VIOLA K. CASSTEVENS (WIDOW); AND HELEN BETH C. CLARK AND HUSBAND, PAUL GENE CLARK v. THELMA S. CASSTEVENS (WIDOW); HAROLD H. CASSTEVENS AND WIFE, WILMA C. CASSTEVENS; JAY THAD CASSTEVENS AND WIFE, JACQUELINE B. CASSTEVENS; NELSON M. CASSTEVENS, SR., AND WIFE, ETHEL C. CASSTEVENS; NELSON M. CASSTEVENS, JR., AND WIFE, BARBARA T. CASSTEVENS; NORA S. SPROUSE (WIDOW); JAY CASSTEVENS, EXECUTOR OF THE ESTATE OF MARVIN HUGH SPROUSE

No. 8223DC607

(Filed 5 July 1983)

Adverse Possession § 25.2— constructive ouster—letters from petitioner and attorneys as tolling statute of limitations

Respondents failed to prove adverse possession under G.S. 1-40 where several letters from one of the petitioners and from their attorney were sufficient to toll the running of the adverse possession statute. The letters were sufficient to be construed as a demand for rents, profits or possession, and in North Carolina, such was sufficient to prevent a constructive ouster.

APPEAL by petitioners from *Ferree, Judge.* Judgment entered 8 April 1982 in District Court, YADKIN County. Heard in the Court of Appeals 20 April 1983.

This is a special proceeding for sale of lands for partition among tenants in common filed by the petitioners. In their answer, the respondents alleged sole seisin by adverse possession against their co-tenants for more than 20 years.

The petitioners are the collateral heirs of Tress C. Sprouse, who died intestate on 21 March 1960. Tress owned a one-half interest in a 52-acre tract of land in Yadkin County that she acquired in a 1952 special proceeding to divide land owned by her father at his death. That land, known as lots four and five, is the subject of this dispute.

Tress was married to Hugh Sprouse until her death. Tress and Hugh acquired the other one-half interest in the 52-acre tract by purchase.

The respondents include Nora S. Sprouse, the second wife of Hugh Sprouse, and Jay and Harold H. Casstevens, the nephews of Hugh Sprouse.

Hugh died testate on 30 January 1979. His will passed his interest in the lands in controversy to Nora for life, with a vested remainder to Jay and Harold. Nora renounced her share under Hugh's will and filed a dissent to that will.

Tress, Hugh, or Nora never lived on the lands in dispute. Hugh farmed and raised tobacco on the land until about 1975 or 1976 when he had a stroke. He then rented the farm until his death in 1979. After Hugh's death, rent was paid to Jay as the Administrator CTA of Hugh's estate.

On 17 October 1979, the attorney representing Hugh's estate wrote to a number of the parties about a possible cloud upon the title to lots four and five that Tress acquired in the 1952 special proceeding. He advised that under the intestate succession laws in effect at Tress's death on 21 March 1960, her interests in lots four and five passed to her collateral heirs, which includes the petitioners. The attorney suggested four options including conveyance to Hugh's devisees under his 1979 will or assertion of claims to the land.

Helen Clark, a petitioner here, wrote the estate's attorney on 28 November 1979 to inform him that she would seek remuneration or a deed for her share. On 18 December 1979, the petitioners' attorney wrote the estate's attorney seeking an accounting of his clients' interest and proposing an appraisal and negotiated sale of their interests.

The estate's attorney replied to the petitioners' attorney on 2 January 1980. In that letter, he stated that respondents Jay and Harold were going to seek independent counsel to reply to the petitioners' proposal.

The petitioners' attorney wrote Jay on 8 February 1980 to restate his proposal of 18 December 1979. Jay did not respond to this letter even though a response was requested.

The petitioners filed their petition for a partition sale on 30 June 1980. The respondents alleged sole seisin by adverse possession against their co-tenants for more than 20 years in their answer.

The case was heard in District Court by stipulation of the parties and was tried before a jury. One issue was submitted to the jury:

1. Did the Respondents Jay Casstevens, Harold Casstevens and Nora Sprouse acquire sole title to a one-half interest in the 52 acre tract of land in controversy by adverse possession?

   ANSWER: Yes.

From that verdict and a judgment in favor of the respondents, the petitioners appealed.

Randleman, Randleman & Randleman, by Richard N. Randleman, for the petitioner-appellants.

Shore & Hudspeth, by Henry B. Shore and N. Lawrence Hudspeth, III, for the respondent-appellees.

ARNOLD, Judge.

This case presents two questions. First, did the respondents adversely possess the land in question to the exclusion of their co-tenants, the petitoners? Second, did the response of the petitioners to the 17 October 1979 letter toll the adverse possession by the respondents, or was the filing of their petition for partition the only act which could halt the running of time?

Under G.S. 1-40, adverse possession against an individual without color of title must run for 20 years before title ripens in the adverse possessor and is extinguished in the former owner. Adverse possession is defined "as the actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another" for the statutory period. J. Webster, Real Estate Law in North Carolina § 286 (Hetrick rev. 1981).

Before a person can adversely possess land held in co-tenancy, there must be an ouster of his co-tenants. Although older cases speak of an actual ouster, *see* Annot., 82 A.L.R. 2d 5, 56-63 (1962), North Carolina adheres to the rule of constructive ouster.

That rule, which was first explained in *Thomas v. Garvan*, 15 N.C. 223 (1833), presumes the requisite ouster "if one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for twenty years *when there had been no demand for rents, profits or possession.*" *Collier v. Welker*, 19 N.C. App. 617, 621, 199 S.E. 2d 691, 694-95 (1973) (emphasis added) (citations omitted).

Although the facts here do not show an actual ouster, constructive ouster was present from 21 March 1960 to at least 28 November 1979. It was on 28 November 1979 that petitioner Helen Clark notified the estate's attorney that she would seek remuneration for her share. The respondents can "tack" their possession to Hugh's prior adverse possession because they received a claim to the land upon Hugh's death. *See* Webster, *supra*, at § 292.

Even if we assume that the respondents held adversely to the petitioners, their possession and constructive ouster would not allow them to prevail unless they did so for the entire 20 year period. Upon completion of the statutory period, the ouster would then relate back to the initial taking of possession. *Cox v. Wright*, 218 N.C. 342, 11 S.E. 2d 158 (1940); *Collier*, 19 N.C. App. at 621, 199 S.E. 2d at 695. Although this presumption has been criticized, *see*, Note, *Real Property—Adverse Possession Between Tenants in Common and the Rule of Presumptive Ouster*, 10 Wake Forest L. Rev. 300 (1974) cited in *Sheets v. Sheets*, 57 N.C. App. 336, 338, 291 S.E. 2d 300, 301, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 371 (1982), it is the law in our State.

Because the respondents did not oust the petitioners for the requisite 20 years here, we reverse the verdict and judgment in their favor.

Helen Clark's 28 November 1979 letter, the 18 December 1979 letter from the petitioners' attorney to the estate's attorney, and the 8 February 1980 letter from the petitioners' attorney to respondent Jay, were sufficient to toll the running of any adverse possession. Notice that Clark would seek remuneration, and the request by the petitioners' attorney for an accounting and a financial statement, amounted to "a demand for rents, profits or possession" under the case law and the rule of constructive ouster.

Because of our disposition of this case, it is unnecessary to examine the petitioners' other arguments. Since the respondents did not show continuous adverse possession for the statutory period, the jury verdict and judgment were reached incorrectly.

Reversed.

Chief Judge VAUGHN and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. LORENZO JOHNSON

No. 824SC1142

(Filed 5 July 1983)

Robbery § 5.2— armed robbery conviction—failure to instruct on "mere presence"

In a prosecution for armed robbery, the trial court erred in failing to instruct on "mere presence" by the defendant, and the jury was left without judicial guidance as to how to weigh and evaluate the presence of the defendant at the scene of the crime charged.

APPEAL by defendant from *Brown, Judge.* Judgment entered 30 June 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 14 April 1983.

Defendant was indicted for two factually similar armed robberies committed the same evening.

At trial the State presented evidence tending to show that on the evening of 30 January 1982, defendant with Donnell Hawkins and Carlos Thomas was riding around in Hawkins' father's automobile. After picking up a Marine and transporting him to Jacksonville in return for $5.00, Hawkins parked the car at a nightclub and the three men walked across the highway and entered a field. When a Marine crossed the field in which they were standing, Thomas pulled out a knife and robbed the Marine of his wallet. Hawkins was standing behind the Marine with his finger in the Marine's back and defendant was standing in front of the Marine. After Thomas searched the wallet, the three men drove back toward Jacksonville.

They then went to the Jacksonville bus station where they met Tyrone Lewis, a co-defendant whose case was consolidated with defendant's case for trial. Thomas, Lewis and defendant went into the bus station and came back to the car with Marine James Greathouse, Jr. who wanted a ride back to the base. Hawkins drove, Thomas sat on the passenger side in front, and Lewis and the defendant sat on each side of Greathouse in the back seat. At some point, Thomas pulled out a knife and asked Greathouse to hand him his money. After Greathouse handed over his money, he was put out on the street.

The four men then returned to the Jacksonville bus station where Thomas, Lewis and the defendant again went in, shortly

returning to the car with another Marine, David C. Polk, who needed a ride to the base. The seating arrangement was identical to that in the immediately preceding robbery. Polk was robbed and then put out of the car in the same fashion as Greathouse.

Defendant and his three companions returned again to the same bus station and repeated the sequence of events except that the car was stopped by law enforcement officers before the fourth Marine had been robbed.

At the end of the State's evidence, the co-defendants moved for a dismissal on both counts of armed robbery. The trial court granted the motion as to the count of armed robbery of James Greathouse, Jr., but denied the motion as to the count of armed robbery of David C. Polk.

The jury found defendant guilty of armed robbery of David C. Polk but found co-defendant Tyrone Lewis not guilty of the Polk armed robbery.

From judgment entered pursuant to that verdict, defendant appealed.

Attorney General Edmisten by Associate Attorney John R. Corne, for the State.

Ellis, Hooper, Warlick, Waters and Morgan, by Charles H. Henry, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant's appeal raises two assignments of error. First, defendant asserts that the trial court erred when it refused to grant defendant's motion to dismiss the count charging armed robbery of David Polk, because the evidence was insufficient to allow its submission to the jury. Defendant also argues that the trial court erred in its refusal to give a jury instruction that defendant's "mere presence at the scene of the crime, even though he is in sympathy with the criminal act and did nothing to prevent its commission, does not make him guilty of the offense." We hold that the State presented sufficient evidence for the jury to determine whether defendant participated in the armed robbery of David Polk. However, we hold that the trial court should have given defendant's requested instruction on "mere presence,"

and that failure to do so here was reversible error. While the jury's different verdict of "not guilty" for the co-defendant Lewis in the joint trial may be an indication that the jury distinguished between mere presence and active participation in the crime, it is not a sufficient basis on which to excuse the failure to instruct in this case.

Donnell Hawkins, a co-defendant, pleaded guilty and became a witness for the State. He testified that, in the armed robbery of David Polk on 30 January 1982, the defendant and two others went into the bus station and returned to the car escorting Polk. Polk sat between the defendant and another man in the back seat from the time he entered the automobile at the bus station until the time he was forced out of the car after being robbed. Hawkins also testified that the defendant had asked Polk, after Polk had handed over his wallet to Thomas, "what else you got?"

The victim, David Polk, testified that during the robbery one of the men in the back seat with him asked if he had anything else on him. Defendant was seated in the back seat at the time.

The law is well established that "mere presence, even with no effort to prevent the crime, or even with silent approval of or sympathy with the criminal, or even with the intention of assisting, cannot be said to be aiding and abetting unless the intention to assist, if necessary, is in some way communicated to the actual perpetrator of the crime, or unless the person present is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection." 4 N.C. Index 3d, Criminal Law § 9.1; *State v. Moses*, 52 N.C. App. 412, 279 S.E. 2d 59 (1981); *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980).

In the case *sub judice*, in the absence of a "mere presence" instruction, the jury was left without judicial guidance as to how to weigh and evaluate the presence of the defendant at the scene of the crime charged. Admittedly the jury reached differing verdicts for the defendant and co-defendant Lewis on very similar evidence. We believe we may not reliably conclude from the differing results that the jury was able to properly differentiate and distinguish between the very similar misconduct of the defendant and co-defendant, nor may we conclude therefrom that the jury

was properly able to evaluate the evidence correctly without the aid of an instruction on "mere presence."

For the above reasons we

Reverse and remand.

Judges WELLS and BECTON concur.

COASTAL CHEMICAL CORPORATION, LLOYDS, NEW YORK, AND NATIONAL UNION FIRE INSURANCE COMPANY v. GUARDIAN INDUSTRIES, INC., D/B/A DICTOGRAPH SECURITY SYSTEMS

No. 823SC947

(Filed 5 July 1983)

1. **Appeal and Error § 6.3— personal jurisdiction—denial of motion to dismiss—appealability**

Denial of a motion to dismiss for lack of *in personam* jurisdiction is immediately appealable. G.S. 1-277(b).

2. **Constitutional Law § 24.7; Process § 14.3— foreign corporation—personal jurisdiction—minimum contacts**

In an action to recover for breach of warranty of a security system, defendant foreign corporation had sufficient minimum contacts with this State "at or about the time of the injury" to warrant assertion of personal jurisdiction over it pursuant to G.S. 1-75.4(4) and G.S. 55-145(a) where the evidence established that, on an annual basis for the previous five years, defendant had conducted with persons located in North Carolina transactions approximating $50,000.00 in value. Furthermore, defendant had sufficient contacts with this State so that the assertion of personal jurisdiction over it did not offend due process requirements where the evidence further established that defendant owns camera equipment which is leased to commercial establishments doing business in North Carolina; in pursuit of its transactions of business, defendant has sent its employees to North Carolina; defendant has advertised its products or services in North Carolina and has prepared promotional literature which it has distributed to its North Carolina franchisees; defendant has solicited business in North Carolina by mail and otherwise; defendant has manufactured or distributed goods which were sold, used or consumed in North Carolina; and defendant has sold, produced or distributed goods or equipment with the intention that the same be ultimately sold within North Carolina in the ordinary course of business.

3. **Appeal and Error § 6.6— denial of motion to dismiss—premature appeal**

Defendant had no right of immediate appeal from the denial of its motion to dismiss for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2) which provides that

where the matter in controversy in a products liability action exceeds the sum of $10,000.00, the pleadings shall not state the demand for monetary relief but only that the relief sought is damages in excess of $10,000.00. G.S. 1-277(a); G.S. 7A-27(d)(2), (3) and (4).

APPEAL by defendant from *Reid, Judge.* Order entered 26 July 1982 (for 16 July 1982) in Superior Court, PITT County. Heard in the Court of Appeals 10 June 1983.

Defendant appeals from an order denying its motion to dismiss for want of *in personam* jurisdiction and for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2) (Cum. Supp. 1981).

Trauner, King & Cohen, by Russell S. Thomas, and Charles R. Hardee, for plaintiff appellees.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and R. Thompson Wright, for defendant appellant.

WHICHARD, Judge.

I.

Plaintiffs' original complaint alleged the following:

On or about 19 February 1979 a warehouse belonging to plaintiff Coastal Chemical Corporation (hereafter Coastal), and the goods therein, were destroyed by fire. The warehouse was protected by a security system which was programmed to call various authorities in the event fire or smoke was detected by its sensors. The system failed properly to operate or to notify the authorities. If the system had performed properly, the fire would have been extinguished with significantly less damage.

Plaintiffs sought damages in the sum of $2,325,410.25.

Defendant moved, pursuant to G.S. 1A-1, Rules 12(b) and 8(a)(2), that the complaint be stricken, the service of process quashed, and the action dismissed. The grounds alleged were lack of *in personam* jurisdiction over the defendant, a corporation organized and existing under the laws of New Jersey, and plaintiffs' violation of G.S. 1A-1, Rule 8(a)(2), which provides that in products liability actions "the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars . . . ."

Plaintiffs in turn moved for leave to file an amended complaint. The proposed amended complaint contained, *inter alia*, the additional allegations that Coastal had purchased from defendant a surveillance system which defendant designed and manufactured; that defendant was a merchant with respect to this system; that the system was not merchantable, was defective, and was not fit for the ordinary purposes for which such systems are used and did not conform to the affirmations made upon its sale to Coastal; and that its defective condition amounted to a breach of the implied warranty of merchantability. The amended complaint also sought "damages which exceed TEN THOUSAND DOLLARS ($10,000.00)."

The trial court found that defendant had "sufficient minimum contacts with the State of North Carolina to warrant the assertion of jurisdiction over [it] in this State." It thus denied the motion to dismiss for lack of *in personam* jurisdiction.

It also denied the motion to strike the complaint, quash the service of process, and dismiss the action for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2). It found that it had taken note of the pendency of plaintiffs' motion for leave to file an amended complaint, and that it intended to grant that motion. In light of that intention, it found that defendant's motion to dismiss "presents a moot question."

From the order denying its motion to dismiss, defendant appeals.

II.

[1] Denial of the motion to dismiss for lack of *in personam* jurisdiction is immediately appealable. G.S. 1-277(b) (Cum. Supp. 1981). Resolution of the jurisdictional inquiry involves a two-fold determination: (1) whether our statutes permit the courts of this jurisdiction to entertain this action against defendant, and (2) if so, whether the exercise of this power by our courts violates due process of law. *Dillon v. Funding Corp.*, 291 N.C. 674, 675, 231 S.E. 2d 629, 630 (1977).

[2] The trial court found the following in support of its denial of the motion to dismiss for lack of *in personam* jurisdiction:

(a) The defendant owns some camera equipment which is leased to certain commercial establishments who do business in North Carolina.

(b) On an annual basis for the previous five (5) years, the total monetary value of all transactions conducted by and between the defendant and any other persons, whether natural or artificial, located in North Carolina approximates Fifty Thousand Dollars ($50,000.00).

(c) In pursuit of its transactions of business, the defendant has sent its employees to North Carolina.

(d) The defendant has advertised its products or services in North Carolina when seeking new franchisees for Dictograph Security Systems, and defendant has prepared promotional literature which it has distributed to its North Carolina franchisees.

(e) To the extent noted in Paragraph (d) above, defendant has solicited business in North Carolina by mail or otherwise.

(f) Defendant has produced, manufactured or distributed goods which were sold, used or consumed in the State of North Carolina.

(g) Defendant has sold, produced or distributed goods or equipment to East Coast Security Systems and/or Hugh B. Griffin and Melvin D. Williams with the intention that the same be ultimately sold within the State of North Carolina in the ordinary course of business.

Defendant's answers to plaintiffs' interrogatories fully support these findings. The findings in turn fully support the conclusion that defendant has sufficient minimum contacts with this State to warrant assertion of jurisdiction over it in this State pursuant to G.S. 1-75.4(4) (Cum. Supp. 1981) and G.S. 55-145(a) (1982).

Defendant's principal contention with regard to the statutory prong of the jurisdictional inquiry is that the evidence did not show that its activities in North Carolina were "at or about the time of the injury," as required by G.S. 1-75.4(4). The evidence established, however, that on an annual basis for the previous five years defendant had conducted, with natural or artificial persons located in North Carolina, transactions approximating

$50,000 in value. This clearly sufficed to meet the "at or about the time of the injury" requirement. Defendant's argument that the statutory prong of the jurisdictional inquiry has not been met is without merit.

Further, by its acts recited in the findings, which the evidence fully supports, defendant "purposefully avail[ed] 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, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958). The findings thus establish that assumption of *in personam* jurisdiction over defendant by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the due process clause of the fourteenth amendment, and that defendant's contacts with the State are sufficient to satisfy due process requirements. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); *Dillon v. Funding Corp., supra; Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965). Defendant's argument that the due process prong of the jurisdictional inquiry has not been met is without merit.

III.

[3] Defendant also purports to appeal from the denial of its motion to dismiss for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2), which provides that in actions against product manufacturers for property damage arising out of defect or failure in relation to a product, where the matter in controversy exceeds the sum of $10,000, the pleading shall not state the demand for monetary relief, but only that the relief sought is damages in excess of $10,000.

The purported appeal from this portion of the order is interlocutory. The order in this respect is not a final judgment. *See* G.S. 7A-27(c) (1981). It does not in effect determine the action and prevent a judgment from which appeal might be taken, or discontinue the action, or grant or refuse a new trial. *See* G.S. 1-277(a) (1969); 7A-27(d)(2), (3), (4). It does not affect a substantial right belonging to defendant, *see* G.S. 1-277(a), 7A-27(d)(1), in that at this juncture in the litigation no prejudice to defendant from the violation in question appears. Assuming prejudice, *arguendo*, no reason appears for an immediate appeal rather than assertion of

the right or rights affected upon appeal from a final disposition. The appeal in this respect thus must be dismissed.

On 8 October 1982 another panel of this Court denied defendant's petition for a writ of certiorari to review this issue. This panel cannot overrule that one, and thus has no authority to exercise its discretion in favor of reviewing this aspect of the order. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E. 2d 629, 631-32 (1983).

IV.

The portion of the order establishing *in personam* jurisdiction over the defendant is immediately appealable and is affirmed.

The purported appeal from the portion of the order denying defendant's motion to dismiss for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2), is dismissed as interlocutory.

Affirmed in part; dismissed in part.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. WALTER D. JEFFRIES

No. 8215SC826

(Filed 5 July 1983)

Criminal Law §§ 70, 74— transcript of recorded statement—authentication

The authenticity of a typed transcript of defendant's tape-recorded statement was sufficiently established to permit the officer who took the statement to read it into evidence without testimony showing the condition of the recording device, the skill of the operator, and the custody of the tape where the officer testified on cross-examination that he had reviewed the transcript and that it coincided with the recording and contained everything which was said when the recording was made.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 5 November 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 February 1983.

The defendant, tried for second degree murder, was convicted of voluntary manslaughter.

On June 27, 1981, the defendant was sitting on a bar stool in Jerry's Tavern in Burlington. Some days earlier, he had been involved in a fist fight with Walter David Clark, who thereafter told others that he was going to kill Jeffries and this message was relayed to defendant. Clark entered the tavern and approached defendant, who told Clark that he heard he had been looking for him. Clark replied that he had and pushed Jeffries off the stool onto the floor. Clark, who was not wearing shoes, stood over defendant, kicked him, and said, "I ought to cut your eyes out." After somebody pulled Clark away from him, defendant went outside and sat in his car parked in front of the tavern; he left the car door open and was sitting sideways with his feet on the curb. Clark left the bar, approached the defendant, an argument occurred, and shortly thereafter, the defendant shot Clark in the head with a pistol. The State's evidence indicated that defendant got his pistol immediately upon going to the car and shot Clark as he approached the vehicle unarmed, after words were exchanged between them. The defendant testified that he thought Clark was going to attack him with a knife, even though he had seen no knife and Clark was clad only in shorts. After the shooting, Jeffries drove away, went to a lake, and threw his pistol in it. Several hours later, he went to the police and made a statement to them about the shooting. The statement or interview was recorded.

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

Raiford & Harviel, by R. Chase Raiford and Ernest J. Harviel, for defendant appellant.

PHILLIPS, Judge.

None of the defendant's many assignments of error are meritorious, in our opinion, and only one requires more than passing comment. His earnest contention that the case against him should have been dismissed as a matter of law is based on only a partial view of the evidence, a goodly portion of which tends to show that defendant shot an unarmed man, then posing no threat to his life or well-being, through the head with a pistol. And each of his several exceptions to the judge's charge is based on only a small segment thereof, whereas, read as a whole, in context, as

our practice requires, it shows that the jury was fairly and correctly instructed as to the law of the case.

The defendant's most vigorous contention that prejudicial error was committed during the trial is based on the officer who took the defendant's recorded statement being permitted to read a typed transcript of it into evidence over his objection. The basis for the objection was that the authenticity of the recording and transcript had not been established as required by *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), where it was said:

> To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement, courts are in general agreement that the State must show to the trial court's satisfaction (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made.

Id. at 17, 181 S.E. 2d at 571.

As this evidence was first presented the defendant's objection was well taken, since the attempted authentication then consisted only of the officer testifying that the typed transcript coincided with the recording. That, of course, did not authenticate the recording and through it the accuracy and completeness of the defendant's statement; it only established the accuracy of the typist who listened to the tape and transcribed what was on it. Thus, as things then stood, the evidence was clearly inadmissible and should have been rejected.

But later, while being cross-examined, the officer testified:

> To my knowledge there was no part of the transcript which I read into evidence yesterday that was left out or any part that was not recorded. I reviewed it after I received it

> back from the typist, or word processing, *and from my memory, it was there in its entirety.* [Emphasis supplied.]

This testimony cured the defect and rendered the transcription admissible; not because it showed that all the conditions enumerated in *Lynch* had been met, but because it showed that complying with them was unnecessary. *State v. Poole*, 44 N.C. App. 242, 261 S.E. 2d 10 (1979), *disc. rev. denied*, 299 N.C. 739, 267 S.E. 2d 667 (1980); *State v. Davis and State v. Fish*, 284 N.C. 701, 202 S.E. 2d 770, *cert. denied*, 419 U.S. 857, 95 S.Ct. 104, 42 L.Ed. 2d 91 (1974); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

Complying with the steps required by *Lynch* is necessary and makes sense when a tape operator or auditor, remote from the scene, with no personal knowledge of what was said or by whom, is undertaking to authenticate a recording or transcript. But since the witness here was the one that asked the questions and listened to the answers in a face to face interview with the defendant and was able to say, from his own personal knowledge, not only that the transcript coincided with the recording, but that it contained everything that was said during that transaction, requiring testimony as to the skill of the operator, the condition of the machine, and of the tape's safekeeping would, as one of the profession's most respected scholars observed, be a pointless superfluity and "defy common sense." 2 Brandis, North Carolina Evidence § 195, at p. 122 (2d rev. ed. 1982).

In the defendant's trial, therefore, no prejudicial error is found.

No error.

Judges WEBB and BECTON concur.

JAMES S. LOCKLEAR, EMPLOYEE, PLAINTIFF v. CANAL WOOD CORPORATION, EMPLOYER, AND HEWITT, COLEMAN & ASSOCIATES, INC., DEFENDANTS, CARRIER

No. 8210IC708

(Filed 5 July 1983)

Master and Servant § 74— workers' compensation—serious bodily disfigurement—sufficiency of evidence

The evidence was sufficient to support a determination by the Industrial Commission that plaintiff was entitled to compensation for serious bodily disfigurement from four scars on his leg as a result of a chain saw accident where, in addition to the Deputy Commissioner's own observations, plaintiff presented evidence that he had no scars on his leg prior to the accident, that he was a senior in college majoring in physical education, and that he planned to be a high school physical education teacher, which would involve wearing shorts, since the Commission could properly find that the disfigurement would tend to hamper plaintiff in his earnings and in seeking employment because of his training to be a physical education teacher and the fact that such occupation routinely requires the wearing of shorts.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission entered 28 May 1982. Heard in the Court of Appeals 12 May 1983.

This case involves a claim by plaintiff for compensation under the Workers' Compensation Act for serious bodily disfigurement as a result of a compensable injury. Plaintiff was injured while cutting trees for defendant-employer when he lost his balance, fell backward and was cut on the right leg by a chain saw. The injury was accepted as compensable by defendants, and plaintiff was paid temporary total disability. In this action, plaintiff sought compensation for four scars on his leg as a result of the accident.

The Deputy Commissioner found that plaintiff had sustained serious bodily disfigurement and awarded him $1,500.00. Upon appeal, on 28 May 1982 the Full Commission adopted the Opinion and Award of the Deputy Commissioner. Defendants appeal.

Regan and Regan by Cabell J. Regan for plaintiff appellee.

Gene Collinson Smith for defendant appellants.

BRASWELL, Judge.

The question before us on this appeal is whether the Commission's findings of fact upon which plaintiff's award is based are supported by competent evidence. *Locklear v. Robeson County*, 55 N.C. App. 96, 284 S.E. 2d 540 (1981). If such evidence exists, the findings are conclusive on appeal, 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).

Plaintiff's award for disfigurement was based upon the following findings of fact made by Deputy Commissioner Delbridge and adopted by the Full Commission:

> "2. As a result of the injury in question, plaintiff has disfigurement which was viewed by the undersigned and described as follows:
>
> 'Let the record show that the undersigned observed the right leg of the plaintiff and noted below the knee on the outer aspect of the leg there are a series of scars, the largest of which is approximately 8 inches in length and ¼ inch in width. This being approximately halfway between the knee and the ankle. Just above this on the outer aspect of the leg there is another scar that is approximately 3 inches in length and ¼ inch in width. There is another scar just below the kneecap itself which is about the size of a quarter. And above this there is an additional scar that is small making a total of four scars on the plaintiff's right leg. These scars are a different color from the remaining skin on the plaintiff's leg, being a darker color than the other portion of the leg.'
>
> 3. As a result of the injury in question, plaintiff has suffered bodily disfigurement as hereinabove described which is permanent and serious and is such as would tend to hamper plaintiff in his earnings and in seeking employment; that proper and equitable compensation for said disfigurement is $1,500.00."

Defendant contends that these findings are not supported by competent evidence. "Serious bodily disfigurement" is compensable under G.S. 97-31(22), which provides:

> "In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000)."

Our Supreme Court has held that "there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, *no present loss of wages* need be established; but to be *serious*, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power." *Davis v. Construction Co.*, 247 N.C. 332, 336, 101 S.E. 2d 40, 43 (1957).

Our Court has recently held that a finding of disfigurement based upon a Deputy Commissioner's personal observation, standing alone, is inadequate because it affords the appellate court no basis for review. *Carrington v. Housing Authority*, 54 N.C. App. 158, 282 S.E. 2d 541 (1981); *Weidle v. Cloverdale Ford*, 50 N.C. App. 555, 274 S.E. 2d 263 (1981). In *Carrington*, the only evidence, other than the Deputy Commissioner's observations, of claimant's disfigurement was claimant's testimony that " 'I couldn't see any disfigurement myself, but I don't know.' " *Carrington v. Housing Authority, supra*, at 159, 282 S.E. 2d at 542. Likewise, in *Weidle*, the claimant testified that he had returned to work in the same position that he had held prior to the accident, that the injury caused him no discomfort and no embarrassment on the job. There was no testimony concerning any disfigurement. *Weidle v. Cloverdale Ford, supra*, at 556, 274 S.E. 2d at 264. In each case, this Court held that the evidence was insufficient to support the Commission's findings of serious bodily disfigurement.

We find that the case presented by this appeal differs from both *Carrington* and *Weidle* in that there was competent evidence, in addition to the Deputy Commissioner's own observa-

tions, to support the finding of fact. Plaintiff testified that prior to the accident, he had no scars on his leg. As a result of the injuries he received from the chain saw, he has scarring in four separate places. At the time of the hearing plaintiff was a senior at Pembroke State University, majoring in physical education. He planned to be a high school physical education teacher, which would involve wearing short pants a great deal of time in the gym and outdoors. Although plaintiff's description of the scars is not as detailed as the Deputy Commissioner's observation, his testimony is competent direct evidence of his serious bodily disfigurement and supports the finding of disfigurement made by the Deputy Commissioner and adopted by the Commission.

We also believe that plaintiff's testimony is competent evidence to support the finding that the disfigurement would tend to hamper plaintiff in his earnings and in seeking employment. We think this case is distinguishable from that presented in *Liles v. Charles Lee Byrd Logging Co.*, 59 N.C. App. 330, 296 S.E. 2d 485 (1982), *disc. rev. allowed*, 307 N.C. 577, 299 S.E. 2d 646 (1983). In *Liles*, the claimant was a logger who had two unsightly scars on his knee as the result of a compensable accident. Claimant returned to the same job he had before the accident at the same wages. This Court held that the scars were not a serious bodily disfigurement since claimant failed to show that he would be handicapped in obtaining or performing any job for which he is otherwise qualified. We find, however, in the case before us that because of plaintiff's training to be a physical education teacher, which occupation routinely involves wearing shorts, the disfigurement of the lower right leg was of such nature that the Commission could "fairly [presume] that the injured employee has suffered a diminution of his future earning power." *Davis v. Construction Co., supra; Wilhite v. Veneer Co.*, 303 N.C. 281, 286, 278 S.E. 2d 234, 237 (1981).

We hold that there was competent evidence to support the Commission's findings and conclusions that plaintiff has sustained serious bodily disfigurement within the meaning of the law. The Opinion and Award of the Industrial Commission is

Affirmed.

Judges WEBB and WHICHARD concur.

MARY B. WADE v. CHARLES LESTER WADE

No. 828DC827

(Filed 5 July 1983)

Divorce and Alimony § 21.3— enforcement of alimony award—failure to pay not proven to be willful and without lawful excuse—inability to reduce arrearage to judgment for sum certain

In order to reduce an arrearage in alimony payments to judgment for a sum certain, plaintiff must prove not only the amount of the arrearage but also that defendant's failure to pay had been willful and without lawful excuse. G.S. 50-16.7(i).

APPEAL by plaintiff from *Goodman, Judge.* Order entered 1 June 1982 in District Court, LENOIR County. Heard in the Court of Appeals 19 May 1983.

Jones and Wooten by Lamar Jones for plaintiff appellant.

No counsel, contra.

BRASWELL, Judge.

This case involves an action for permanent alimony without divorce. By judgment entered 11 July 1979 defendant-husband was ordered to pay plaintiff-wife $100.00 per week permanent alimony.

On 19 November 1981, plaintiff filed a motion in the cause, alleging that defendant was $2,145.00 in arrears, and seeking to have all past due payments reduced to judgment for a sum certain. Defendant answered, admitting the arrearage but denying that he was financially able to make the payments. On 21 December 1981 Judge Goodman entered a consent order that upon payment by defendant of $1,350.00 by 1 February 1982, defendant would be deemed to be current in his alimony payments.

On 14 April 1982 plaintiff filed another motion in the cause, alleging that defendant had paid only $400.00 toward the $1,350.00 he had been ordered to pay, and again seeking to have the arrearage reduced to judgment for a sum certain. By order entered 1 June 1982 Judge Goodman found facts and concluded as a matter of law:

"1. That the Consent Order dated December 21, 1981 was actually an adjudication by the Court which is enforceable by contempt, rather than a contract approved by the Court which cannot be modified absent a consent of the parties.

2. That the defendant has failed to make alimony payments in the amount of Three Thousand One Hundred Fifty and No/100 Dollars ($3,150.00) as of the week of May 24, 1982.

3. That in the absence of any evidence to the contrary, the defendant's failure to pay the Three Thousand One Hundred Fifty and No/100 Dollars ($3,150.00) is not willful and is not without lawful excuse."

The court ordered that plaintiff's motion in the cause be dismissed. Plaintiff appealed from entry of the order.

In her brief plaintiff assigns as error the court's refusal to reduce defendant's arrearage to judgment for a sum certain. However, in violation of Rule 10, N.C. Rules App. Proc., the record before us contains no exception immediately following the judicial action to which it is addressed. As provided in Rule 10, the scope of appellate review is confined to the exceptions set out and made the basis of assignments of error in the record on appeal. In the absence of proper exceptions, our review is limited to whether the judgment is supported by the findings of fact and conclusions of law. Rule 10(a), N.C. Rules App. Proc.

The findings of fact in the order are based upon uncontroverted evidence. The findings support the conclusion of law, as stipulated to by the parties, that the unpaid alimony payments amounted to $3,150.00 as of the week of 24 May 1982. It is also undisputed, as stated in the first conclusion of law, that a judgment awarding alimony, even if entered by consent of the parties, is enforceable by contempt proceedings and may be modified by the court. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983); *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). It is also uncontroverted that the third conclusion of law is correct in that plaintiff did not present any evidence that defendant's failure to pay was willful and without lawful excuse. Based upon the findings and conclusions, the court dismissed plaintiff's motion in the cause.

It appears from the order that Judge Goodman believed that in order to reduce the arrearage to judgment for a sum certain, plaintiff had to prove not only the amount of the arrearage but also that defendant's failure to pay had been willful and without lawful excuse. G.S. 50-16.7(i) provides in part that "past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments." *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977); 2 R. Lee, N.C. Family Law § 165 (1980). Although our research has disclosed no case law on the question of the degree of proof required to obtain judgment pursuant to G.S. 50-16.7(i), we believe it is consistent with domestic law in this State to require proof both of the amount due and a willful failure to pay. We hold that in actions for judgments on a sum certain, as in those for civil contempt, the moving party must show and the court must find as a fact that the respondent's failure to pay was willful, *i.e.*, that respondent possessed the means to comply with the order awarding alimony and/or child support during the period of default. *See Henderson v. Henderson, supra.*

We hold that the findings of fact and conclusions of law support the court's order dismissing plaintiff's motion in the cause.

Affirmed.

Judges ARNOLD and WEBB concur.

R. D. SAWYER AND WIFE, ERMA SAWYER v. LAWRENCE GOODMAN AND LOWELL NELSON, T/A SAILS ASSOCIATES

No. 821SC875

(Filed 5 July 1983)

Rules of Civil Procedure § 60.2— refusal to set aside default judgment

The trial court did not err in refusing to set aside a default judgment against defendant for "any other reason" under G.S. 1A-1, Rule 60(b)(4) on the ground that defendant was not validly served with process and was unaware of the suit against him where the court's jurisdiction over defendant through valid service of process was amply supported by the record, there was evidence tending to show that defendant learned about the suit near its beginning and could have contested it had he been so inclined, and defendant's af-

fidavit did not clearly establish that his motion was filed within a reasonable time after learning of the judgment.

APPEAL by defendant Nelson from *Battle, Judge.* Order entered 1 June 1982 in Superior Court, DARE County. Heard in the Court of Appeals 7 June 1983.

This appeal is from an order denying defendant's motion to set aside a default judgment rendered against him February 14, 1979.

According to the record and plaintiffs' affidavit: In August 1978, plaintiffs sued defendants for rent due for occupying certain Dare County realty under a lease entered into in 1973 and modified in 1975. The defendants had the same mailing address in Rockville, Maryland and upon the Dare County Sheriff being unable to serve the defendants, the plaintiffs sent alias and pluries summonses to them at their address by certified mail. The mailing to the defendant Goodman was returned by the post office marked "unclaimed"; the mailing to the defendant Nelson was received by his wife, Kathleen Nelson, who signed therefor. Since no service had been accomplished on the defendant Goodman and the service on the defendant Nelson was subject to question, plaintiffs served both defendants by publishing the requisite notice in a Manteo newspaper, and copies of the notice mailed to them at their Maryland address were not returned. No answers were filed, and in January 1979, plaintiffs scheduled the matter for hearing and copies of the calendar request were mailed to the defendants in Maryland. When the scheduled hearing was held judgment in the amount of $9,261.00 was entered against both defendants.

Defendant Nelson's motion and affidavit, filed February 19, 1982, asserted that he was not validly served with process, none of the mailings were received by him, the letter his wife received did not contain a copy of the summons and complaint, he was unaware of the suit until he was sued on the judgment in Maryland, and had a meritorious defense. At the hearing thereon the judge found that defendant had "failed to establish any facts entitling him to relief" and refused to disturb the judgment.

Aldridge, Seawell & Khoury, by G. Irvin Aldridge, for plaintiff appellees.

White, Hall, Mullen, Brumsey & Small, by G. Elvin Small, III, for defendant appellant.

PHILLIPS, Judge.

Although the defendant's motion alleges that the judgment is a nullity, as it would be if he was not properly served with process, instead of the motion being treated as one to set aside a *void* judgment under Rule 60(b)(4) of the Rules of Civil Procedure, it was treated, perhaps at the defendant's request, as a motion justifying relief for "any other reason" under Rule 60(b)(6). This may have been because it was correctly recognized that the court's jurisdiction over the defendant through valid service of process is amply supported by the record and because of the wide latitude that trial judges have in granting relief from judgments under Rule 60(b)(6). But the trial judge's extensive power to afford relief in situations of this kind is accompanied by a corresponding discretion to deny it, and the only question for our determination, as the appellant recognizes, is whether the court abused its discretion in denying defendant's motion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975).

No abuse of discretion has been shown. Though defendant's affidavit is to the contrary, the evidence which tends to show that defendant did learn about the suit near its beginning and could have contested it had he been so inclined clearly justifies the decision made. There being competent evidence of record on both sides of the issue, its evaluation was for the trial judge, not us. In evaluating the evidence, weight may have been given to the fact that defendant's affidavit does not establish clearly and directly, as situations like this require, that his motion was filed within a reasonable time after learning of the judgment, as the rule requires. Though defendant asserts he did not learn of the suit until he was sued on the judgment in Maryland, his affidavit does not state when that was or what period of time passed before relief from the court was sought. Explicit information about that and any delay that occurred would no doubt have been helpful to the court, since the defendant's motion was not filed until February 1982, and plaintiffs claim that the Maryland case was filed in 1979.

The order appealed from is therefore

Affirmed.

Judges HEDRICK and WELLS concur.

GEORGE CHAPMAN, EMPLOYEE v. SOUTHERN IMPORT COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER

No. 8210IC631

(Filed 5 July 1983)

1. **Evidence § 50.1— medical expert testimony—nature of injury—proper**

A medical doctor's opinion testimony concerning the extent of plaintiff's preexisting disability was properly admitted where it was based upon his own examination of the plaintiff, including X-ray examination of his back, as well as the medical history prior to the accident which was related to the doctor by the plaintiff.

2. **Master and Servant § 67.3— partial disability of back—preexisting condition—sufficiency of evidence**

Reviewing collectively the medical testimony of two experts, the evidence was sufficient to support a finding of the Industrial Commission that plaintiff sustained a fifteen percent permanent partial disability of his back as a result of an accident.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 9 April 1982. Heard in the Court of Appeals 21 April 1983.

On 18 January 1979 plaintiff sustained an injury by accident arising out of and in the course of his employment. Defendants admitted liability and agreed to pay plaintiff compensation for temporary total disability from the date of the accident until 5 September 1980. On 9 June 1981 an Industrial Commission hearing was held before the Chief Deputy Commissioner for determination of the amount of additional compensation, if any, plaintiff was entitled to for permanent partial disability of his back. On 13 July 1981 an opinion and award was filed granting plaintiff additional compensation for a period of thirty weeks for a ten percent permanent partial disability of the back. On appeal to the Full Commission, the matter was remanded for additional

evidence. On 9 April 1982, the Full Commission entered an opinion and award which affirmed the award of the Chief Deputy Commissioner with the modification that plaintiff was awarded additional compensation for a period of forty-five weeks for a fifteen percent permanent partial disability of the back. From this opinion and award, plaintiff appeals.

Hewlett & Collins, by John C. Collins, for plaintiff appellant.

Crossley & Johnson, by Robert W. Johnson, for defendant appellee.

EAGLES, Judge.

[1] Plaintiff first argues that the Chief Deputy Commissioner was in error in finding that plaintiff had a twenty-five percent permanent partial disability of the back as a result of prior spinal fusions. This finding was based upon the testimony of the examining doctor, Dr. Dorman. Plaintiff contends that the doctor's opinion was mere speculation since he did not consult with Dr. McGillicuddy, the doctor who had previously performed the surgery on plaintiff's back, and did not actually review the earlier medical records in determining his estimate of plaintiff's preexisting disability. We find this argument to be entirely without merit. Dr. Dorman based his opinion of the extent of plaintiff's preexisting disability upon his own examination of the plaintiff, including X-ray examination of his back, as well as the medical history prior to the accident which was related to him by the plaintiff. A medical history given to an examining physician by the patient for the purposes of treatment is deemed inherently reliable. The examining physician may base his medical opinion, in part, upon these statements. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). Dr. Dorman's personal examination of the plaintiff, along with plaintiff's medical history, constituted a sufficient basis for his opinion. Furthermore, plaintiff's assignment of error is to a finding made by the Chief Deputy Commissioner. An appeal to this Court may be taken only from the opinion and award of the Full Commission. *Cf., Hollowell v. North Carolina Department of Conservation and Development*, 201 N.C. 616, 161 S.E. 89 (1931) (appeal lies in Superior Court only from award of Full Commission, decided prior to 1967 amendment of G.S. 97-86). After remand for additional evidence, the Full Commission had before it the deposition testimony of Dr. McGillicuddy. This assignment of error is overruled.

[2] Plaintiff also argues that there was no competent evidence to support the modified finding by the Full Commission that plaintiff sustained a fifteen percent permanent partial disability of the back. In its review of an Order from the Industrial Commission, this Court does not weigh the evidence which was before the Commission. *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973). "If there is evidence of substance which directly or by reasonable inference tends to support the findings, the Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 291, 229 S.E. 2d 325, 330 (1976), *rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977). The opinion of Dr. Dorman was to the effect that plaintiff now suffered a thirty-five percent permanent partial disability of the back and rated his previous permanent partial disability of the back at twenty-five percent. Dr. McGillicuddy stated on deposition that in his opinion the prior spinal fusions in plaintiff's back would have resulted in a five percent permanent partial loss of function of the spine. Reviewing collectively the medical testimony of these two experts, we hold that the evidence does support the finding of the Full Commission that plaintiff sustained a fifteen percent permanent partial disability of the back as a result of the accident. *See, Perry v. Furniture Company*, 296 N.C. 88, 249 S.E. 2d 397 (1978). Since it is supported by competent evidence, we are bound by this finding even though the evidence would have supported a finding of disability of a different degree.

The order of the Full Commission is

Affirmed.

Judges WELLS and BECTON concur.

REGINALD WAYNE BELK v. ELBERT L. PETERS, JR., COMMISSIONER, AND DIVISION OF MOTOR VEHICLES OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 8226SC719

(Filed 5 July 1983)

Automobiles and Other Vehicles § 2.1 — points assessed for "driving left of center"

A conviction of "driving left of center" in violation of G.S. 20-150(d), which is a subsection under a statute relating to "limitations on privilege of overtak-

ing and passing," constituted a conviction of one form of "illegal passing" for which four points must be assessed under G.S. 20-16(c) rather than a conviction under the category of "all other moving violations" for which only two points are assessed under that statute.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 23 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1983.

On 9 March 1980 plaintiff received a traffic violation citation for "driving left of center" in violation of G.S. 20-150(d). The record reflects that "[t]hrough inadvertence, the citation was incorrectly marked to reflect a violation of N.C.G.S. § 20-146, 'driving on the wrong side of the road,' . . . ."

Plaintiff waived trial and pled guilty, believing he had admitted to a violation of G.S. 20-150(d). Under G.S. 20-16(c) four points were assigned to plaintiff's license by the Division of Motor Vehicles for a violation of G.S. 20-146. The plaintiff subsequently discovered the mistake, and his motion to correct the court record of conviction so that it would reflect a conviction for "driving left of center" pursuant to G.S. 20-150(d) was granted in District Court. Although the Division of Motor Vehicles was notified repeatedly, plaintiff's motor vehicle record at the Division of Motor Vehicles was never amended to reflect this change. Plaintiff contended that his motor vehicle record should reflect only two points for a conviction under G.S. 20-150(d), instead of the four points assigned for the conviction under G.S. 20-146.

On 28 January 1981, plaintiff petitioned to have the point value for the above conviction changed on his motor vehicle record from four to two points and to permanently enjoin defendant from revoking plaintiff's license. After a hearing on the matter, the court concluded that plaintiff was not entitled to a change of points on his motor vehicle record and that plaintiff's license was subject to revocation for having accumulated twelve or more points on his driving record.

Lila Bellar, for plaintiff-appellant.

Attorney General Edmisten by Special Deputy Attorney General Jean A. Benoy, for defendant-appellee.

EAGLES, Judge.

We reject plaintiff's contention that a violation of G.S. 20-150(d) falls under the "all other moving violations" category of G.S. 20-16(c) for which only two points are awarded. Plaintiff's record of conviction was corrected to reflect a conviction for a violation of G.S. 20-150(d). G.S. 20-150 is entitled "Limitations on privilege of overtaking and passing." Under G.S. 20-16(c), the Division of Motor Vehicles must enter four points on the motor vehicle record of any person convicted of "illegal passing." We hold that plaintiff pled guilty under G.S. 20-150(d) to one form of illegal passing and his motor vehicle record presently reflects the correct point value for that violation.

For the above reason the judgment of the Superior Court is

Affirmed.

Judges WELLS and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JULY 1983

BRAME v. BRYANT-DURHAM ELECTRIC No. 8210IC1118	Industrial Commission (H-9523)	Affirmed
HASKETT v. BURLINGTON IND. No. 8210IC671	Industrial Commission (H-2272)	Affirmed
IN RE PREVETTE v. PREVETTE No. 8221DC729	Forsyth (76CVD1601)	Affirmed
LEASING SYSTEMS v. BUMGARNER PONTIAC No. 8225SC767	Catawba (80CVS1714)	Affirmed in Part; Reversed in Part; Remanded
LIANG v. FAYETTEVILLE STATE UNIV. No. 8210SC787	Wake (81CVS3218)	Affirmed
STATE v. BEASLEY No. 8218DC548	Guilford (72CVD643)	Affirmed
STATE v. KILBY No. 8226SC1258	Mecklenburg (79CRS75135)	No Error
STATE v. SELLERS No. 824SC954	Sampson (81CRS12334) (81CRS13235)	No Error
WEAVER v. HOBBS No. 8210SC466	Wake (79CVS5231)	Affirmed

HAYDEN B. RENWICK v. THE NEWS AND OBSERVER PUBLISHING COMPANY, D/B/A THE RALEIGH TIMES

HAYDEN B. RENWICK v. GREENSBORO NEWS COMPANY, D/B/A THE GREENSBORO DAILY NEWS AND RECORD

No. 8215SC432

(Filed 5 July 1983)

1. Libel and Slander § 14.1— newspaper editorials—potentially defamatory—dismissal improper

Where ordinary men could naturally understand an editorial printed in defendants' newspapers to imply or insinuate that plaintiff's statistics regarding the number of blacks denied admission to UNC between 1975 and 1979 were either knowingly and intentionally false, or the result of gross incompetence in the conduct of plaintiff's profession, the trial court erred in dismissing plaintiff's action since the editorial as a whole is reasonably susceptible of a defamatory meaning so as to warrant its submission to a jury to determine if, in fact, the defamatory meaning was so understood.

2. Libel and Slander § 5.2— defamatory statements as actionable—literal assertions

Where an editorial made it unlikely that the ordinary reader would not conclude that plaintiff had dishonestly or recklessly released false figures about blacks denied admission to UNC because he was dissatisfied with the existing minority admissions policies and practices, and where other portions of the editorial referred obliquely to adverse consequences the "irresponsible" charges had had, a defamatory imputation of personal dishonesty and irresponsibility on the part of an employee in a position of authority at a public university, while not expressly stated, was nonetheless strongly implied. The charges, whether express or implied, went far beyond the mere expression of editorial disagreement with those who charged the university with racial discrimination as defendant contended. The editorial's contents gave no indication that the charges were meant, or would be interpreted, in any but their literal sense. As literal assertions, the implied charges, as well as those stated explicitly in the editorial, more nearly resembled the statements found sufficiently factual in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to support a libel action, than they did the obviously personal evaluations expressed through slogans insufficiently specific to be proved false in *Greenbelt Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970) and *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

3. Libel and Slander § 5.2— defamation claim sufficient to withstand motion to dismiss

Notwithstanding any possible ambiguity with respect to whether an editorial stated facts or stated opinions, the Court's examination of the constitutional and legal principles developed in the line of cases beginning with *New York Times Co. v. Sullivan* leads to the conclusion that even if the

editorial were to read as only expressing the "opinion" that plaintiff dishonestly and irresponsibly charged the University with denying admission to 800 black students when, as a "fact," only 36 blacks had been denied access, it is not absolutely protected under *Gertz.* Rather, the editorial is protected, if at all, only by the qualified protection afforded by *Sullivan* for a comment based upon erroneous facts where proof is lacking that the defendants actually knew of the falsity or acted in reckless disregard to the truth or falsity of the assertions. *A fortiori* a claim based upon an ambiguous editorial would be sufficient to withstand a motion to dismiss.

4. Libel and Slander § 5.2— defamation action—underlying facts to support "opinion" stated in editorial—not insulating defendants from liability

The fact that defendants disclosed the underlying facts supporting their opinion in an editorial, standing alone, did not insulate the editorial under First Amendment protections for the following reasons: (1) the key underlying fact regarding plaintiff's allegation, which formed the subject of the editorial, is alleged to be false in the complaint, and (2) the structure of the editorial is such that the disclosed facts do not function to indicate that a particular word constitutes a loose, protected opinion rather than a direct charge; rather, it is the detailing of the facts themselves that could be read as charging plaintiff with dishonesty.

5. Libel and Slander § 14.3— privilege of fair comment

The privilege of fair comment is a matter of defense to an action for defamation. Dismissal of the complaint on the grounds that the statements are privileged comment is seldom appropriate because the privilege is only a qualified one, defeasible upon a showing that the comments were written with actual malice.

6. Privacy § 1— false light invasion of privacy—sufficiency of complaint

For the same reasons that editorial opinions may predicate a libel action because they are (1) not absolutely protected as "pure opinion" under the First Amendment, (2) are based upon an allegedly false statement of fact and (3) are inextricably intertwined with the allegedly false factual disclosure, thus capable of giving them the effect of false statements of fact upon the reader, they may also predicate a false light invasion of privacy action.

7. Libel and Slander § 6— republication of defamation

Pleadings in a defamation action sufficiently alleged republication with knowledge of material inaccuracies or in reckless disregard of whether such statements were inaccurate to withstand defendants' motion to dismiss the complaint.

Judge WELLS dissenting.

APPEAL by plaintiff from *Martin, Judge.* Judgments entered 3 March 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 March 1983.

Renwick v. News and Observer and Renwick v. Greensboro News

Plaintiff, Hayden B. Renwick, Dean of the College of Arts and Sciences at the University of North Carolina at Chapel Hill, filed duplicate actions alleging libel and invasion of privacy against media defendants, The News and Observer Publishing Company and Greensboro News Company. The twin suits are founded upon an editorial originally published in *The Raleigh Times* on 22 April 1981, entitled, "And He Calls It Bias?", and reprinted by the Greensboro News Company on 26 April 1981 in the *Greensboro Daily News and Record* in a commentary section, "Around the State," under the title, "Discrimination?" *The Raleigh Times* editorial reported and commented upon the public controversy surrounding the University of North Carolina's minority admissions efforts and the plaintiff's role in this controversy. Plaintiff's request for a retraction on the grounds that the editorial defamed him was denied by both newspapers. The defendants in both actions filed motions to dismiss the complaints, and a consolidated hearing was held. From judgments entered dismissing the actions pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim, plaintiff appeals.

Kennedy, Kennedy, Kennedy and Kennedy, by Annie Brown Kennedy, Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellant.

Sanford, Adams, McCullough & Beard, by H. Hugh Stevens and Nancy Bentson Essex, for defendant appellee, The News and Observer Publishing Company.

Smith, Moore, Smith, Schell & Hunter, by Richard W. Ellis and Alan W. Duncan, for defendant appellee, Greensboro News Company.

JOHNSON, Judge.

The two cases in this libel and invasion of privacy action have been consolidated for purposes of appeal. The common questions presented for review are whether plaintiff's complaint (1) states a claim for relief for defamation and (2) states a claim for relief for invasion of privacy. Defendant Greensboro News raises an additional issue in its brief concerning a newspaper's liability for republication of the allegedly defamatory writings of another newspaper. For the reasons set forth below, we reverse the judgment dismissing plaintiff's complaints.

A copy of the editorial as it appeared in each defendant's newspaper is incorporated by reference into each complaint. The two complaints present substantially identical allegations and, where appropriate, they will be treated as a single complaint. The record on appeal contains no indication that pleadings responsive to the complaints were filed, and consists solely of the two complaints and two motions to dismiss, phrased exclusively in the language of Rule 12(b)(6) of the Rules of Civil Procedure.[1] The judgment dismissing the complaint fails to state the grounds upon which dismissal was considered appropriate.

A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *Presnell v. Pell, supra; Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). The function of a motion to dismiss is to test the law of a claim, not the facts which support it. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980). The allegations of the complaint are taken as true for the limited purpose of testing its sufficiency. *Presnell v. Pell, supra.* With these rules in mind, we must determine if the facts pleaded, together with reasonable inferences to be drawn therefrom, involve substantive principles of law which entitle plaintiff to relief.

1. It was brought to this Court's attention both during oral argument and by the briefs submitted by the defendants, that Dean Renwick's deposition was taken in the case and filed with the trial court, together with motions for summary judgment, prior to the hearing on the Rule 12(b)(6) motions. Further, that matters addressed in the deposition which were material and germane to the allegations of the complaint and to the defense were brought to the attention of the court during the hearing. The Renwick deposition is not part of the record on appeal and this Court has not been provided a transcript of the hearing. Thus, we are not in a position to know if matters outside the pleading were, in fact, presented to and not excluded by the court. When this does occur, Rule 12(b) provides that the motion to dismiss shall then be treated as one for summary judgment and disposed of as provided in Rule 56. Information contained in the Renwick deposition is not properly before this Court, despite the efforts of both defendants to present it in their briefs, and, therefore, we will consider neither that information nor those arguments of the defendants which are based upon the deposition information.

The plaintiff in this action was, at the time of the publications, and is presently, the Associate Dean of the College of Arts and Sciences at the University of North Carolina at Chapel Hill. He had been an employee of the University of North Carolina (UNC) since 1969. Sometime prior to 1978, plaintiff Renwick was in charge of the University's minority admissions program at the Chapel Hill campus. *The Raleigh Times* editorial discusses and comments upon an issue of great public interest involving UNC's minority admissions policies, charges from Washington of racial discrimination against minority applicants, and plaintiff's role in the controversy surrounding the adequacy of the University's minority admissions efforts.

As a preliminary matter, we note that in order to recover for defamation it is plaintiff's burden to allege and prove that defendants made false and defamatory statements of or concerning plaintiff, which were published to a third person causing injury to plaintiff's reputation and, if the plaintiff is a public official or public figure, plaintiff must allege and prove actual malice on the part of defendants. *See generally Hall v. Publishing Co.*, 46 N.C. App. 760, 266 S.E. 2d 397 (1980) and Restatement (Second) of Torts §§ 558, 580A (1977). With regard to fault, the complaint alleges that the statements at issue were published negligently, with knowledge of their falsity or with reckless disregard for the truth, and with actual malice. Plaintiff seeks both actual and punitive damages and the complaint further alleges that the statements were willful and wanton, published in bad faith, maliciously, and in total disregard of the truth. Similar allegations of reckless disregard for the truth, malice, and bad faith accompany the claim for invasion of privacy.

Plaintiff neither contests nor expressly concedes that he is a "public figure" for purposes of the constitutional limitation on state libel actions established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) and its progeny. Inasmuch as the pleading adequately alleges the standard of liability appropriate for a publisher of defamatory falsehood injurious to a public official or figure, we will treat the plaintiff as a public figure for purposes of this appellate review. We note only that Dean Renwick appears to fit under either of the two characterizations of a "public figure" stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed. 2d 789, 808

(1974).[2] *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) and *Hall v. Publishing Co., supra.*

The editorial appeared in *The Raleigh Times* on 22 April 1981 as follows:[3]

And He Calls It Bias?

Some of the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill —many obviously unfounded—are so ridiculous they only widen the gulf between reason and resentment as the State seeks to create better racial relations.

The latest barrage is based on allegations by Hayden Renwick, Associate Dean of the College of Arts and Sciences at Chapel Hill, in a 1978 newspaper article. Renwick, formerly in charge of minority admissions, said that between 1975 and 1978 about 800 black students had been denied admission.

Yet Collin Rustin, the Minority Admissions Director since 1975, flatly denies the charge. Furthermore, the special admission concessions in effect for blacks also give the lie to charges of unfair discrimination against minorities.

According to Rustin, every black student who meets the minimum standard combined score of 800 on the Scholastic Aptitude Test and has a 1.6 predicted grade point average is AUTOMATICALLY admitted. The exception would be if the applicant had not taken high school subjects required for admission.

That's discrimination? When the 800 required is only half the maximum possible score of 1,600? When the average SAT score for other competitive students admitted to last fall's

2. "For the most part those who attain this [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

3. We have italicized those portions of the editorial which plaintiff principally claims contain false and defamatory statements concerning him.

freshman class at Carolina was between 1,070 and 1,080? When those competitive students admitted were in the top five percent of their high school graduating classes? When only 4,800 of 11,500 applicants clamoring to get in were admitted?

It has taken North Carolinians years to adjust to the necessity to grant some minority applicants, because of their disenfranchised background, special concessions in admissions. This gives them a chance to prove that their academic deficiencies are only temporary, not permanent.

But extremists who belittle and criticize these concessions—which indeed, seem here so excessive they do nothing for the student or the quality of education—*should be publicly rebuffed.*

The fact that, according to a 1979 faculty committee report, only 36 blacks have been denied access to UNC between 1975 and 1979—compared to 6,700 competitive students turned away in one season—attests to UNC's yeoman efforts to make minorities welcome on campus. *How long highly qualified whites denied admissions will tolerate this reverse discrimination without taking the University to court is undoubtedly affected by irresponsible charges such as this one.*

With regard to defamation, plaintiff's first cause of action alleges *inter alia*:

That in said Article (Exhibit A) plaintiff is reported as having said in a 1978 newspaper article "that between 1975 and 1978 about 800 black students had been denied admission."[4] That said statement is false. That the entire Article (Exhibit A) gives the impression that the plaintiff is an extremist, a liar and is irresponsible in his profession. That said article has exposed plaintiff to public hatred, contempt and ridicule causing him embarrassment and humiliation.

* * *

4. The quotation marks were inexplicably missing from the complaint against The News and Observer, while included in the complaint against The Greensboro News. We choose to include them here as they render the awkward phrasing of the allegation somewhat clearer.

> That the publication of false and libelous statements set forth in Paragraph V herein, constitutes libel per se. In the alternative, such statements have a special meaning or innuendo in that they held the plaintiff out to the public to be an extremist, liar and irresponsible in his profession, and thereby constitute libel per se.

The second cause of action for invasion of privacy alleges:

> That the publication of the foregoing statements set forth in Paragraph IV herein, placed the plaintiff in a false light before the public and constituted an invasion of plaintiff's privacy. That said statements were published with knowledge of their falsity or with reckless disregard for their truth.
>
> That by reason of the defendant placing the plaintiff in a false light and thereby invading his privacy, the plaintiff has been injured in his good name, and in his profession, and brought into public disgrace, contempt and infamy in his community . . .

On appeal, plaintiff contends that the complaint states a claim for libel *per se* under the theory that the words concerning plaintiff were in themselves libelous, or that the editorial read as a whole libelously imputes dishonesty and irresponsibility to the plaintiff. Further, that the editorial holds plaintiff out to public contempt and tends to impeach him in his profession. In an attempt to establish the defamatory nature of the editorial, plaintiff devotes the greater portion of his brief to an analysis of the law of libel as existed in North Carolina prior to the United States Supreme Court's imposition of significant constitutional limitation on libel and invasion of privacy actions in *New York Times Co. v. Sullivan, supra,* and *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456 (1967).

In sharp contrast to plaintiff's approach to the issue, defendants rely almost exclusively on legal and constitutional principles generated by *New York Times Co. v. Sullivan* and its progeny. As their primary argument, defendants point out that a plaintiff within the ambit of *Sullivan* has, at least as a practical matter, the burden of proving falsity, since he must in any event establish that defendants published with knowledge of falsity or reckless

disregard of the truth.[5] Further, that because statements of opinion cannot be proved false, they cannot be held libelous no matter how unreasonable or vituperous the opinion may be. Both defendants argue that the editorial represents nothing more than a forcefully expressed opinion on a public issue of considerable statewide importance; as such, its publishers are to be afforded absolute immunity from liability for injury to plaintiff's reputation under the constitutional privilege for expressions of opinion enunciated in *Gertz v. Robert Welch, Inc., supra.*

Defendant Greensboro News presents an additional argument in support of the dismissal based upon the common law privilege of fair comment, which also recognized the key distinction between statements of fact and opinion in libel actions. The Greensboro News contends that the statements are not actionable because the underlying facts are set out in the editorial, that those facts are not materially false and could in no way constitute libel against the plaintiff. On this basis, it is argued that the editorial constitutes fair comment upon a matter of public concern and may not be made the subject of a claim for libel. Defendant Raleigh Times takes the position that the common law *qualified* privilege of fair comment has been wholly superceded by the *Gertz* rule of *absolute* protection.

The arguments presented by the defendants with respect to plaintiff's claims for invasion of privacy essentially mirror those made with respect to the libel claims regarding the necessity that plaintiff prove the statements made concerning him were substantially false. Thus, we are presented with a number of issues arising under the common law of libel and invasion of privacy, the constitutional guarantees of freedom of speech and press, and the interplay between them. We turn first to the questions of whether the editorial is capable of bearing the meaning urged by plaintiff, and whether that meaning is defamatory.

5. *See, e.g. Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed. 2d 115 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975).

I

Libel Per Se

In general, the tort of defamation is an invasion of the interest in reputation and good name. Three classes of libel are recognized in North Carolina. They are: (1) publications obviously defamatory which are called *per se;* (2) publications susceptible of two interpretations, one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquim, and explanatory circumstances become libelous, which are termed libels *per quod. Arnold v. Sharpe,* 296 N.C. 533. 251 S.E. 2d 452 (1979). We are not concerned here with libels of either the second or third class since the language published was clear and unambiguous and plaintiff has failed to plead extrinsic facts and circumstances which would render otherwise innocuous statements libelous.

A most thorough definition of libel *per se* was stated by our Supreme Court in *Flake v. News Co.,* 212 N.C. 780, 785-87, 195 S.E. 55, 59-60 (1938).

> A libel *per se* is a malicious publication expressed in writing, printing, pictures, caricatures, signs, or other devices which upon its face and without aid of extrinsic proof is injurious and defamatory . . .
>
> In its most general and comprehensive sense it may be said that any publication that is injurious to the reputation of another is a libel . . .
>
> . . .
>
> In order to be libelous *per se* it is not essential that the words should involve an imputation of crime, or otherwise impute the violation of some law, or moral turpitude, or immoral conduct . . . But defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. The imputation must be one tending to affect a party in a society whose standard of opinion the court can recognize . . .

. . .

> The general rule is that publications are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those who see them. The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication. (Citations omitted.)

The Court in *Flake* then summarized the case law as follows:

> The decisions in this jurisdiction, as well as others, clearly establish that a publication is libelous *per se*, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession. (Citations omitted.)

See also Arnold v. Sharpe, supra; Badame v. Lampke, 242 N.C. 755, 89 S.E. 2d 466 (1955); *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660 (1954).

Plaintiff argues that the editorial implies that he is a liar, an extremist, ridiculous, irresponsible, and one who should be publicly rebuffed, that these are false factual charges, and that they tended to subject plaintiff to ridicule, public hatred, contempt or disgrace and tended to injure the plaintiff in his profession.

As a preliminary matter, we note that in determining the actionability of a written imputation, the entire statement is to be considered. The writing should be interpreted from its four corners and the intent and meaning of an alleged defamatory statement must be gathered not only from words singled out as libelous, but from the context in which they appear. All the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have. 50 Am. Jur. 2d, Libel and Slander, § 141, p. 643 (1970); Restatement (Second) of Torts § 563, Comment d. The initial question for the court is whether the editorial is reasonably susceptible of a defamatory connotation, so as to warrant its submission to a jury to deter-

mine if in fact the defamatory connotation was conveyed. Restatement, *supra*, § 614. When read as a whole, we find the editorial capable of bearing a meaning that is defamatory in either of the senses urged by plaintiff.

The editorial as it appeared in *The Raleigh Times* bore the title, "And He Calls It Bias?" The opening paragraph comments upon the deleterious effect many of the "obviously unfounded" and "ridiculous" charges from Washington against UNC has upon the citizens of the state. The second paragraph attributes the "latest barrage" of these charges to "allegations by Hayden Renwick, Associate Dean of the College of Arts and Sciences at Chapel Hill, in a 1978 newspaper article." The sole reference to the content of that 1978 article is as follows: "Renwick, formerly in charge of minority admissions, said that between 1975 and 1978 about 800 black students had been denied admission." Paragraphs 3, 4, 5 and 8 are devoted to a refutation of Renwick's purported allegation concerning UNC's minority admissions practices. Paragraph 3 states that the Minority Admissions Director during the years in question "flatly denies the charge." Paragraph 8 states *as a fact* that only 36 blacks have been denied access to UNC between 1975 and 1979, according to a 1979 faculty committee report. In paragraph 3 it is pointed out that in themselves, "the special admission concessions in effect for blacks also give the lie to charges of unfair discrimination against minorities." Paragraph 8 concludes by stating that "irresponsible charges such as this one" undoubtedly affect the length of time highly qualified whites denied admissions will tolerate the "reverse discrimination" practiced by UNC. In paragraph 6 the editorial calls for the public rebuff of those "extremists" who belittle and criticize UNC's seemingly excessive special admissions concessions for blacks.

[1] Injury to reputation through defamation may be accomplished by both direct and indirect imputations and insinuations. W. Prosser, The Law of Torts, § 111, p. 746 (4th Ed. 1971). It is not necessary that the charge be made in a direct, positive and open manner. A mere inference, implication, or insinuation is as actionable as a positive assertion if the meaning is plain. 50 Am. Jur. 2d, Libel and Slander, § 13, p. 528. We conclude that ordinary men would naturally understand the editorial to imply or insinuate that plaintiff's statistics regarding the number of blacks denied admission to UNC between 1975 and 1979 were either

knowingly and intentionally false, or the result of gross incompetence in the conduct of plaintiff's profession. Either implication would appear to be dictated by the unexplained disparity between the 800 figure attributed to plaintiff, and the figure of 36 stated in "a 1979 faculty committee report." In addition, plaintiff's purported charges are termed "irresponsible," that is, made without consideration of possible consequences and held up to be a likely impetus or precipitating factor to future lawsuits against plaintiff's employer, UNC. These charges, if made in a positive and open manner, would be actionable.

Communications which have been held actionable *per se* include: accusations that plaintiff, a school cafeteria manager, brought "liquor" onto the school premises and distributed it to painters then employed in the school cafeteria. *Presnell v. Pell, supra;* the statement, "Do you know Captain McCall of the Charlotte Police Department? Call him and he can tell you about all the shady deals Mr. Badame has pulled." *Badame v. Lampke, supra;* allegations that a minister who was a member of a church "had been a disorderly member thereof in the sense that he was unwilling to cooperate in maintaining peace and the right spirit in church but caused trouble amounting to a continuous upheaval, and disrupted the peace and harmony of the church and therefore was excluded therefrom." *Kindley v. Privette, supra;* the statement by a butcher that his competitor had slaughtered a mad dog-bitten cow, *Broadway v. Cope,* 208 N.C. 85, 179 S.E. 452 (1935); a publication which said of an ordained minister that there was not in this generation "a more ignorant man . . . or one less charitable toward men who might honestly disagree with him." *Pentuff v. Park,* 194 N.C. 146, 138 S.E. 616 (1927); and statements in a letter from a CPA to the Internal Revenue Service which complained about plaintiff IRS agent's "harrassment [sic] of the client whose tax return was under review," her "inability to grasp certain fundamental accounting practices," a level of "expertise below what one should expect of an Internal Revenue Agent," and plaintiff's general lack of professionalism as compared with other IRS agents. *Angel v. Ward,* 43 N.C. App. 288, 258 S.E. 2d 788 (1979).

Words which have been held not to be actionable *per se* are: the plaintiff had "infavorable [sic] personal habits," *Robinson v. Nationwide Insurance Co.,* 273 N.C. 391, 159 S.E. 2d 896 (1968);

that the plaintiff, who was white, "had negro blood in his veins," *Deese v. Collins*, 191 N.C. 749, 133 S.E. 92 (1926). From a reading of these cases, we believe the editorial, insofar as it imputes dishonesty and/or incompetence and irresponsibility to plaintiff, would tend to expose plaintiff to ridicule, public hatred or contempt and tend to deprecate plaintiff in his profession. If proven to be false, these imputations would constitute libel *per se*.

However, we do not agree with plaintiff that the term "extremist" as used in this editorial would constitute libel *per se*. We acknowledge that in some circles the word may not be considered complementary. However, as used here, the term carried no pejorative connotation that could adversely affect plaintiff's professional character or subject him to public contempt and ridicule. In context, the epithet merely expressed the newspaper's view that plaintiff was indirectly advocating that UNC make even greater efforts in the area of minority admissions.

With the exception of the term "extremist," we conclude that at common law, as it stood prior to the *Sullivan* case, the editorial as a whole is reasonably susceptible of a defamatory meaning so as to warrant its submission to a jury to determine if, in fact, the defamatory meaning was so understood. Restatement, *supra*, § 614. However, the matter does not end here.

II

Constitutional Privilege

[2] Defendants' principal contention supporting dismissal of the complaint is that the statements complained of are expressions of constitutionally privileged "pure opinion." They argue that the editorial describes a set of circumstances and expresses the *Times'* opinion in light of the circumstances. Defendant Greensboro News presents the theory as follows:

> An expression of opinion occurs when the maker of a comment states the facts on which his opinion is based and then expresses a comment on a subject. An assertion that cannot be proved false, such as an opinion, cannot be held libelous. It is only when the underlying material facts upon which an opinion is based are shown to be false that a statement of opinion may become actionable. When the facts upon which the opinion is based are fully set forth in the published com-

munication, or are generally within the knowledge of the parties to the published communication, any expression of opinion is constitutionally protected and absolutely privileged.

From this, defendants conclude that plaintiff's complaint discloses on its face an insurmountable bar to recovery because expressions of editorial opinion may not form the basis for a libel (or invasion of privacy) action consistent with constitutional guarantees of free speech and press. The argument is based largely upon § 566 of the Restatement (Second) of Torts, *Gertz v. Robert Welch, Inc., supra*, and a number of state and federal court decisions interpreting the impact of *Sullivan* and *Gertz* upon the law of libel and the common law privilege of "fair comment" or "privileged criticism." *See* Restatement, Torts, §§ 606, 607 (1938) and Restatement (Second) of Torts, § 580A.

Plaintiff contends that the editorial consists of representations of fact which are capable of being proved false. In the alternative, plaintiff argues that should this Court conclude that the statements are opinion, the First Amendment provides no absolute protection for a newspaper "to make false material statements of fact and then to draw defamatory conclusions therefrom," because such conduct would not advance society's interest in "uninhibited, robust, and wide open debate on public issues." Thus, we must determine what the scope of the absolute constitutional privilege for opinion is, whether the defamatory communications at issue are statements of fact or opinion, and, if opinion, whether they come within the ambit of that constitutional privilege.

We approach these issues with the realization that since *New York Times Co. v. Sullivan, supra*, the principles governing libel actions have developed in recognition of the countervailing interests between the desire for a free and uninhibited press and the law of defamation. In *Sullivan*, the Court recognized that our nation has made a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it will include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," 376 U.S. at 270, 84 S.Ct. at 721, 11 L.Ed. 2d at 701, and created a *qualified* constitutional privilege toward that end. The federal rule established in *Sullivan*, prohibiting a public official

from recovering damages for publications containing factual errors or defamatory content which relate to his official conduct *unless* he proves that the statement was made with "actual malice" was extended to include even characteristics germane to fitness for office which may also affect the official's private character. *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964). The Court later acknowledged that this constitutional bias toward unfettered speech will often come at the expense of compensation for harm to reputation, at least where a topic of public concern or interest is involved. *Gertz v. Robert Welch, Inc., supra* at 342, 94 S.Ct. at 3008, 41 L.Ed. 2d at 807. However, in *Gertz*, the Court also reiterated its prior rejection of the view that publishers and broadcasters enjoy an unconditional and indefeasible constitutional immunity from liability for defamation in recognition of the fact that underlying the law of libel is the legitimate state interest in the compensation of individuals for the harm inflicted on them by defamatory falsehood. *Id.* at 341, 94 S.Ct. at 3008, 41 L.Ed. 2d at 806.

> We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life, itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

At stake then, are the competing values of the individual's interest in reputation and society's interest in freedom of expression. We next examine the accommodation between these values established in the *New York Times-Gertz* line of cases.

A. False Ideas Under the First Amendment

As Judge Friendly noted in *Cianci v. New Times Pub. Co.*, 639 F. 2d 54, 61 (2d Cir. 1980), the following passage from Justice Powell's opinion for the Court in *Gertz* "has become the opening salvo in all arguments for protection from defamation actions on

the ground of opinion, even though the case did not remotely concern the question."

> 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.

Gertz, 418 U.S. at 339-40, 94 S.Ct. at 3007, 41 L.Ed. 2d at 805. However, in the very next sentence Justice Powell stated that there is *"no constitutional value in false statements of fact,"* and continued,

> Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Citations omitted.)

An illustration of the point regarding the type of opinion that could be corrected by discussion, and thus become entitled to constitutional protection, was taken from Thomas Jefferson's first Inaugural Address:

> "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

Id. at 340 n. 8, 94 S.Ct. at 3007, 41 L.Ed. 2d at 805. In contrast to the foregoing example drawn from the realm of purely theoretical debate on the value of competing political systems, the alleged libels in *Gertz*, considered sufficiently "factual" to warrant remanding the case for a new trial for defamation, included an "implication that petitioner had a criminal record" and charges that he was a "Leninist" or "Communist-fronter." *Id.* at 326, 94 S.Ct. at 3000, 41 L.Ed. 2d at 797-98. The latter expressions took on the nature of factual allegations in the context of an article alleging that plaintiff had been the architect of a communist frameup leading to the conviction of a Chicago policeman.

Two other Supreme Court cases relied upon by defendants are also commonly cited for the creation of a constitutional exception, for statements of opinion, *Greenbelt Pub. Ass'n. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 6 (1970), and *Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed. 2d 745 (1974). In *Greenbelt* the defendant newspaper published a series of articles concerning the city's efforts to acquire land for a new school site. One of the articles opened by stating that "[d]elay in construction of a new Greenbelt high school is the lever by which a local developer is pressuring the city to endorse his bid for higher density rezoning of two large tracts of land." A speaker's comment at a city council meeting that plaintiff was "blackmailing" the city in connection with these negotiations was reprinted and adopted by the newspaper. Plaintiff sued on the theory that the articles imputed to him the crime of blackmail. After noting that the articles were full, accurate, truthful reports of the plaintiff's negotiating proposals and what had been said at the public hearings before the city council, Justice Stewart wrote for the Court that no libel had been committed because no one who read the account would have considered that the plaintiff was being charged with the crime of blackmail. The word "blackmail" in this context "was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S. at 14, 90 S.Ct. at 1542, 26 L.Ed. 2d at 15. It is plainly implied that had an accusation of actual criminal wrongdoing been conveyed, it would have been held actionable.

In *Letter Carriers v. Austin, supra*, recovery was sought for a union newsletter's use of the epithet "scab" to describe the plaintiff, and its publication of a well-known Jack London definition of a "scab" as a, "traitor to his God, his country, his family and his class." The Court stated, "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-340." *Id.* at 284, 94 S.Ct. at 2781, 41 L.Ed. 2d at 761. "Scab" was held to be a representation of fact (that plaintiffs had refused to join the union), but was not considered actionable because (1) it was both literally and factually true and (2) in its derogatory aspect, it was mere rhetoric, a means by which the union thought it could most effectively make its point. The phrase "traitor to his God, his country" was protected because "traitor" in this context could not

be construed as a false representation of fact. "Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." 418 U.S. at 284, 94 S.Ct. at 2781, 41 L.Ed. 2d at 762. They were further examples of the "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—[not a falsification of] facts." *Id., quoting from Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943). Again, it was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members to those who refuse to join."

The determination of whether statements complained of are representations of fact or expressions of opinion is a matter of law for the court to decide. *Letter Carriers v. Austin, supra; Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P. 2d 425 (1976); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, *cert. denied*, 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed. 2d 456 (1977). Whether an alleged defamatory statement is fact or opinion may depend on the context of the publication. As one court stated, "what constitutes a statement of fact in one context may be treated as opinion in another in light of the nature and context of the communication taken as a whole." *Gregory*, 17 Cal. 3rd at 601, 131 Cal. Rptr. at 644, 552 P. 2d at 428.

Defendant News and Observer argues that editorials by *definition* express the opinions of the newspaper, so that the nature of the publication indicated that the sentiments expressed were opinion, and not fact. Defendant further contends that the sentiments expressed in the *Times*' editorial are "merely rhetorical hyperbole," used in the context of commentary on an issue of public concern and debate. For these reasons defendant argues the editorial falls within the ambit of first amendment protection for statements of opinion.

While it is indisputable that editorials may, and usually do, express the opinions of the newspaper, the fact of publication in the editorial column alone is not determinative. The *Times*' editorial contains nearly as much purely factual information concerning the minority admissions program as it contains expres-

sions of editorial opinion. Paragraphs 3, 4, 5 and 8 primarily contain statistics and information about UNC's admissions practices. The editorial "viewpoint" is expressed primarily by indirection, through a comparison of facts and figures attributed to Hayden Renwick with contrary data obtained by the defendant. Many of the facts disclosed are handled in a loose manner. For example, the *minimum* standard combined score of black students on the Scholastic Aptitude Test is contrasted to the *average* SAT score "for other competitive students." That Hayden Renwick actually charged UNC with unfair discrimination against minorities in his 1978 article is never directly stated, but hinted at repeatedly. The "ridiculous" allegations of discrimination from Washington are never identified specifically, and the basis for the editorial's conclusion that plaintiff's 1978 article was the cause of the latest barrage of these charges in 1981 is unstated. In addition, the source of many of the facts presented in the editorial is not disclosed. Interspersed with the factual data thus loosely presented are the statements and implications complained of. This quasi-reportorial style renders the ordinarily difficult process of distinguishing between representations of fact and expressions of opinion nearly impossible.

The *Greenbelt-Letter Carriers-Gertz* trilogy relied on by defendants to create the constitutional immunity for statements of "opinion" offers little direct guidance on the fact/opinion controversy presented here because the defamatory meaning is largely implied and must be gleaned from a reading of the editorial as a whole. *Letter Carriers* and *Greenbelt* both involved specific words or phrases used in contexts which clearly indicated that the words were employed in their figurative, descriptive senses. On that basis, the plaintiffs' contentions that the words charged them falsely with having committed specific crimes—blackmail and treason—were rejected. With the exception of allegations concerning the term "extremist," rhetorical hyperbole, which by definition is "artificially eloquent exaggeration for effect, not to be taken literally," does not form the basis of plaintiff's claim for defamatory falsehood.[6] To argue that the *sentiments* expressed are *mere hyperbole* is to confuse *what* is expressed with the *form of its expression.*

6. *See* Entries for "rhetorical" and "hyperbole," Webster's Third New International Dictionary (Unabridged Ed. 1968).

Thus far, it would appear that the Supreme Court has extended absolute protection to the form—epithet, rhetorical hyperbole, metaphor—in which the speaker or writer chooses to express his judgment, characterization, or evaluation when the context (supporting facts stated) renders it absolutely clear that the derogatory characterization was used in its loose, figurative, or emotive sense and not as a factual assertion of specific misconduct or criminal conduct. This protection for "opinion" in the context of libel actions is analogous to the First Amendment protection extended to the content of speech in other areas of legitimate state regulation of speech. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284 (1971) is an illustrative case in point. The *Cohen* court held, *inter alia*, that the words "Fuck the Draft" printed on a jacket worn into a Los Angeles courthouse would not support a state conviction for obscene expression because obscene expression must be, in a significant way, *erotic*. *Id.* at 20, 91 S.Ct. at 1785, 29 L.Ed. 2d at 291. In rejecting this literal interpretation of the language, Justice Harlan, writing for the Court, noted:

> It cannot plausibly be maintained that this vulgar allusion to the selective service system would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

Id. Later, Justice Harlan discussed the figurative, imaginative sense in which the words were employed, observing that in matters of taste and style, "one man's vulgarity is another's lyric."

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. at 25, 26, 91 S.Ct. at 1788, 29 L.Ed. 2d at 294.

In other words, if the offending terminology has no substantive, literal bearing on the content of the expression, the speaker

cannot be punished solely for his choice of language. In *Greenbelt, supra,* it is clear that had the defendant merely expressed the opinion that Bresler's negotiating position was "extremely unreasonable," the cognitive content of that opinion would have been protected. The only arguably defamatory aspect was the form in which the speaker chose to express the idea. The Supreme Court merely held that protection would not be forfeited because the idea was expressed through a word subject to interpretation as charging criminal conduct. Much the same can be said of the holding in *Letter Carriers v. Austin, supra.*[7] Neither *Letter Carriers, Greenbelt,* nor *Gertz* itself directly analyzed a

7. In their briefs defendants cite, without placing principal reliance on, a number of cases to show that opinions far harsher than the *Times'* have been protected under the *Gertz* rule. We have examined these and other cases that our research had disclosed, and find nothing in the rulings inconsistent with our analysis of the scope of the *Gertz* decision's protection for expressions of "opinion." For example, in *National Ass'n. of Gov't. Employees v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E. 2d 996 (1979), *cert. denied*, 446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed. 2d 788 (1980), a charge of "communism" was held to be mere pejorative rhetoric, a word too vague to be the subject of a defamation action. The court reasoned that the word was not meant to charge the plaintiff with complicity in the atrocities of Solzhenitsyn's Gulag Archipelago or other horrors distinctive of a totalitarian regime. In the context of its use, "communism" would most likely be taken to be rhetoric, abusive of the plaintiff for what it had done in attempting to squelch criticism. *See also Anton v. St. Louis Suburban Newspapers*, 598 S.W. 2d 493 (Mo. App. 1980) (Editorial characterizing attorney's work in handling a fire district merger as a "sleazy sleight-of-hand" protected as expressing the author's feelings or "opinions" on the issue). Protection is also extended to aesthetic and culinary criticism under a similar rationale. In *Myers v. Boston Magazine*, 380 Mass. 336, 403 N.E. 2d 376 (1980) a statement that plaintiff is "the only newscaster in town who is enrolled in a course for remedial speaking" appeared in humorous "Best and Worst" format. The court held that the amusing format, as well as the ironic use of "is" rather than "ought," made it clear that the device used was no less figurative than a vague epithet or a soaring metaphor, was in the tradition of aesthetic criticism of performers, and was to be protected as mere opinion or ridicule. In *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977) a restaurant reviewer's characterizations of some of the dishes served at the Maison de Mashburn were held to be evaluations of a purely subjective nature, mere expressions of opinion. "[W]hen the author speaks of 'trout a la green plague' and 'yellow death on duck' it is obvious that an ordinarily reasonable person would not infer that these entrees were actually carriers of communicable diseases." *Id.* at 889. *Compare McManus v. Doubleday*, 513 F. Supp. 1383 (S.D.N.Y. 1981) (Statement that plaintiff had "homicidal tendencies" could reasonably be taken in its literal rather than hyperbolic sense by a jury where such words appear in a passage focusing on lobbyists in America connected with the Provisional Irish Republican Army ("IRA"), which was replete with reference to violence and gunrunning). The case on which defendants place principal reliance will be discussed *infra.*

publication defamatory in its cognitive, literal content, as opposed to the stylistic form of its expression under the "opinion" exception.[8]

The gravamen of plaintiff's complaint is that the editorial falsely attributes the statement that 800 blacks were denied admission to him, and proceeds to draw defamatory contrasts and conclusions concerning plaintiff from its own false statement of fact. By means of the structure of the editorial, the *Times* presented an unexplained disparity in the admissions figures purportedly released by Renwick in 1978, and those released in an anonymous "faculty committee" report. The statement,

> [A]llegations by Hayden Renwick . . . that between 1975 and 1978 about 800 black students had been denied admission

was contrasted to,

> [t]he fact that, according to a 1979 faculty committee report, only 36 blacks have been denied access to UNC between 1975 and 1979.

No further information is provided regarding the respective sources or data bases for the two sets of black admissions figures. No direct statement is made that Renwick actually charged UNC with discrimination in his 1978 article, nor is any other background provided regarding his figures. However, Renwick's purported statement regarding admissions is repeatedly characterized as a "charge" of "bias" or "discrimination," and he is clearly classed among the "extremists" who belittle UNC's

8. Another decision of note is *Miskovsky v. Oklahoma Pub. Co.*, 654 P. 2d 587 (Okla. Sup. Ct.), *cert. denied*, --- U.S. ---, 103 S.Ct. 235, 74 L.Ed. 2d 186 (1982). During a political campaign the plaintiff, one of several candidates, raised allegations that another candidate, then Governor of Oklahoma, was a homosexual. In a series of editorials and political cartoons the defendant newspaper characterized plaintiff as the campaign "hatchet-man." The court held "hatchet-man" protected as mere epithet, a judgmental and opinionative statement, incapable of constituting a falsehood. Other statements to the effect that the plaintiff "had sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing," were also held protected opinion. Although the United States Supreme Court denied the petitioner's request for review in *Miskovsky*, Justice Rehnquist, joined by Justice White, dissented from the denial on the grounds that the Court did not intend to wipe out the rich and complex history of the common law's attempts to deal with the problem of defamatory "opinion" with the two sentences of *dicta* quoted from *Gertz* regarding "false ideas." --- U.S. at ---, 103 S.Ct. at 236, 74 L.Ed. 2d at 186.

"yeoman" minority admissions efforts and who should be "publicly rebuffed." By thus hinting at a motive for the release of the 800 figure, the editorial makes it unlikely that the ordinary reader would not conclude that Renwick had dishonestly or recklessly released false figures about blacks denied admission because he was dissatisfied with the existing minority admissions policies and practices. In addition, other portions of the editorial refer obliquely to adverse consequences these "irresponsible" charges have had—bringing on an additional "deluge" of charges from Washington—and undoubtedly will have—prospective lawsuits against plaintiff's employer.

Thus, a defamatory imputation of personal dishonesty and irresponsibility on the part of an employee in a position of authority at a public university is not expressly stated, but is nonetheless strongly implied. These charges, whether express or implied, go far beyond the mere expression of editorial disagreement with those who charge the University with racial discrimination as defendant News and Observer contends. The editorial's contents give no indication that these charges were meant, or would be interpreted, in any but their literal sense. As literal assertions, the implied charges as well as those stated explicitly in the editorial, more nearly resemble the statements found sufficiently factual in *Gertz* to support a libel action, than they do the obviously personal evaluations expressed through slogans insufficiently specific, or hyperbole insufficiently literal, to be proved false in *Greenbelt* and *Letter Carriers*.

B. Actionable Opinions vs. Generally Derogatory Remarks

[3] Both defendants argue that statements similar to those in *The Raleigh Times* editorial have been held constitutionally protected by courts in other jurisdictions. We have carefully reviewed the cases cited in both sets of briefs and principally relied upon to create the broad immunity for statements of "opinion" urged by defendants. As a preliminary matter we note that in no case concerning the protection of statements as mere opinion has a serious question as to the accuracy and truth of the disclosed facts been raised. Our analysis of the cases reveals as essential judicial consensus on the scope of the absolute protection afforded expressions of opinion under the First Amendment which effec-

tively *excludes* accusations of personal dishonesty, misconduct or criminal conduct.

In *Rinaldi v. Holt, Rinehart & Winston, Inc., supra*, the plaintiff, a state court judge, charged the defendants with libel in writing and publishing a book charging the judge with being corrupt and incompetent and advocating his removal from office. The New York Court of Appeals ruled that the charge of incompetence was an expression of opinion regarding the Judge's performance in office, and the advocacy of his removal was an expression of the opinion that the Judge was unfit for his office. Both opinions were entitled to protection, even if falsely and insincerely held, because the writer set forth the basis for his beliefs, thus allowing the reader to draw his own conclusion as to whether the writer's views should be supported or challenged. In short, it was subject to public debate. However, the charges that plaintiff was "probably corrupt" and that his sentences of certain defendants were "suspiciously lenient," were held actionable.

> These words were not used merely in a "loose, figurative sense" to demonstrate Newfield's strong disagreement with some of plaintiff's dispositions . . . The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected . . . While inquiry into motivation is within the scope of absolute privilege, *outright charges of illegal conduct, if false, are protected solely by the actual malice test.* (Citations omitted.) (Emphasis added.)

42 N.Y. 2d at 381-82, 397 N.Y.S. 2d at 951, 366 N.E. 2d at 1307.

The analysis in *Rinaldi*, is based in part upon *Gregory v. McDonnell Douglas Corp., supra. Gregory* concerned a defamation action arising from a labor dispute. At issue were statements in a company bulletin to the effect that plaintiff union officers were apparently willing to sacrifice the interests of the members of their union to further their own political aspirations and personal ambitions. The Supreme Court of California noted that the language of both statements was "cautiously phrased in terms of apparency," and "[m]ore importantly, the charges are of the kind typically generated in the 'economic give-and-take' of a spirited

labor dispute in which the judgment, loyalties and subjective motives of rivals are reciprocally attacked and defended, frequently with considerable heat." 17 Cal. 3d at 603, 131 Cal. Rptr. at 645, 552 P. 2d at 429. The court rejected the plaintiffs' contentions that although statements of opinion regarding their abilities and judgment constitute protected First Amendment speech, attacks on their motivations are not so shielded. However, the court stated, in dictum, that there is a critical distinction between opinions which attribute improper motives to a public official and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. "No First Amendment protection, of course, enfolds the latter charges." *Id.* at 604, 131 Cal. Rptr. at 646, 552 P. 2d at 430.

In *Hotchner v. Castillo-Puche*, 551 F. 2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed. 2d 95 (1977), the statements at issue were unfavorable remarks about the writer A. E. Hotchner (friend of Ernest Hemingway and author of the memoir, *Papa Hemingway*). The author-defendant described Hotchner as a "toady" and a "hypocrite" who was "never open and above board." In the context of discussing the need for the plaintiff to prove that the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth, the court stated that these characterizations, *if viewed in isolation* cannot constitute actionable libel. "A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." 551 F. 2d at 913. The court also noted that the statements about Hotchner contained no claims that he had engaged in any unusual or outlandish conduct. *Id.* It is apparent that the characterizations "toady" and "hypocrite" fall easily into the category of mere epithet or hyperbole, too loosely definable to carry specific factual content themselves.[9] Therefore, although vituperous, they could not be actionable.

In *Rinaldi*, *Gregory*, and *Hotchner* statements which the reader would clearly understand to be general evaluations of fitness, loyalty, judgment, subjective motives, and even character,

9. This point was specifically recognized by Judge Friendly writing for a different panel of the Court of Appeals for the Second Circuit in *Cianci v. New Times Pub. Co.*, *supra*, 639 F. 2d at 63.

both from the context of the issue discussed and nature of the statement made, have received absolute protection, while more specific charges of particular acts of misconduct or dishonesty have not.

The Second Circuit Court of Appeals reached a similar conclusion in *Cianci v. New Times Publishing Co., supra.* The *Cianci* court reviewed a number of state and federal cases in which the "pure opinion" defense was raised, including an earlier opinion of that court in *Buckley v. Littell,* 539 F. 2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed. 2d 777 (1977). One of the statements at issue in *Buckley,* contained in the book, *Wild Tongues* (a "timely study of political extremism"), appears as follows:

> Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do.

539 F. 2d at 895. The *Buckley* court held this to be an assertion of the fact that Buckley had lied about and implicitly libeled several people who, if they wanted to and could afford it, would take him to court for his lies. The statement was contrasted to the two other alleged libels; that Buckley was a "fellow traveler of the fascists," or the "right wing" and a deliberate purveyor of material picked up from "openly fascist journals." The former statement could not be considered as factual because of the "tremendous imprecision of the meaning and usage of the terms," and the latter were held to be merely "loosely definable, variously interpretable statements of opinion . . . made inextricably in the context of political, social or philosophical debate." *Id.* at 895.

With regard to the statement comparing Buckley to Pegler, the *Cianci* court interpreted the decision as follows:

> This was considered to be a defamatory assertion of fact namely, that Buckley had made false and libelous statements. After repeating the contrast drawn in *Gertz* between expressions of "pure opinion" and "false statements of fact," the court held the statement was actionable because "the clear meaning to be inferred was that *he considered* Buckley to be

> a libeler like Pegler." *Id.* at 896 (emphasis supplied). *Since surely this was a statement of Littell's opinion, our decision must mean that when an "opinion" is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers no absolute immunity, as distinguished from the qualified protection accorded by Sullivan in the case of public figures.* And the court did not rest its decision at all on the basis that Littell implied he had reasons for believing Buckley to have been a libeller and defamer other than those disclosed in his articles. (Emphasis added.)

639 F. 2d at 63.

Cianci itself involved a libel action brought by an incumbent mayor against a magazine which printed an article stating that the mayor had once been accused of rape, had arranged to have the charges dropped, and had made a payment to the accuser. The defendants' motion to dismiss the complaint under F. R. Civ. P. 12(b) and/or 56 was granted by the district court on the grounds that the article did not directly charge Cianci with the alleged criminal behavior, but principally because to the extent the article implied that Cianci was guilty of rape or improper payoffs, such implications were constitutionally protected as expressions of opinion.

The appellate court reversed the dismissal of the complaint on the grounds that the defendants were not immunized by the constitutional exception for statements of opinion, by the common law privilege of fair comment, or by the constitutional privilege of neutral reportage. The court drew the following conclusion from its review of the relevant cases, 639 F. 2d at 64:

> The principle of the *Greenbelt-Letter Carriers-Gertz* trilogy, of our own *Buckley* decision, and of the New York Court of Appeals decision in *Rinaldi* is (1) that a pejorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct if the term could not reasonably be so understood in context; but (3) that the principle does not

cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.

Applying the fact/opinion distinction set forth in *Gertz*, the court held "a statement that Cianci raped Redick at gunpoint twelve years ago and then paid her in an effort to obstruct justice falls within the [*Gertz*] Court's explication of false statements of fact rather than its illustrations of false ideas where public debate is the best solvent." 639 F. 2d at 62.

The defendant's *organization* of the facts detailing the decision not to prosecute Cianci and the $3,000 payment to the "victim" was itself held susceptible of the foregoing defamatory connotation because the article, so organized, strongly implied that the payment was prior to and was the primary reason for the decision not to prosecute, although it did not state this directly. In fact, the two events had occurred independently of one another. The court concluded that even if the article were to be read as only expressing the "opinion" that Cianci had committed the crimes of rape and obstruction of justice, it is not absolutely protected as distinguished from the protection afforded by *Sullivan.*

> The charges of rape and obstruction of justice were not employed in a "loose, figurative sense" or as "rhetorical hyperbole." A jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence but rather to produce a specific image of depraved conduct—committing rape with the aid of trickery, drugs and threats of death or serious injury, and the scuttling of a well-founded criminal charge by buying off the victim. Such serious charges have not yet become "undefined slogans that are part of the conventional give-and-take in our economic and political controversies." (Citations omitted.) To call such charges merely an expression of "opinion" would be indulge in Humpty-Dumpty's use of language. We see not the slightest indication that the Supreme Court or this court ever intended anything of this sort and much to demonstrate the contrary.

Id. at 64.

We are persuaded by the logic and reasoning of the *Cianci* opinion, as well as our analysis of the relevant Supreme Court decisions, that the protection thus far extended to expressions of "mere opinion" under the First Amendment has by no means been interpreted as broadly and comprehensively by other courts as defendants argue. It is clear that many purported statements of "opinion" concerning the personal honesty, integrity, and conduct of individuals have been held sufficiently capable of being proven false to support libel actions for injury to reputation.

Defendants place great reliance upon statements in *Edwards v. National Audubon Society*, 556 F. 2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed. 2d 498 (1977), protecting use of the epithet "liar" as an expression of opinion concerning the plaintiffs' intellectual honesty. Defendant News and Observer contends that *The Raleigh Times'* editorial does not even contain the epithet "liar," and, to the extent that it expresses an opinion on honesty, the editorial merely questions the intellectual, not moral, honesty of "certain categories of persons."

Two publications were at issue in *Edwards*. The first, a *New York Times* article reporting on serious charges levelled by an official of the Audubon Society against public figures during the midst of a heated and often acrimonious debate over continued use of the insecticide DDT. The second publication was a letter sent to the *Times* by another Audubon official, clarifying the charges. The *Times* article contained portions of a forward to the Society publication *American Birds* reporting the Society's Christmas Bird Count totals. The forward stated that certain paid "scientist-spokesmen" who were citing the bird count totals as proving that birdlife was thriving despite the use of DDT were being "paid to lie." Although the persons under attack were not named in the forward, the *Times* reporter obtained the names from the Society and printed them in the article. The letter of response to the *Times*, which was not published, stated, 556 F. 2d at 119:

> Nor do we like to call people liars, but those who have most consistently misused our data [including the appellees] certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

The *Edwards* court first analyzed the statements concerning the plaintiffs in the letter. The court held that the reference to the scientists and professors as "liars" was protected as an expression of opinion, reasoning that,

> The epithet "liar" in this context, standing by itself, merely expressed the *opinion that anyone who persisted in misusing the Audubon statistics after being forewarned could not be intellectually honest.* Since the basis of this opinion was fully set forth, the communication of Clement's views cannot be libelous, however mistaken they might be. (Emphasis added.)

556 F. 2d at 121. However, the Audubon Society's principal charges, as reported in *The New York Times*, "went far beyond a mere accusation of scientific bad faith" and actually charged the plaintiffs with being "paid to lie." This was held to be an implication of corruption, requiring a factual basis, which no party to the case was contending existed. *Id.* at 121 n. 5.

The court's reasoning makes it clear that "liar" was used as a rhetorical accusation of scientific bad faith concerning an issue over which opinions may differ—scientifically valid uses of data. That the epithet was merely a stylistic device to express strong disagreement over the plaintiff's use of the data was made clear by the supporting facts stated. Thus, the undertone of personal or moral dishonesty was entirely lacking.

We find no similar ameliorating circumstances present in *The Raleigh Times'* editorial to accompany the imputation of dishonesty arising out of the unexplained disparity between the 800 figure attributed to Hayden Renwick and the 36 figure attributed to the faculty committee. While the editorial clearly does not go so far as to impute corruption to plaintiff, it does go beyond an accusation of mere intellectual dishonesty. Plaintiff is not being charged with what would be the arguable misuse of admissions data, but with the release of absolutely false and misleading data. Had the editorial only expressed disagreement with certain named persons who charged the University with racial discrimination and inadequate affirmative action efforts by charging those persons, in turn, with intellectual dishonesty, such editorial opinions would clearly be protected under the First Amendment. However, a jury could find that the effect of the editorial was not simply to convey the idea that Renwick had taken a demonstrably unrea-

sonable position in the discrimination controversy surrounding UNC, but rather to produce a specific image of dishonest and irresponsible conduct which could only have a divisive effect on the public as well as potentially adverse consequences for the University itself.

These allegations, if stated expressly, would appear sufficiently factual to support a claim for defamation able to withstand the defendants' motions to dismiss the complaint. The California Supreme Court has held that where an article is ambiguous, and cannot as a matter of law be characterized as either stating a fact or an opinion, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion charging specific acts of misconduct, or whether the statements were generally understood as an opinion respecting an official's public conduct in regard to a public matter. *Good Government Group v. Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P. 2d 572 (1978), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed. 2d 1066 (1979). *A fortiori* a claim based upon an ambiguous editorial would be sufficient to withstand a motion to dismiss. Notwithstanding any possible ambiguity with respect to the fact/opinion distinction in this case, our examination of the constitutional and legal principles developed in the line of cases beginning with *New York Times Co. v. Sullivan, supra*, leads to the conclusion that even if the editorial were to be read as only expressing the "opinion" that Renwick dishonestly and irresponsibly charged the University with denying admission to 800 black students when, as a "fact," only 36 blacks had been denied access, it is *not absolutely protected* under *Gertz*. Rather, the editorial is protected, if at all, only by the *qualified protection* afforded by *Sullivan* for comment based upon erroneous facts where proof is lacking that the defendant actually knew of the falsity or acted in reckless disregard of the truth or falsity of the assertions. The question of whether plaintiff may ultimately recover under the heavy burden imposed by that standard is as yet wholly premature.

C. Restatement (Second) of Torts, § 566

[4] Defendants also argue, in effect, that any implied opinion conveyed by the editorial is protected because the facts which, at least in their view, supported this opinion are set forth in it. Sec-

tion 566 of the Restatement, governing expressions of opinion, states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

As acknowledged by the reporter, and demonstrated by the illustrations in the Comments, this statement of the law was arrived at by combining the common law privilege of fair comment with the limited constitutional protection of opinions and ideas developed in the *Gertz*, *Greenbelt*, and *Letter Carriers* cases.[10] *See* Wade, The Communicative Torts and the First Amendment, 48 Miss. L. J. 671, 694-95 (1977).

In *Cianci v. News Times Pub. Co.*, *supra*, the Second Circuit took the position that neither the pre-Restatement Supreme Court decisions nor the post-Restatement decisions in *Buckley v. Littell*, *supra*, *Rinaldi v. Holt, Rinehart & Winston*, *supra* and the dictum in *Gregory v. McDonnell Douglas Corp.*, *supra*, taken together would protect an "opinion" that conveys a false representation of defamatory fact, such as a direct accusation of criminal misconduct (or personal dishonesty), even where there is no implication that the writer is relying on facts not disclosed. 639 F. 2d 64-5. While disclosure of the supporting facts will often serve as an indication of whether a particular word constituted a direct charge of a crime or a looser protected opinion, such disclosure *alone* will not serve to insulate a direct accusation of criminal misconduct. *Id.* at 65. We note also that the Restatement reporter has acknowledged that the position embodied in § 566, that mere opinion expressed upon disclosed or assumed facts is

10. The genesis of new § 566 is discussed in detail in Christie, Defamatory Opinions and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621 (1977). Professor Christie takes the position that new § 566, in its final form, is logically consistent with the Restatement's own approach to defamation, that the communication must be *factually false as well as defamatory*, *see* § 588, and with the logic of *Gertz*, that there is no such thing as a "false idea" or "opinion." Under old § 566, a derogatory expression of opinion, although based on disclosed or assumed facts, could be actionable. New § 566 is to the contrary. The section, together with the commentary, encompasses and renders unnecessary old § 567 regarding expressions of opinion on undisclosed facts. In addition, old §§ 606-607 regarding "fair comment" or "privileged criticism" were considered obviated by the new absolute protection for statements of "pure opinion."

not actionable, *may not be accurate* as there has been no clear, firm holding by the Supreme Court to that effect. *Wade, supra* at 705-06.

Wherever the outer limits of First Amendment protection for "opinion" may ultimately lie, it is clear that under the current state of the law, the statements in the *Times'* editorial are not eligible for absolute protection for the reasons stated in Part II, A and B of this opinion. Nor do we find the fact that defendants have disclosed the underlying facts (there being no allusion to other undisclosed defamatory facts which would support the alleged "opinions"), standing alone, to otherwise insulate the editorial for two reasons: (1) the key underlying fact regarding plaintiff's allegation, which forms the subject of the editorial, is alleged to be false in the complaint and (2) the structure of the editorial is such that the disclosed facts do not function to indicate that a particular word constitutes a loose, protected opinion rather than a direct charge; rather, it is the detailing of the facts themselves that could be read as charging plaintiff with dishonesty.

In *Greenbelt, supra,* the Supreme Court carefully noted it was undisputed that the articles published by the defendants were accurate and truthful reports of what had been said at the public hearings before the city council, so that it "cannot even be claimed that the petitioners were guilty of any 'departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers' (Citations omitted), much less a knowing use of falsehood or reckless disregard of whether the statements made were true or false." 398 U.S. at 12, 90 S.Ct. at 1541, 26 L.Ed. 2d at 14. Further, that Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail. But, the Court specifically stated that had the reports "been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meetings, this would be a different case." *Id.* at 13, 90 S.Ct. at 1541, 26 L.Ed. 2d at 15. Plaintiff's complaint alleges the falsity of the sole material fact concerning his 1978 statement. From the comparison of that central fact to other data flow the imputations plaintiff claims defamed him. It is not evident from the complaint or the appended editorial in what man-

ner the defendants have falsely represented plaintiff's statement. However, for purposes of reviewing the dismissal of the complaint, it must be taken as true that the newspaper has truncated or distorted plaintiff's statement so as to render the account of it false.

At common law, statements of opinion about matters of public concern were qualifiedly privileged when based upon a true or privileged statement of fact under the doctrine of "fair comment" or "privileged criticism." 1 Harper and James, The Law of Torts, § 5.28, p. 456 (1956); Restatement of Torts, §§ 606, 607 (1938). The requirement of truly stated or privileged facts is explained in Harper and James, *supra* at 458, as follows:

> If the actual facts are accurately stated, an opinion based thereon will be understood as such and taken for what it is worth. In such a case the writer may, by expressing his opinion, "libel himself rather than the subject of his remarks." *But if the facts are misstated, the subject of his remarks is at the writer's mercy, and a defamatory opinion, unless properly labeled, may have the effect of a statement of fact.* (Emphasis added.)

Restatement § 566 appears to incorporate the fair comment requirement of true or privileged disclosed facts in Comment c, at p. 175:

> If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the expression of opinion . . . The same result is reached if the statement of facts is defamatory but the facts are true (see § 581B), *or if the defendant is not shown to be guilty of the requisite fault regarding the truth or defamatory character of the statement of facts* (See §§ 580A and 580B), *or if the statement of facts is found to be privileged.* (See §§ 593-612.) (Emphasis added.)

Restatement § 580A, referred to above, covers defamation of public officials or public figures and essentially restates the rule of *New York Times Co. v. Sullivan, supra.* It is commonly acknowledged that the effect of *Sullivan* was to extend application of the privilege of fair comment to misstatements of fact as well as opinion about the conduct of public officials and figures,

unless the plaintiff can prove that the statement was made with knowledge it was false or with reckless disregard of whether it was false or not. *See e.g.* Restatement § 580A, Comment a, p. 215 and Reporter's Notes, p. 458-59; Hanson, 1 Libel and Related Torts, §§ 140, 141 (1969); Note, The Scope of First Amendment Protection of Good-Faith Defamatory Error, 75 Yale L. J. 642, 644-45 (1966).

Thus, where the *Sullivan* standard of fault is applicable, and the issue of opinion upon disclosed facts has been raised, the plaintiff would have the burden of proving that the defendant based his expression of a derogatory opinion of the plaintiff on his own statement of false facts, with knowledge of their falsity or with reckless disregard of whether the facts were false or not. This is essentially the conclusion reached in *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A. 2d 251 (1975), *cert. denied*, 426 U.S. 907, 96 S.Ct. 2228, 48 L.Ed. 2d 832 (1976) in a decision written prior to the redrafting of Restatement § 566.

In *Kapiloff* the plaintiff high school principal sought recovery for alleged libels contained in a newspaper article rating the performance of county high school principals upon source materials set forth in the article. Plaintiff received one of the two "unsuited" ratings based upon the defendant's profile of the educational atmosphere at his school and the effect which the philosophies of the individual principal had on that atmosphere. The plaintiff alleged and offered proof as to the falsity of some of the facts stated by defendants. The court expressly rejected the defendants' argument that the Supreme Court either in *Gertz* specifically or in *Sullivan* or its progeny, has created an absolute privilege for all expressions of opinion on public matters and therefore eliminated the defense of "fair comment," noting that there is language in *Sullivan* to the contrary.[11] 27 Md. App. at 529, 343 A. 2d at 261.

11. The Supreme Court stated, 376 U.S. at 292 n. 30, 84 S.Ct. at 732, 11 L.Ed. 2d at 713, "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a *defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact.* Both defenses are of course defeasible if the public official proves actual malice, as was not done here." (Emphasis added.) *See also Curtis Publishing Co. v. Butts, supra* at 152 n. 18, 87 S.Ct. at 1990, 18 L.Ed. 2d at 1109.

The Maryland court concluded that both expressions of opinion and statements of fact concerning public officials and public figures can be actionable. Acknowledging the necessary relationship between an opinion and the facts it purports to comment on or interpret, the court concluded that the possible constitutional immunity for commentary must be determined on the basis of the veracity of the underlying facts.

> Where the statements, however, are actual expressions of opinion, based upon stated or readily known facts, their objective truth or falsity depends on the veracity of these underlying facts. Therefore, any determinations with regard to falsity or the presence of actual malice must look to the stated or known facts which form the basis for the opinion.

27 Md. App. at 533, 343 A. 2d at 264. *See also Rand v. New York Times*, 75 A.D. 2d 417, 430 N.Y.S. 2d 271 (1980) (A cause of action for libel will lie for the statement that a singer's recording company, lawyer, and manager "all screwed her at once" when the falsity of the disclosed facts is properly alleged in the pleadings) and *Hotchner v. Castillo-Puche, supra*, 551 F. 2d at 913 (Opinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts).

Defendants both cite the decision of this Court in *Brown v. Boney*, 41 N.C. App. 636, 255 S.E. 2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 910 (1979), as having established a constitutional bar to recovery against a media defendant for statements of opinion made in editorials upon disclosed facts. We do not read the decision quite so broadly. In *Brown* the plaintiff had been involved in an automobile accident, was charged with driving under the influence, and pled guilty to the offense. As a result, his driver's license was revoked. Defendant newspaper editor routinely published the list of license revocations. Plaintiff sought to prevent publication of his name by first attempting to prevent the otherwise routine release of his name from the Department of Motor Vehicles in Raleigh to defendant, and next by pleading personally with defendant not to publish his name. As a result of these and other efforts, defendant published a series of editorial articles accurately chronicling the accident, charges, revocation and plaintiff's efforts to prevent publication of his name in the

newspaper revocation list. A few of the editorials compared plaintiff's efforts to have his name withheld from public scrutiny with "President Nixon's efforts to cover up Watergate." Plaintiff sued for libel and invasion of privacy, presumably on the basis of the metaphorical comparison between his efforts and the Watergate cover-up.

This Court affirmed a directed verdict for the defendant on the grounds that the plaintiff's own evidence tended to show the truth rather than the falsity of the underlying factual statements. In reference to the parallel drawn between plaintiff's admitted actions to prevent publication of his name and the Watergate cover-up this Court stated only that,

> The statements on which plaintiff primarily relies in this case are within the realm of fair editorial comment which has been accorded a significant measure of protection under the First Amendment.

41 N.C. App. at 648, 255 S.E. 2d at 791. Following a reference to *Gertz*, a caveat appeared.

> This does not mean, however, that newspapers or other media defendants can escape liability where the evidence discloses the publication of false factual statements under the guise of editorializing.

Id. The case under discussion is clearly distinguishable because the underlying fact is alleged to be false. In addition, as we discussed in Part II, A and B, *supra*, the statements at issue do not come within the measure of absolute constitutional protection for false ideas thus far established.

Defendants' entire argument depends upon acceptance of the premise that "opinions" are incapable of being proven false. However, the editorial opinions at issue, to the extent they are characterizable as such, are readily analyzable for objective truth or falsity according to the formula established in *Kapiloff v. Dunn*, *supra*, by application of the *New York Times* actual malice test to the underlying facts disclosed therein. As pointed out in *Harper* and *James*, *supra*, when the facts are misstated, a derogatory opinion, *unless properly labeled*, may have the *effect* of a statement of fact because the subject of the remarks is wholly at the writer's mercy. This is particularly true in plaintiff's

case because any implied editorial opinion is inextricably intertwined with the supporting facts. A similar situation was presented in *Cianci v. New Times Pub. Co., supra.* There the *organization* of the facts detailed in the article was itself held to be reasonably susceptible of a defamatory connotation, 639 F. 2d at 60, and the court held the common law privilege of fair comment to be inapplicable because the opinion was conveyed as part and parcel of the factual disclosures. "In such a case it is meaningless to say that the opinion is protected, when the facts are not." *Id.* at 67.

In short, we hold that mere disclosure of the facts upon which the opinions are based will not insulate the newspapers from liability where the facts are alleged to be false, and the detailing of the facts itself gives rise to the defamatory imputations complained of. We agree with plaintiff's contention that the First Amendment provides no absolute protection for a newspaper to make false material statements of fact and then draw defamatory conclusions from them. Nothing in the Supreme Court decisions discussed above leads to the conclusion that such conduct would serve any "social value as a step to the truth" so as to outweigh the plaintiff's interest in the preservation of his own good name and reputation. We conclude that defendants' editorial is to be protected, if at all, under the *Sullivan* standard for good faith defamatory error. To hold otherwise on the facts of this case would be to sanction a media license to libel public figures far beyond that reasonably alluded to by the Supreme Court in *Gertz v. Robert Welch, Inc., supra.*

III

Fair Comment

[5] We will briefly address defendant Greensboro News' argument that the editorial opinions are protected under the privilege of fair comment, inasmuch as we are of the opinion that the privilege retains considerable vitality quite apart from the limited constitutional immunity for "pure opinion" established in *Gertz.*

Our courts have long recognized the privilege of fair comment upon matters of public interest, including the activities of public officials or figures. *See e.g. Ponder v. Cobb,* 257 N.C. 281, 126 S.E. 2d 67 (1962); *Yancy v. Gillespie,* 242 N.C. 227, 87 S.E. 2d

210 (1955); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891); *Angel v. Ward, supra; Brown v. Boney, supra.* However, the privilege is a matter of the *defense* to an action for defamation. *Alexander v. Vann, supra*; Restatement of Torts §§ 606, 607. Dismissal of the complaint on the grounds that the statements are privileged comment is seldom appropriate because the privilege is only a *qualified* one, defeasible upon a showing that the comments were written with actual malice. *Ponder v. Cobb, supra; Alexander v. Vann, supra; Ramsey v. Cheek, supra.* In *Yancey v. Gillespie, supra*, our Supreme Court recognized the qualified privilege as a constitutional one.

> One of the functions of a newspaper is to give information about public affairs and how public officials are carrying on the public business. So long as that qualified privilege is not abused, an action for libel cannot be maintained. Article I, Sec. 20, of the Constitution of North Carolina provides: "FREEDOM OF THE PRESS. The Freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same."

242 N.C. at 229, 87 S.E. 2d at 212.[12]

The Raleigh Times' editorial comments upon, *inter alia*, the veracity and effect of a particular statement published by a public figure concerning an issue of great public concern. Clearly the occasion of its publication would be a privileged one. However, where the complaint contains allegations of actual malice in both the common law and constitutional senses, as does plaintiff's, dismissal my not be premised on the basis of this qualified privilege as defendant contends.[13]

We do not reach the issue of whether the editorial is in fact entitled to protection under the doctrine of fair comment because,

12. The provision of the 1868 North Carolina Constitution quoted in *Yancey* is now embodied in Article 1, § 14 FREEDOM OF SPEECH AND PRESS. (Adopted 1970.)

13. The contrary is true of a complaint which discloses on its face both defamation and facts giving rise to an occasion of absolute privilege. Such a complaint may properly be dismissed for failure to state a claim upon which relief may be granted. *Scott v. Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146 (1954).

as yet, no responsive pleadings have been filed raising that defense. We hold only that the qualified privilege of fair comment poses no insurmountable bar to plaintiff's recovery in view of the allegations of the complaint.

IV

False Light Invasion of Privacy

[6] Our courts have long recognized a claim for relief for false light invasion of privacy. *Flake v. News Co., supra* at 791-93, 195 S.E. at 62-64; *Brown v. Boney, supra; Barr v. Telephone Co.*, 13 N.C. App. 388, 185 S.E. 2d 714 (1972). The claim recognized is consistent with Restatement § 652E, entitled "Publicity Placing a Person in False Light," which provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

For liability to attach under Section 652E it is essential that the matter publicized be untrue, although it is not necessary for the matter to be defamatory. § 652E, Comment b. It is sufficient if the matter published attributes to the plaintiff characteristics, conduct, or beliefs that are false so that he is portrayed before the public in a false position. *Id.; Brown v. Boney, supra*, at 648, 255 S.E. 2d at 791. An action for defamation and a claim for false light invasion of privacy, however, are closely allied and the same considerations apply to each. *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761 (D.N.J. 1981); Hill, Defamation and Privacy under the First Amendment, 76 Colum. L. Rev. 1205, 1207 (1976). It is for the Court to determine whether the communication in question is capable of bearing a particular meaning which is highly offensive to a reasonable person. *Cibenko, supra* at 766.

Plaintiff ascribes the same meaning to the publication in connection with his false light claim as he does in connection with his defamation claim. For the reasons set forth in connection with the defamation claim, then, this Court finds that the editorial is

reasonably capable of conveying the offensive meaning or the innuendo ascribed by plaintiff as the basis for his invasion of privacy claim. And, for the same reasons that the editorial opinions may predicate a libel action because they are (1) not absolutely protected as "pure opinion" under the First Amendment, (2) are based upon an allegedly false statement of fact and (3) are inextricably intertwined with the allegedly false factual disclosure, thus capable of giving them the effect of false statements of fact upon the reader, they may also predicate a false light invasion of privacy action. Actual malice and damages have been adequately pleaded and the complaint discloses no absolute bar to recovery for plaintiff's second cause of action.

V

Republication of Defamation

[7] Defendant Greensboro News contends that plaintiff's claim against it should be dismissed because the "constitutional guaranty of freedom of expression prevents a finding of liability for a newspaper's republication of a syndicated column, absent evidence that the newspaper had good reason to doubt the accuracy of the column." Defendant argues further that absent allegations that the Greensboro News Company had knowledge of material inaccuracies in *The Raleigh Times* editorial, it cannot be held responsible for reprinting the editorial.

We note first that the complaint against the Greensboro News Company in essence alleges:

> 1. That the Greensboro News Company reprinted and published the false and defamatory statements concerning the plaintiff which had been originally written and published in *The Raleigh Times*.
>
> 2. Thereby endorsing and extending the circulation of the defamatory statements.
>
> 3. That defendant published said statements with knowledge of their falsity, or with reckless disregard for the truth, and with actual malice.

These pleadings sufficiently allege republication with knowledge of material inaccuracies or in reckless disregard of whether such

statements were inaccurate to withstand defendant's motion to dismiss the complaint.

A federal court has recently referred to the "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement." *Hoover v. Peerless Publications, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978). *Accord Cianci v. New Times Pub. Co., supra*, 639 F. 2d at 60-61. The rule is stated in the Restatement (Second) of Torts, § 578 as "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." All of the cases cited and relied upon by defendant in its brief essentially established a *defense* to liability for republication on the basis of justified reliance upon the research, writing, or reporting of an author or newspaper of proven professional ability and repute, absent evidence indicating knowledge of inaccuracies. *See e.g. Mistrot v. True Detective Publishing Corp.*, 467 F. 2d 122 (5th Cir. 1972); *Dresbach v. Doubleday & Company*, 518 F. Supp. 1285 (D. D.C. 1981) and *McManus v. Doubleday & Company, supra.* However, the mere fact that such a defense may be available to defendant does not serve to defeat a claim which is adequately pleaded and to which no insurmountable bar to recovery appears from the face of the complaint.

VI

Conclusion

For the foregoing reasons we hold that plaintiff's complaint states a claim for relief for defamation and invasion of privacy against both media defendants. The very organization of the editorial, as well as certain direct statements therein, are reasonably capable of conveying a defamatory meaning. The editorial statements are not absolutely protected under the First Amendment as "false ideas" or "mere opinion" because the defamatory imputations are sufficiently factual to be understood as literal charges of personal dishonesty and irresponsibility. The mere fact that defendants have disclosed the underlying facts upon which the opinions are based is insufficient, standing alone, to insulate the otherwise unprotected expressions of opinion—to the extent that the opinions are reasonably distinguishable from

the facts in the editorial. Furthermore, the alleged falsity of the underlying facts concerning plaintiff, which we must take as false for purposes of testing the sufficiency of the complaint, effectively nullifies the claim of privilege for the opinions based upon disclosed facts as raising an absolute bar to recovery. In such a case the effect on the reader may be tantamount to that of a false statement of fact. It then properly becomes a question for the jury whether the editorial was so understood.

In due regard to the constitutional bias toward a robust, free, and uninhibited press we stress the narrow character of our ruling, namely that the defendants are not absolutely immunized by a constitutional exception for statements of opinion. Beyond that we have discussed the other privileges raised in support of the complaint's dismissal only to demonstrate that these privileges likewise offer no *absolute protection*, as distinguished from the qualified or conditional protection afforded by the *New York Times* case, for the express and implied statements complained of. We therefore conclude that defendant newspapers simply have not demonstrated that an insurmountable bar to recovery for plaintiff's claims is disclosed on the face of the complaint either under the United States Constitution, the North Carolina Constitution or the common law of defamation, and that the complaint gives defendants sufficient notice of the nature and basis of plaintiff's claim to enable them to answer and to prepare for trial. We emphasize that our ruling in no way relieves the plaintiff from the substantial burden imposed by *New York Times Co. v. Sullivan, supra.* We hold only that the trial court erred in dismissing plaintiff's compalint for failing to state a claim.

Reversed.

Judge PHILLIPS concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

When viewed from its four corners, the publication complained of constitutes an expression of opinion regarding activities and comments of a public figure that, in my opinion, is entitled to protection under the Article I, Sec. 14 of the Constitu-

tion of North Carolina and the First Amendment to the Constitution of the United States. I believe this case to be a fair example of where the public's interest in uninhibited, robust, and open comment is paramount to an individual's interest in protecting his reputation or privacy. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964); *compare Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *and Brown v. Boney*, 41 N.C. App. 636, 255 S.E. 2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 910 (1979).

For these reasons, I must respectfully dissent.

PINEY MOUNTAIN NEIGHBORHOOD ASSOCIATION, INC. v. TOWN OF CHAPEL HILL, NORTH CAROLINA; JOSEPH L. NASSIF, MAYOR AND MEMBER OF THE TOWN COUNCIL OF THE TOWN OF CHAPEL HILL; R. D. SMITH, JOSEPH STRALEY, MARILYN BOULTON, WILLIAM THORPE, BEV KAWALEC, JONATHAN HOWES, JOSEPH A. HERZENBERG, AND JAMES WALLACE, MEMBERS OF THE TOWN COUNCIL OF THE TOWN OF CHAPEL HILL; AND CHAPEL HILL HOUSING AUTHORITY

No. 8215SC705

(Filed 5 July 1983)

1. **Municipal Corporations § 31.1— special use permit—judicial review—standing of corporation representing property owners**

A corporate petitioner who has no property interest in an area affected by a special use permit but which represents individuals who live in the affected area and who potentially will suffer injury by the issuance of the permit has standing to seek judicial review of a municipality's action in approving an application for a special use permit.

2. **Municipal Corporations § 30.6— special use permit—conformity of project with land use plan—sufficiency of evidence**

In determining whether to issue a special use permit for a housing authority's subsidized multi-family housing project, the evidence supported the town council's finding that the project conformed with the town's comprehensive land use plan where the project was clearly within the density range favored by the plan, it did not result in undue racial or income group concentration, and the percentage of subsidized housing that would be created in the subcommunity was not significantly beyond the recommended guidelines, particularly when the projected long range urban growth of the subcommunity is considered.

3. Municipal Corporations § 30.6— special use permit—housing project—public necessity

A finding that a proposed subsidized multi-family housing project was a public necessity was supported by evidence that those eligible for public housing or rent assistance in the town far exceeded the resources available; only one new apartment project was planned in the area, and it was expected to be converted to condominiums; and 40 of the 42 assisted housing families in the area were at the opposite end of the subcommunity.

4. Municipal Corporations § 30.6— special use permit—housing project—maintaining value of contiguous property

A finding that a proposed subsidized multi-family housing project was designed to maintain the value of contiguous property was supported by evidence that the proposed development was on a scale compatible with area residences and arranged so as to minimize the visual impact of its relatively higher density, and that these factors were calculated to maintain surrounding values, and by evidence that studies in other areas had shown that public housing projects did not adversely affect nearby residential values.

5. Municipal Corporations § 30.6— special use permit—no failure to comply with zoning regulations

A town council did not fail to comply with its own zoning regulations by failing strictly to apply the three per cent subsidized housing distribution standard of its comprehensive land use plan in determining whether to issue a special use permit for a public housing project where the whole record supported a finding that the project conformed to the general, advisory guidelines of the comprehensive plan.

6. Municipal Corporations § 30.6— special use permit—requirement that council review record of public hearing

A town council adequately complied with a zoning ordinance's mandate that it "review the record of the public hearing" in determining whether to issue a special use permit where members of the council were present at both the public hearing and the meeting at which the permit was approved; the public hearing was only seven days before final decision on the application for the permit, and the public testimony thus was fresh in the council members' memories; the council did have all documentary evidence introduced at the hearing, much of which duplicated oral testimony, and which comprised a large portion of the hearing record; and several council members professed adequate familiarity with the hearing through personal recollections and notes and review of the documents introduced.

7. Municipal Corporations § 30.22— special use permit—sufficiency of findings

A town council made sufficient findings in ruling on an application for a special use permit where the findings merely tracked the language of the applicable ordinance without enumerating specific facts in the record which supported the findings, since the findings were sufficiently specific to enable the reviewing court to determine whether they were substantially supported by the record and thus whether the council's decision was arbitrary.

8. Municipal Corporations § 31.2— approval of special use permit—review in superior court

The superior court did not impermissibly substitute its own findings for those of a town council in affirming the council's approval of an application for a special use permit but merely made findings regarding the evidence in the record which, although at times contradictory, on the whole supported the councils' findings.

APPEAL by petitioner from *Martin (John C.), Judge.* Judgment entered 8 February 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 May 1983.

Petitioner appeals from a judgment affirming the action of respondent Town of Chapel Hill (hereafter Town), through its Town Council (hereafter Council), in issuing a special use permit to respondent Chapel Hill Housing Authority (hereafter Authority) to construct a subsidized multi-family housing project in a subcommunity where a large number of petitioner's members reside, and refusing to enjoin the Town from granting the special use permit.

Parker, Sink, Powers, Sink & Potter, by William H. Potter, Jr., for petitioner appellant.

Haywood, Denny & Miller, by Michael W. Patrick, for respondent appellees.

WHICHARD, Judge.

I.

A threshold question of petitioner's standing to challenge the Council's approval of the special use permit must be determined.

Only an aggrieved party may appeal the grant or denial of a special use permit. *See Pigford v. Bd. of Adjustment,* 49 N.C. App. 181, 182-83, 270 S.E. 2d 535, 536 (1980), *disc. rev. denied and appeal dismissed,* 301 N.C. 722, 274 S.E. 2d 230 (1981); *In re Coleman,* 11 N.C. App. 124, 127, 180 S.E. 2d 439, 441 (1971). The appellant must, therefore, have "some interest in the property affected." *Pigford,* 49 N.C. App. at 182-83, 270 S.E. 2d at 536.

In its petition for writ of certiorari from the superior court, petitioner alleged, and neither the Town nor the Authority denied, that its membership included more than 150 families

residing in the area where the housing project is proposed to be built. If the individual members were the petitioners here, they would clearly have an interest in the property affected by the housing project as residents of the neighborhood where the project is to be located, and they would be potentially aggrieved by any decline in the use or value of their property that resulted from the housing project. Respondents contend, however, that the corporate petitioner is without standing because it has no ownership or other interest in neighborhood property.

[1] The question whether an association of property owners may have party aggrieved standing under appropriate circumstances has received varying answers, *see* Annot., 8 A.L.R. 4th 1087 (1981). Although our Courts have not addressed this issue, we take note of the trend in other jurisdictions toward relaxing strict procedural requirements involving standing. *See id.* We thus hold that where, as here, a corporate petitioner has no property interest, but represents individuals who live in the affected area and who potentially will suffer injury by the issuance of a special use permit, such petitioner has standing to seek judicial review of the municipality's action in approving an application for a special use permit. *See, e.g., Residents of Beverly Glen, Inc. v. Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973); *Tuxedo Conservation & Taxpayers Assoc. v. Town Board of Town of Tuxedo*, 96 Misc. 2d 1, 408 N.Y.S. 2d 668, 669-70 (1978), *aff'd*, 69 A.D. 2d 320, 418 N.Y.S. 2d 638 (1979); Annot., *supra*, at § 5[a].

II.

The scope of judicial review of a town council's decision on an application for a special use permit must include:

(1) Reviewing the record for errors in law,

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

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

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

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

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980). Both the superior court and the Court of Appeals are bound by the foregoing scope of review. *Id.* at 627, 265 S.E. 2d at 383.

III.

The Chapel Hill Zoning Ordinance provides that

> [no] Special Use Permit . . . shall be approved by the Council unless each of the following findings is made concerning the . . . planned development:
>
> a) That the . . . development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;
>
> b) That the . . . development complies with all required regulations and standards of [the Zoning Ordinance], including all applicable provisions of Articles 4, 5, and 6 and the applicable specific standards contained in Sections 8.7 and 8.8, and with all other applicable regulations;
>
> c) That the . . . development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, *or* that the . . . development is a public necessity; and
>
> d) That the . . . development conforms with the general plans for the physical development of the Town as embodied in [the Zoning Ordinance] and in the Comprehensive Plan.

Chapel Hill Zoning Ordinance § 8.3 (1981) (emphasis supplied). The Council made the above required findings by merely reciting the language of the ordinance, without expressly relating it to the particular circumstances of the application. The Council made both alternative findings specified in section 8.3(c).

IV.

Petitioner contends that certain required findings are not supported by competent, material, and substantial evidence in the whole record.

In applying the whole record test, "the court may not consider the evidence which in and of itself justifies the [agency's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). *See Jennewein v. City Council of Wilmington*, 62 N.C. App. 89, 93, 302 S.E. 2d 7, 9 (1983).

[2] Petitioner contends the findings that "the development conforms with the general plans for the physical development of the Town as embodied in the Zoning Ordinance and in the Comprehensive Plan," and that it complies with applicable standards in the Zoning Ordinance are not supported by substantial, competent, and material evidence in the whole record. Specifically, petitioner contends the development does not conform to the provisions of the Comprehensive Plan involving distribution of subsidized housing, concentrations of racial or income groups, and residential density.

The following provisions of the Comprehensive Plan are pertinent:

> Residential uses in the subcommunities have been divided into low density residential, with a density of from 1 to 7 dwelling units per acre, and high density residential, with a density of from 7 to 15 dwelling units per acre . . . .
>
> . . . .
>
> Low density residential use is the most flexible use when allocating space in the urban area . . . .
>
> One Town objective is a "full range and mix of residential uses including various . . . densities (low to high), and cost levels (low to high) in each sector". . . .
>
> . . . It is recognized that there is a critical need for moderate cost housing in Chapel Hill. . . . [T]o meet this need . . ., moderately priced low density housing located in primarily

> single family areas [is] the goal. To accomplish this, development at the higher end of the low density housing range, i.e., 5 to 7 dwelling units/acre is encouraged . . . .
>
> . . . In order to implement the Town policy of providing "housing for persons of limited means . . . locate(d) throughout residential areas of the community, providing choice of location and preventing undue concentration of racial or income groups," the current average, or 3%, of the housing units in each subcommunity should be subsidized for low and moderate income persons. . . . This standard should be used in evaluating the location of future subsidized units.

Town of Chapel Hill Comprehensive Plan, Land Use Report 11-12 (December 1977).

A review of the whole record reveals the following pertinent evidence:

The uncontroverted density of the proposed development is approximately 5.8 dwelling units per acre. Petitioner presented evidence that the subcommunity in question has had 4% subsidized housing, and after construction of the proposed development there would be 7% subsidized housing. Contrary evidence was presented that the rate of subsidized housing in the subcommunity in July 1977 was 4%, as of July 1981 it was 2.96%, and the proposed development would raise it to 5.11% if it were occupied at this time. Further, the subcommunity in question is one of the town's largest and has substantial population growth potential in the coming years, and the Comprehensive Plan contemplates long range development over at least a ten to fifteen year period. Although the subcommunity was in the past primarily rural and black, recent development has seen increased urban development, primarily white, and only slight changes in the black population.

We agree with the superior court's finding that "the Comprehensive Land Use Plan does not set forth mandatory zoning requirements, but consists of general goals, standards and guidelines for the implementation of zoning policy." The Plan is, by its express terms, merely advisory:

> The Plan does *not* by itself specify the future use of a particular piece of land; the Plan must be implemented by ap-

> propriate ordinances, policies, and private sector initiative. It does not guarantee development or nondevelopment of a specific site; it sets forth broad outlines to guide land use decisions of the private and public sector.

Comprehensive Plan, supra, at 1. A comprehensive plan "is a policy statement to be implemented by zoning regulations, and it is the latter that have the force of law." 82 Am. Jur. 2d, Zoning and Planning § 69, at 502. It "is generally deemed to be advisory, rather than controlling, and it may be changed at any time." *Id.* at 503.

Taking due note of the advisory nature of the Comprehensive Plan, we find that the above material and competent evidence, taking contradictions into account, substantially supports the finding that the development conforms with the general plans for physical development of the Town. The development is clearly within the density range favored by the plan, it does not result in undue racial or income group concentration, and the percentage of subsidized housing that will thereby be created in the subcommunity is not significantly beyond the recommended guidelines, particularly when the projected long range urban growth of the subcommunity is considered.

With regard to the Comprehensive Plan's guidelines for racial group concentration, we note that "municipal restrictions upon the use and occupancy of property as affected *solely* by the racial status of the proposed occupant . . . [are] . . . beyond the reach of the police power." *Clinard v. Winston-Salem*, 217 N.C. 119, 123, 6 S.E. 2d 867, 870 (1940) (emphasis supplied).

[3] Petitioner contends there is no evidence that this development in particular is a public necessity, but only that public housing is a "general necessity." Detailed evidence was introduced showing that those eligible for public housing or rent assistance in Chapel Hill far exceed the resources (vacancies and allocations) available. The area of the proposed housing project was said to be overwhelmingly moderate to high income. Only one new apartment project is planned in the area, and it is expected to be converted to condominiums. Forty of the forty-two assisted housing families in the area are at the opposite end of the subcommunity from the proposed development. Petitioner offered no material contradictory evidence. We hold that the foregoing constitutes

substantial evidence to support the finding that the proposed development is a public necessity.

[4] Petitioner contends that a review of the whole record fails to provide substantial support for the finding that "the development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property."

The pertinent evidence is as follows:

Petitioner's president expressed the opinion that "we are sure, and we have yet to see here any proof to the contrary, that our property values will go down." Two other residents of the subcommunity said that their willingness to purchase homes in the area would have been affected had the housing project been completed at the time of their purchases, and that it had already affected surrounding property values. One witness commented that "several homes . . . have not sold."

Evidence was presented that the proposed development is residential, on a scale compatible with area residences, and arranged so as to minimize the visual impact of its relatively higher density, and that these factors are calculated to maintain surrounding values. Reference was made to a study in Portland, Oregon, which found that public housing projects did not adversely affect nearby residential values. A survey of property values near another public housing project in Chapel Hill was introduced, which found not only no "long-term loss in property values," but also that "properties closest to Public Housing ha[d] a slightly higher valuation."

A man who formerly resided adjacent to the housing project subject to this study stated that "when [he] sold that house, [he] didn't tell the person what [the housing project] was . . . . That's why the real estate value did not drop there[,] because [he]'d be crazy to tell it, what that project back there was."

A witness expressed the opinion that "over time, there is not an adverse effect except where the neighborhood is otherwise weak . . . ."

The foregoing opinions by residents of the area that the value of neighboring property would be adversely affected by the housing project, as well as the opinion that only weak neigh-

borhoods would be adversely affected, insofar as they are "conclusions unsupported by factual data or background, are incompetent and insufficient to support the [Council's] findings." *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 469, 202 S.E. 2d 129, 136 (1974).

Without considering incompetent opinions regarding value, we hold that the above-stated physical plans for the housing project, along with the results of studies in other areas, substantially support the finding that the development is designed to maintain the value of contiguous property.

V.

A municipality considering an application for a special use permit for a housing project is constrained by the following statutory and common law principles:

"All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated." G.S. 157-13 (1982).

> The [zoning] regulations may . . . provide that the board of adjustment or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein . . . . When issuing or denying special use permits or conditional use permits, the city council shall follow the procedures for boards of adjustment [with one exception] . . ., and every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.

G.S. 160A-381 (1982).

"[I]n passing upon an application for a special permit, a [town council] may not violate at will the regulations it has established for its own procedure; it must comply with the provision[s] of the applicable ordinance." *Refining Co., supra*, 284 N.C. at 467, 202 S.E. 2d at 135. This requirement is necessary in order to accord due process and equal protection to applicants and to refute charges that any denial is an arbitrary discrimination against the property owner. *Id.* at 468, 202 S.E. 2d at 135.

> A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. [Citations omitted.] In no other way can the reviewing court determine whether the application has been decided upon the evidence and the law or upon arbitrary or extra legal considerations.

Id. at 468, 202 S.E. 2d at 136.

When a town council conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, it "can dispense with no essential element of a fair trial." *Id.* at 470, 202 S.E. 2d at 137. The applicant must have the opportunity to give evidence, cross-examine witnesses, and inspect documents; and unsworn statements may not be used to support findings absent waiver or stipulation. *Id.* Finally, "in allowing or denying the application, [the Council must] state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Id.* at 471, 202 S.E. 2d at 138.

Petitioner contends the Council violated the foregoing requirements in several ways.

[5] First, by failing strictly to apply the three per cent subsidized housing distribution standard, and taking into account a long range view, the Council failed to require conformance with the Comprehensive Plan and thus "violate[d] at will the regulations it has established for its own procedure." *Refining Co., supra.* Because we have held that the whole record supports the finding that the development conforms to the general, advisory guidelines of the Comprehensive Plan, we find petitioner's attempt to require strict, technical compliance with the Plan under this alternative theory unavailing. Indeed, the Council must comply with its own zoning regulations, but the regulations only call for conformance with a Comprehensive Plan which is, by its own terms, merely advisory.

[6] Second, petitioner contends the Council failed to follow its own zoning regulations by not having before it a written transcript of the previous public hearing when it acted on the application for the special use permit.

The zoning ordinance requires that the Town Manager analyze an application for a special use permit and submit a re-

port to the Planning Board, which reviews the application and the Manager's report, and then submits a recommendation of the action to be taken to the Town Council. Chapel Hill Zoning Ordinance § 8.4.1-.5. After receipt of the Planning Board's recommendation, the Council must hold a public hearing on the application, and "[a] record of the proceedings of the hearing shall be made and shall include all documentary evidence presented at the hearing." *Id.* at § 8.4.6. The Town Manager then reviews the record of the public hearing and submits a recommendation for action to the Council. *Id.* at § 8.4.7. The Council then "shall review the record of the public hearing, the Planning Board's recommendation, and the Town Manager's report and shall take action on the application based on findings as to the determinations required in Section 8.3. All findings shall be based on reliable evidence presented at the public hearing." *Id.* at § 8.4.8.

The public hearing on the Authority's application was held on 21 September 1981. On 28 September 1981 the Council met and voted to approve the application. The Town Attorney advised the Council at the 28 September meeting that no completed summary of the public hearing was then available, but that the minutes of the meeting would not necessarily contain all the evidence heard and it was the task of Council members to form a decision based on their recollection of the evidence presented.

Although the ordinance requires the Council to "review the record" of the public hearing, it does not specify what form the record must take, other than requiring inclusion of all documentary evidence. It is not specified whether a verbatim transcript, a narrative summary (*i.e.*, minutes), or a tape recording will suffice.

We believe the intent of the ordinance is to insure that the Council is sufficiently familiar with, and thus gives proper consideration to, the evidence presented at the hearing. Members of the Council were present at both the 21 September public hearing and the 28 September meeting. The hearing was only seven days before final decision on the application, and the public testimony thus was fresh in the Council members' memories. Further, the Council did have all documentary evidence introduced at the hearing, much of which duplicated oral testimony, and which comprised a large portion of the hearing record. Finally, several Council members at the 28 September meeting, although express-

ing concern that absence of a written record might be subsequently attacked as a procedural irregularity, professed adequate familiarity with the hearing through personal recollections and notes, and review of the documents introduced. In light of these circumstances, we hold that the Council adequately complied with the ordinance's mandate that it "review the record of the public hearing."

[7] Petitioner next contends the Council made insufficient findings of fact in that it merely tracked the language of the ordinance in section 8.3, *supra*, and did not enumerate specific facts in the record that supported those findings.

The courts have required municipal agencies to make findings when ruling on an application for a special use permit, *e.g.*, *Refining Co.*, *supra*, so that the reviewing court may properly determine whether the agency has acted lawfully and the parties will be informed of the grounds for the decision. *See also Barnes v. O'Berry Center*, 55 N.C. App. 244, 246-47, 284 S.E. 2d 716, 717-18 (1981) (Industrial Commission's findings too ambiguous to allow meaningful appellate review). Pursuant to this principle, the ordinance here requires the Council to make specific findings. That the Council made those findings using the language of the ordinance does not render them any less effective as findings. The findings required by the ordinance are sufficiently specific that the reviewing court can determine whether they are substantially supported by the record, and thus whether the decision is arbitrary. That is all that is required under current law. *See Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E. 2d 496, *cert. denied*, 281 N.C. 314, 188 S.E. 2d 897 (1972) (Board of Adjustment tracked the language of the ordinance in denying a special use permit, finding three of four required findings insufficiently supported; Court was able to review denial on basis of such findings).

Petitioner contends that G.S. 150A-36 (1983) of the Administrative Procedure Act, although not applicable to municipalities, G.S. 150A-2(1) (1983), suggests that more specificity should be required of findings such as those here. Although the APA has been the source of general principles adopted by our Courts with respect to municipal actions, *see Concrete Co.*, *supra*, 299 N.C. at 625, 265 S.E. 2d at 382, we do not believe it should be applied by analogy to require more detailed findings here.

Finally, petitioner makes bare, unsupported claims that it was denied the essentials of a fair trial, and that this denial, along with the preceding contentions, constituted arbitrary and capricious action and denial of due process by the Council. We find no merit to these contentions.

VI.

[8] Petitioner argues that the superior court impermissibly substituted its own findings for those of the Council in affirming the approval of the permit application.

"The 'whole record' test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* . . . ." *Thompson v. Board of Education, supra,* 292 N.C. at 410, 233 S.E. 2d at 541. *See also, Concrete Co., supra,* 299 N.C. at 626, 265 S.E. 2d at 383.

The superior court did not substitute its judgment for the Council's, but merely made findings regarding the evidence in the record which, although at times contradictory, on the whole supported the Council's findings. Further, whether the superior court substituted its judgment for that of the Council could not be determinative of the review by this Court, for our task is to review the Council's action, not that of the superior court, and in doing so to address the full scope of considerations that also guided the superior court in its review. *See Concrete Co., supra,* 299 N.C. at 626-27, 265 S.E. 2d at 383.

Affirmed.

Judges WEBB and BRASWELL concur.

IN THE MATTER OF: SOPHIA RENEE TRUESDELL

No. 8226SC482

(Filed 19 July 1983)

1. Insane Persons § 12— sterilization laws—judicial standard

To insure that the State's interest may be furthered without unnecessary and unwarranted infringement upon the mentally retarded person's rights of personal privacy, bodily integrity and autonomy in matters of conception, procreation and childbearing, the petitioner in a compulsory sterlization proceeding must meet the following standards by clear, strong and convincing evidence: (1) that the respondent is a mentally ill or retarded person subject to the sterilization statutes (G.S. Ch. 35, Art. 7); a. has a physical, mental or nervous disease or deficiency, b. the disease or mental deficiency is not likely to materially improve, and c. the respondent is likely to procreate a genetically defective child, or d. would probably be unable to care for a child or children; AND (2) the respondent is physically capable of procreation; AND (3) there is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation; AND (4) the respondent is unable or unwilling to control procreation by alternative birth control or conception methods, including, but not limited, to supervision, education and training; AND (5) that the proposed method of sterilization entails the least invasion of the body of the respondent. In addition, in the case of a proposed female candidate for sterilization, the court must consider and make findings relative to the possibility that the respondent will experience trauma or psychological damage if she becomes pregnant or gives birth, and conversely, the possibility of trauma or psychological damage from the sterilization operation. The latter consideration would also be applicable to a male candidate for sterilization. These minimum basic conditions must be convincingly demonstrated when the State seeks an order of *compulsory sterilization*, for if there are other reasonable ways to achieve the legislative goals with a lesser burden on the constitutionally protected activity, the way of greater interference may not be chosen. G.S. 35-37, G.S. 35-43, and G.S. 35-39.

2. Insane Persons § 12— sterilization petition properly denied—findings and conclusions erroneous

The trial court properly denied a petition to sterilize respondent pursuant to G.S. 35-43 because the petitioner failed to meet its burden of establishing that sterilization of respondent *at this time* would further the State's interest in preventing the conception and the birth of a child whose parent is unable to adequately care for it. Petitioner failed to carry its burden of proof by clear, strong and convincing evidence that (1) there was a substantial likelihood (a) that respondent would voluntarily engage in sexual activity likely to cause impregnation or (b) would engage in sexual activity which she did not initiate; (2) that respondent was unable or unwilling to control procreation by alternative birth control or contraceptive methods; and (3) that the proposed method of sterilization entailed the least intrusive and least burdensome surgical intervention for respondent. However, because of many erroneous findings of

fact and conclusions of law pertaining to respondent's best interest and inability to use other forms of birth control, the case was remanded for entry of findings of fact and conclusions of law not inconsistent with the opinion.

APPEAL by petitioner from *Griffin, Judge.* Order entered 18 December 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 March 1983.

Petitioner, Mecklenburg County Department of Social Services (DSS), initially instituted this action by a petition filed on 30 March 1977, and amended on 18 June 1980, pursuant to G.S. 35-36, *et seq.*, requesting the sterilization of respondent, Sophia Renee Truesdell on the ground that she is mentally deficient without any hope of improvement, and that as a result of said deficiency Sophia will never be able to provide adequate care for a child or children, and that sterilization would be in the best interests of both the State and the respondent. A guardian ad litem was appointed for the respondent on 30 May 1980 by District Court Judge William G. Jones. On 27 June 1980, the guardian ad litem filed an objection to the petition for sterilization. Following a hearing on the matter, Judge Jones denied the petition, concluding as a matter of law, and construing G.S. 35-36, *et seq.* to require clear, strong, and convincing evidence that *inter alia* the respondent is likely to engage in sexual activity before sterilization may be ordered. The court specifically found that there was no evidence that the respondent was likely to engage in any sexual activity with any male and made further findings which, taken together, indicated the lack of a substantial risk of exposure to sexual activity in light of respondent's character, behavior and daily schedule. Petitioner gave notice of appeal, and a trial *de novo* was held in Superior Court.

At the *de novo* hearing in Superior Court, Edward C. Holscher, M.D., qualified as an expert in psychiatry and child psychiatry, and Charles E. Warner, M.D., qualified as an expert in the field of medicine with emphasis in pediatrics, gave extensive testimony directed to the question of whether respondent's condition met the statutory elements required by G.S. 35-43 and the broader question of whether a sterilization was in respondent's best interest. Although Dr. Holscher had only seen respondent once, for a 45-minute psychiatric evaluation, he testified to the effect that sterilization by hysterectomy would be in respondent's

best interest. Additional testimony was received from Daisy Vance, respondent's caretaker and from persons who work with respondent during the daytime at a school for the mentally handicapped. Judge Griffin denied DSS's petition, *inter alia* finding as a fact and concluding as a matter of law that before a sterilization may be ordered there must be a showing that respondent is likely to engage in sexual activity without using contraceptive devices and that in respondent Truesdell's case there is no evidence that she is likely, at present, to engage in sexual activity. From entry of this order, petitioner appeals.

Ruff, Bond, Cobb, Wade and McNair, by Moses Luski, for petitioner appellant.

Assistant Public Defender Eben Rawls, for respondent appellee.

JOHNSON, Judge.

The question presented for review is whether the trial court erred in denying the petition for involuntary sterilization by applying inappropriate legal and constitutional tests. For the reasons set forth below, we hold that the trial court correctly denied the petition for involuntary sterilization because the standards that must be applied to all involuntary sterilizations of the mentally retarded or mentally deficient clearly exclude the respondent, Sophia Renee Truesdell.

I

The undisputed relevant facts as they appear in the record are as follows: Petitioner DSS first instituted this proceeding for involuntary sterilization of respondent, Sophia Truesdell (Sophie) in 1977, when she was 13 years of age. At the time of trial, Sophie was 18 years old. Sophie is a severely retarded individual with a mental age of three to five years and an I.Q. of approximately 30. Her level of intellectual functioning will not materially improve over time. The expert health professionals indicated that Sophie suffers from a severe impairment of adaptive behavior, including basic social skills, which also will not materially improve over time. These deficiencies render Sophie unable to (1) effectively recognize and report her own bodily symptoms, and determine whether medical treatment is warranted and (2) attend to essen-

tial self-help activities such as personal hygiene and health care, shopping, cooking and financial management. Thus, Sophie is unable to exist without significant assistance from others, and could only be expected to live in a social setting in which she had very close supervision, including supervision that her basic needs for food, clothing and personal hygiene were met. In the opinion of the professionals who testified, Sophie's mental deficiencies render her unable, on her own, to care for the needs of a child or children.

Sophie suffers from a degree of psycho-motor impairment, and walks with a somewhat unsteady gait. However, her physical development is commensurate with her chronological age. There is no medical indication that she is infertile. Her regular monthly menstruation makes it reasonable to assume that Sophie ovulates and is, therefore, fertile.

Currently, Sophie resides with Daisy Vance, who was Sophie's foster parent while she was under the jurisdiction of the juvenile courts, and who now serves in a voluntary capacity as Sophie's caretaker. Ms. Vance tends to all of Sophie's needs. During the day, Sophie attends the Metro Center School, a facility for the trainable mentally retarded, where she receives instruction in basic academic, self-help and social skills. She rides the bus to and from school, and never leaves home or school except in the company of school authorities or her foster mother. Sophie has never run away from home. Her instructors describe her as extremely shy, withdrawn and quiet young lady who keeps rather to herself. She has never wandered away from her classrooms, never inappropriately taken off her clothes, and never performed or demonstrated any sexual activity with any members of the class at the Metro School to the knowledge of her instructors. Daisy Vance testified that at times she had observed Sophie rubbing her genital area during her menstruation, and some years prior had observed other such conduct of a sexual nature, but that she had gotten Sophie to stop most of this activity, except possibly some self-stimulation in the privacy of her own room and bed.

At one time, Sophie participated in a social living skills program at the Mecklenburg County Center for Human Development. The class she attended was designed to help students with problems with social skills. The Center's unit supervisor testified

that a goal for each client in the program was to promote social interaction in a highly structured, well-monitored situation; some physical interaction is permitted in furtherance of these goals. Although Sophie was never reported as having initiated any physical contact whatsoever with any of the male clients at the Center for Human Development, one young man there viewed Sophie as his "girlfriend," and was observed putting his arm around her shoulder. No evidence was presented that Sophie was sexually active or had been sexually exploited.

The trial court also received extensive testimony relative to Sophie's menstruation, medical opinion on her ability to utilize various forms of birth control and on the effects and advisability of sterilization by means of hysterectomy.

At the conclusion of the evidence at the trial, Judge Griffin indicated that he would deny the petition for sterilization. However, the record discloses that the trial judge requested that the attorney for the petitioner, DSS, prepare the Findings of Fact and Conclusions of Law despite the fact that the judge had held for respondent, and against petitioner. Findings of Fact Nos. 1 through 10 concern Sophie's limited mental and social development. Finding of Fact No. 2 specifically finds that respondent lacks the capacity to consent to the requested sterilization due to her mental deficiencies. Findings of Fact Nos. 11 through 16 concern Sophie's menstruation and the physical effects of a hysterectomy. Findings of Fact Nos. 16, 17 and 18 relate to her rudimentary sexual drive and social interactions at school. Finding of Fact No. 19 concerns other students at the Metro Center, and Finding of Fact No. 20 speculates as to Sophie's possible reaction to sexual exploitation. Finding of Fact No. 21 states:

> Notwithstanding Findings of Fact 16 through 20, there is no evidence that Respondent, at present, is likely to engage in sexual activity.

Findings of Fact Nos. 22, 23, and 24 concern the unavailability of other forms of birth control as less drastic alternatives to sterilization; Findings of Fact Nos. 25 through 28, possible adverse consequences of pregnancy; Finding of Fact No. 29 states that respondent's mental retardation renders her unable to provide a minimal level of care for a child or children; that she will never be able to care for herself, let alone children. Findings of

Fact Nos. 30, 32, and 33 are in the form of conclusions that: "respondent's menstruation and fertility constitute more of a burden than a benefit to her," that sterilization by hysterectomy would be in the best interests of respondent, so as to outweigh the loss of fertility, and that despite the lack of evidence of sexual activity, hysterectomy constitutes a sound exercise of preventive medicine in the opinion of the medical experts.

Based upon the foregoing findings of fact, the court concluded as a matter of law that,

A. Respondent is subject to N.C.G.S. 35-43;

B. That she suffers from a mental disease or deficiency, not likely to materially improve;

C. Which renders her unable to care for a child or children;

D. That sterilization would be in the best interest of Respondent.

These conclusions notwithstanding, the court further concluded that the decision in *N.C. Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976) precludes it from granting petitioner's request for sterilization.

> Said decision indicates that before a sterilization may be granted there must be a showing that Respondent is "likely to engage in sexual activity without using contraceptive devices." In the instant case there is no evidence that Respondent is likely, at present, to engage in sexual activity . . . [T]herefore . . . Petitioner's request for the sterilization of Respondent [is] denied.

G.S. 35-39 (Cum. Supp. 1981) states that it shall be the duty of the petitioner (county director of Social Services) to institute sterilization proceedings under the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, resident of an institution, or noninstitutional individual, that he or she be sterilized.

(2) When in his opinion it is for the public good that such patient, resident of an institution, or noninstitutional individual be sterilized.

(3) When in his opinion such patient, resident of an institution, or noninstitutional individual would be likely, unless sterilized,

a. To procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or,

b. Because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children. (Spacing and letters added.)

Before the judge may enter an order requiring that the sterilization operation be performed, he must make the findings of fact required by G.S. 35-43, which amounts to a judicial determination that the allegations contained in the petition are true. *N.C. Association for Retarded Children, supra* at 456. The language of G.S. 35-43 is literally a mirror-image of G.S. 35-39(3). That section requires judicial findings that because of mental disease or deficiency which is not likely to materially improve,

a. The person would probably be unable to care for a child or children, or

b. Because the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies. (Spacing and letters added.)

Curiously, the two additional grounds for instituting sterilization proceedings stated in G.S. 35-39, the best interests of the State and the retarded individual, are not included in G.S. 35-43.

Petitioner-appellant argues that the trial court erred in concluding that a showing of sexual activity on the part of the respondent is required before sterilization may be ordered pursuant to G.S. 35-43. Petitioner contends that this is an "additional" standard imposed on the North Carolina statutory scheme by a federal court in an "unprincipled exercise in judicial legislation;" that the decision in *N.C. Association for Retarded Children v. State of North Carolina, supra*, has no binding precedential value on this Court; and that application of that decision in Sophie's case would violate her constitutional right to obtain a steriliza-

tion. Petitioner further contends that the findings of fact made by the trial court far exceeded the standards set by G.S. 35-43, and the decisions of *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976) and *In re Johnson*, 45 N.C. App. 649, 263 S.E. 2d 805, *disc. rev. denied*, 300 N.C. 373, 267 S.E. 2d 686 (1980), for the granting of a sterilization petition, thereby requiring the trial court, as a matter of law, to grant rather than deny, the sterilization petition. According to the petitioner, G.S. 35-43 requires *only* a showing that (1) the respondent suffers from a mental disease not likely to materially improve, (2) which renders respondent unable to care for a child or children, and that such a showing establishes a compelling state interest in the sterilization of respondent. In addition, petitioner contends that sterilization is in the respondent's best interests.

Respondent argues that the correct legal and constitutional standards were applied by the trial court and that should an order of sterilization be entered on the findings of fact in this case, the statutes as applied would impermissibly infringe upon Sophie's fundamental right to procreate. Further, that the findings of fact relied upon by petitioner in support of an order of involuntary sterilization are erroneous, not supported by clear, strong and convincing evidence, irrelevant, and immaterial to the issues before the court. Respondent requests that these findings be stricken from the record and disregarded in deciding this appeal.

We begin with the issues raised concerning the findings of fact by the trial court. The trial judge requested that the attorney for the petitioner, Department of Social Services, prepare the findings of fact and conclusions of law despite the fact that the judge had held for respondent, and against petitioner. The petitioner's proposed findings and conclusions were then directly submitted to the presiding judge who read and signed them on 18 December 1981. That same day, the guardian ad litem for respondent submitted his own set of proposed findings of fact and conclusions of law. The guardian also promptly entered written objections to the findings of fact contained in Judge Griffin's order on the grounds that he was not shown a copy of the proposed findings and conclusions prior to their submission to the judge and specifically on the grounds that Findings of Fact Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30,

32 and 33 are not supported by clear, cogent, and convincing evidence, and are immaterial and irrelevant. The findings of fact specifically objected to, taken as a whole, formed the basis of the court's conclusion of law that sterilization by hysterectomy would be in the best interest of respondent.

Due to the unusual procedure by which the unsuccessful petitioner was allowed to prepare the proposed findings and conclusions, the successful respondent sought to raise the question of the sufficiency of the factual findings as to Sophie's best interests and her inability to use other forms of birth control, by presenting the question in the appellate brief. Additionally, the respondent's written objection to the findings, containing a statement of the error complained of and the grounds upon which the objection was taken, was included in the record on appeal. Petitioner filed a reply brief contending that the respondent-appellee failed to properly preserve the question for review by failing to note any "exceptions," or make any "cross-assignments of error" in the record on appeal pursuant to Rule 10(a) and (d) of the Rules of Appellate Procedure. We disagree.

As the commentary to Rule 10(a) indicates, the underlying purpose behind the exception/assignment of error process is to limit the scope of appellate review to (1) errors which have been first suggested to the trial judge in time for him to avoid or to correct them; and (2) to signal the adversary the points of law which will be urged on appeal. By the further restriction that the exceptions and assignments of error must be formally presented for review as "questions" in the written brief, the ultimate scope of review is defined. But for the labels "exception" and "cross-assignment of error," the procedure followed by the respondent in this case substantially complies in every respect with requirements of Rule 10. Therefore, the question presented as to the sufficiency of the evidence supporting the findings of fact is properly before this Court, and will be considered where appropriate in the course of reviewing the trial court's denial of the sterilization petition.

II

At the outset, we note that in considering the prospect of sterilization, a court must take particular care to protect the rights of the mentally impaired. Of late, increased attention has

been focused on those rights from public authorities in this country. *See e.g.*, 42 U.S.C.A. § 6000 *et seq.*; Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591 (1966); *cf. Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed. 2d 101 (1979) (due process requirements of state commitment procedures); *see generally*, P. Friedman, *The Rights of Mentally Retarded Persons* (1976). In addition, sterilization not only affects the individual's fundamental right to procreate, recognized by the United States Supreme Court in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), it forever deprives the individual of that basic liberty. Therefore, the equal protection clause of the Fourteenth Amendment requires strict scrutiny of both the classification of those subject to the involuntary sterilization laws, as well as the application of that classification, to ensure that the statute as drawn and applied does not have an impermissibly discriminatory effect upon the subject individual's exercise of his or her fundamental rights. *Skinner v. Oklahoma, supra; Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In *Skinner*, the Supreme Court applied the strict scrutiny test and struck down the Oklahoma Habitual Criminal Sterilization Act on the grounds that the classification of those to be sterilized invidiously discriminated against certain types of individuals in the exercise of a fundamental right. Justice Douglas, writing for the Court, stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

316 U.S. at 541, 62 S.Ct. at 1113, 86 L.Ed. at 1660. Justice Douglas went on to state that, although the majority did not question the scope of the police power of the state, the fundamental nature of the right to procreate necessitated the Court's strict scrutiny of the classification which a state makes in a sterilization law, "lest unwittingly or otherwise invidious discriminations [be] made

against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Id.*[1]

Skinner v. Oklahoma, supra, is recognized as a forerunner of the special protection of some "fundamental interests" under the equal protection clause. In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972), the right to conceive and raise one's children was found to be fundamental, and, as such, to warrant protection under the Fourteenth Amendment. Beginning with *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965), the United States Supreme Court has given constitutional recognition to the right of personal autonomy over procreation and contraception. In *Griswold,* the Court sought to shield the right of privacy in marriage from governmental intrusion in the form of a law forbidding the use of contraceptives. A substantive right of privacy was given form out of the "penumbras" of the Bill of Rights. *Id.* at 484, 85 S.Ct. at 1681, 14 L.Ed. 2d at 514. Since *Griswold,* the Supreme Court has repeatedly stated that the broad right of privacy entails the right of the *individual* "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 1058, 31 L.Ed. 2d 349, 362 (1972). Involuntary sterilization directly threatens that right, *Skinner v. Oklahoma, supra.* In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), the Court stated that the Constitution guarantees certain "zones of privacy," and that its previous decisions make it clear that the right of personal privacy also extends to activities relating to marriage, procreation, contraception, family relationships and child rearing and education. Further, that this right of personal privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy, which the state may not altogether deny or unnecessarily burden in furthering its legitimate interest in protecting potential life. 410 U.S. at 152-153,

1. Chief Justice Stone concurred in the result reached on the grounds that the statute violated due process by not affording the opportunity to any individual member of the subject class to show that he is not the type of case which would justify resort to such an invasion of personal liberty as involuntary sterilization. Justice Jackson concurred on both grounds, while also indicating that scientific uncertainty about the transmissibility of certain characteristics raised grave doubts as to the constitutionality of any eugenic sterilization statute. 316 U.S. at 543-546, 62 S.Ct. at 1114-1116, 86 L.Ed. at 1661-1663.

93 S.Ct. at 726-727, 35 L.Ed. 2d at 176-177. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' (citations omitted) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155, 93 S.Ct. at 728, 35 L.Ed. 2d at 178. In *Carey v. Population Services International*, 431 U.S. 678, 685-686, 97 S.Ct. 2010, 2016-2017, 52 L.Ed. 2d 675, 684-685 (1977), Justice Brennan, again invoking the right of privacy to make certain personal decisions without unjustified governmental interference, stated:

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices . . . [T]his is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or prevent conception are among the most private and sensitive . . . "[C]ompelling" is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. (Citations omitted.)

The principles developed in *Roe* and its progeny were recently reaffirmed by the Supreme Court in *Akron v. Akron Center for Reproductive Health, Inc.*, --- U.S. ---, 103 S.Ct. 2481, --- L.Ed. 2d 687 (1983) invalidating a number of state laws regulating the abortion procedure on the grounds that they unconstitutionally burdened the exercise of a woman's fundamental right to make the highly personal choice whether or not to terminate her pregnancy. Justice Powell, writing for the Court, again endorsed the *Roe* recognition that an individual's "freedom of personal choice in matters of marriage and family life," occupies a central place among the liberties protected by the due process clause, 410 U.S. at 169, 93 S.Ct. at 735, 35 L.Ed. 2d at 194 (Stewart, J., concurring); that the state does have an "important and legitimate interest in protecting the potentiality of human life," *id.* at 162, 93 S.Ct. at 731, 35 L. Ed. 2d at 182; but that *searching judicial examination* of the abortion regulations enacted is necessary to ensure that the state meets its burden of demonstrating that the regulations actually furthered the state's interests. In the *Akron* case itself, one of the regulations invalidated required that all second tri-

mester abortions be performed in a hospital. The Court stated that under *Roe*, after the end of the first trimester of pregnancy the state's interest in maternal health becomes compelling and it may, therefore, regulate the abortion procedure to the extent that the regulation reasonably relates to that end. In addition, that the state's interest in the potential life of the fetus is also implicated during the second trimester, however, the Court held that the state may not broadly regulate the *entire trimester.*

> Rather, the State is obligated to make a reasonable effort to *limit the effect of its regulations to the period in the trimester during which its health interest will be furthered.* (Emphasis added.)

--- U.S. at ---, 103 S.Ct. at 2495, 76 L.Ed. 2d at 706. The Court concluded that the indiscriminate temporal sweep of the regulation placed a significant obstacle in the path of a woman seeking an abortion without furthering the state's purpose. Thus, a state may enact regulations which reasonably burden a fundamental right, but the regulation must be narrowly drawn to affect that right *only at such times* when the regulation will palpably further the state's interest. The Supreme Court thereby reaffirmed the principle that not only must the means chosen by the state bear a fair and substantial relation to the ends sought, but the legislation must not unnecessarily impair the fundamental personal decisional right affected.

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231, 237 (1960).

Although the constitutionality of G.S., Chapter 35, Article 7, "Sterilization of Persons Mentally Ill or Mentally Retarded," as drawn is not here questioned, the constitutionality of the statutory scheme as applied to respondent is at issue in this appeal. Thus, the question becomes, at what point in time will the

state's interest in preventing the procreation of a child whose parent is unable to care for it due to mental retardation be furthered so as to warrant the exercise of its power to involuntarily sterilize the mentally retarded person. In other words, under what circumstances does involuntary sterilization under G.S. 35-36 *et seq.* become justified and appropriate? A brief history of the treatment of Article 7 in the courts thus far is necessary for a full understanding of the issues presented by this appeal.

A

The statutory scheme first survived a broad-based constitutional attack in *In re Moore, supra.* The petitioner requested the court to enter an order authorizing the sterilization of Joseph Lee Moore, a minor, by means of a vasectomy, on the ground that unless sterilized he woud procreate a child or children who would probably have serious physical, mental, or nervous diseases or deficiencies. The petition was accompanied by the consent of respondent Moore and the consent of his mother. Later, respondent Moore, through his guardian ad litem and attorney, filed a motion to dismiss the petition, alleging that G.S. 35-36, *et seq.* was unconstitutional. The motion was allowed and the petitioner (DSS) appealed.

The sole issue on appeal was the constitutionality of the statutory scheme as drawn. The Supreme Court concluded that the provisions of Article 7 did not offend the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of the statutes. Further, that the hearing procedures provided for by the statutes protected the procedural due process rights of the mentally retarded, and the statutes substantively constituted a valid and reasonable exercise of the State's police power since the State has a compelling interest to prevent the procreation of children by a mentally ill or retarded person who would probably be unable to care for children and the procreation of children who probably would have serious physical, mental, or nervous diseases or deficiencies.

As to the former ground for sterilization, the Court reasoned that the State's interest in the welfare of the unborn child is suffi-

cient to warrant sterilization of a retarded individual, as is the State's interest in preventing the procreation of children who will become a burden on the State. 289 N.C. at 102-103, 221 S.E. 2d at 312, *citing Cook v. State,* 9 Or. App. 224, 495 P. 2d 768 (1972) and *In re Cavitt,* 182 Neb. 712, 157 N.W. 2d 171 (1968). As to the latter ground, the Court relied upon the United States Supreme Court decision in *Buck v. Bell,* 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) to establish the State's paramount interest in preventing the conception of a genetically defective child.[2]

The court also noted conditions under which it may be in the best interests of the mentally retarded individual to be sterilized.

> The mentally ill or retarded individual may not be capable of determining his inability to cope with children. In addition, he may be capable of functioning in society and caring for his own needs but may be unable to handle the additional responsibility of children. *This individual also may not be able to practice other forms of birth control and therefore sterilization is the only available remedy.* Sterilization itself does not prevent the normal sex drive of the person, it only prevents procreation. Therefore, the State may only be pro-

2. In *Buck v. Bell, supra,* Justice Holmes, writing for the Court accepted the basic premises of the eugenic theory that persons with certain diseases or antisocial characteristics have offspring who inherit the parental defect, tend to procreate more often and do not view sterilization as detrimental so that sterilization of the unfit would promote the general health and welfare of society. *See Id.* at 207, 47 S.Ct. at 585, 71 L.Ed. at 1002; Ferster, *supra* at 602. All of the underlying premises of eugenic sterilization, however, have been vigorously criticized and, for the most part, have proven false. *See Matter of A.W.,* 637 P. 2d 366 (Colo. 1981); Ferster, *supra* at 602-604; Kindregan, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States , 43 Chi. - Kent L. Rev. 123, 134-140 (1966). *See also Skinner v. Oklahoma, supra* at 546, 62 S.Ct. at 1115, 86 L.Ed. at 1663 (Jackson, J., concurring). In Note, *Legislative Naivete in Involuntary Sterilization Laws,* 12 Wake For. L. Rev. 1064 (1976), the author, at 1070-1075, has criticized the *Moore* court's reliance upon *Buck v. Bell, supra,* in part because the individual's competing right to procreate was not given sufficient emphasis by Justice Holmes. The author also analyzed the reasoning of *In re Moore* in light of current constitutional protections and criticizes *inter alia,* the *Moore* court's focusing on the State's right to promote the general good while failing to give adequate weight to the countervailing consideration of the individual's fundamental right to procreate. Thus, the author concludes that the *Moore* analysis closely approximates a "rational basis" standard of review, rather than the "strict scrutiny" required when legislation works a "palpable invasion of a right secured by fundamental law." *Id.* at 1073.

> viding for the welfare of the individual when this individual is unable to do so for himself. (Emphasis added.)

289 N.C. at 104, 221 S.E. 2d at 312-313. The respondent's contention that G.S. 36-43 was unconstitutionally vague and arbitrary because it lacked adequate judicial standards to guide the court in reaching a decision on the sterilization petition was rejected. The Court conceded that the statutes contained some uncertain language and ambiguity. However, citing the traditional principles of statutory construction as stated in *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966) and *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), the Court stated that it is the duty of the court to construe a statute, ambiguous in its meaning, so as to give effect to the legislative intent. The legislative intent was found to be the provision of sufficient safeguards to prevent misuse of the potentially dangerous sterilization procedure, and the meaning of terms such as "likely" to procreate and "probably" be unable to care, as used in G.S. 35-36 *et seq.*, sufficiently subject to objective determination and sufficiently understandable to be complied with. In order to further the legislative intent to protect the fundamental rights of the individual, the Court held that the evidence must be clear, strong and convincing before such an order may be entered. *Id.* at 106-108, 221 S.E. 2d at 314-315.

The statutory scheme survived another broad constitutional challenge in *N.C. Association for Retarded Children v. State of North Carolina, supra*, with two significant exceptions. Subdivision (4) of G.S. 35-39 (subsequently repealed by Session Laws, 1981) which provided that the appropriate public official should initiate proceedings, "[w]hen requested to do so in writing by the next of kin or legal guardian of such patient, resident of an institution, or noninstitutional individual," was held to be an arbitrary and capricious delegation of unbridled power. 420 F. Supp. at 456. The second, and more pertinent action of the federal court was to specifically construe G.S. 35-43 to mean that before an order of sterilization can be entered, the judge must find from evidence that is clear, strong and convincing, that the subject is likely to engage in sexual activity without utilizing contraceptive devices and is, therefore, likely to impregnate or become impregnated.

> We derive that meaning from the clause of the statute saying ". . . because the person would be likely, unless sterilized, to procreate a child or children . . ." Although the phrase is not contained in the prior clause, *it must have been the sense of the legislature to require only that which is necessary, and unless sexual activity and inability or unwillingness to utilize contraception is indicated by the evidence, there would be no occasion for resort to sterilization.* (Emphasis added.)

420 F. Supp. at 456-457. Rejecting arguments that the statute was overbroad and vague, the court repeated this narrowing interpretation in order to uphold the legislative classification of mentally retarded persons on equal protection grounds. After observing that sterilization is a "drastic procedure, almost impossible to reverse in females and difficult and uncertain to reverse in males . . . intended to be permanent and prevent procreation," *id.* at 454, the court made the following findings of fact pertinent to the legislative classification at issue:

> [I]t is in some cases possible to predict with substantial accuracy that a mentally retarded person would be incapable of discharing the responsiblities of parenthood.
>
> * * *
>
> While mentally retarded persons may be entitled to express themselves sexually, it can in some cases be determined that a mentally defective person does not understand or cannot appreciate the natural consequences of sexual activity. It can, likewise, be determined in some cases that the conception of a child is neither the intention nor the expectation of the sexually active mental retardate.
>
> * * *
>
> Some mentally retarded persons who are sexually active may not want children. While many sexually active retarded persons are capable of employing various methods of birth control effectively, some are incapable of effective voluntary contraception.
>
> * * *
>
> In rare and unusual cases, it can be medically determined that involuntary sterilization is in the best interests of either

> the mentally retarded person or the state or both. (Emphasis added.)

420 F. Supp. at 455. Based upon this and other findings, the legislative classification of G.S. 35-36 *et seq.* was upheld. The classification was found to rest upon respectable medical knowledge and opinion that mentally retarded persons are in fact different from the general population and may rationally be accorded different treatment for their benefit and the benefit of the public.

> Moreover, the classification is itself narrowed as to impact so that, as we interpret it, only mentally retarded persons who are sexually active, and unwilling or incapable of controlling procreation by other contraceptive means, *and* who are found to be likely to procreate a defective child *or* who would be unable because of the degree of retardation to be able to care for a child, may be sterilized. (Emphasis original.)

420 F. Supp. at 457. Therefore, the legislative dual purpose—to prevent the birth of a defective child or the birth of a non-defective child that cannot be cared for by its parent—was found to reflect a compelling state interest sufficient to satisfy the requirements of *both* substantive due process and equal protection *only* when the statute is thus narrowly interpreted. The decision in *N.C. Association for Retarded Children* formed the basis for the trial court's denial of DSS' petition in the case *sub judice.*

The involuntary sterilization issue was presented to this Court in *In re Johnson, supra.* Judge Clark, writing for the court, noted that although the sterilization statutes as drawn have been determined to meet the tests of constitutionality, "the absence of standards and statutory definitions requires that the courts construe and apply the statutory provisions to the evidence in each case so as to adequately protect the respondent's fundamental rights." 45 N.C. App. at 652, 267 S.E. 2d at 808. Stressing the need to rely on what the evidence indicated, the court ruled that the mere fact of retardation does not render a person presumptively unfit to parent children so as to require an order of sterilization. *Id.* at 653, 267 S.E. 2d at 809, *citing Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974). Rather, all the evidence was closely examined to determine fitness and the compelling need for sterilization. Testimony

by respondent's social worker, psychiatrist and foster mother indicated that when the 23 year old respondent was 18 years of age she was involved with several men, but was unable either to understand birth control methods or to comprehend that she could become pregnant from sexual intercourse; an intrauterine device (IUD) was inserted at the behest of DSS, but respondent had it removed; according to her foster mother, respondent went out every night, had boyfriends, and refused to take birth control pills; respondent had already had one abortion; the doctor testified that one of respondent's boyfriends wanted to marry her and that she had indicated the desire to have children. The respondent was often either impatient with children or appeared totally disinterested in them. Both the social worker and foster mother were of the opinion that respondent was unable to look after or care for a child. The grant of petitioner's request for sterilization was upheld on the grounds that the petitioner met its burden of proof by presenting clear, strong and convincing evidence that in addition to her mild mental retardation, over a period of years the respondent had exhibited emotional immaturity, a lack of patient with children, and continuous nightly adventures with boyfriends.

From the foregoing evidence and conclusion based thereon, it appears that this Court has already implicitly accepted the interpretation given G.S. 35-43 by the federal court in *N.C. Association for Retarded Children*, that before a sterilization can be ordered there must be a showing that the subject be shown to be likely to engage in sexual activity without utilizing contraceptive devices and is, therefore, likely to become impregnated.

B

The petitioner contends that the trial court erred in applying the construction of G.S. 35-43 found in *N.C. Association for Retarded Children, supra*. We disagree.

As a preliminary matter, it is clear that the questioned interpretation was reached in order to avoid an infirmity under the federal constitution and, as such, constitutes a decision on federal constitutional law. Our Supreme Court recognized that the sterilization statutes, G.S. 35-43 in particular, contain certain ambiguities in phrasing and uncertainty in terminology. 289 N.C. at 108, 221 S.E. 2d at 315. However, the court recognized (1) the

duty of the courts to construe a statute, ambiguous in its meaning, so as to give effect to the legislative intent, and (2) that where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted. 289 N.C. at 106, 221 S.E. 2d at 314. The ambiguity at issue in G.S. 35-43 is at least in part created by the omission of the words "likely to procreate" preceding the parental unfitness ground for sterilization. This issue was not specifically addressed by the court in *Moore* because sterilization of Joseph Moore was sought on the eugenic justification that, unless sterilized, he would be likely to procreate a defective child. The reported decision does not contain any discussion of Moore's home life or social activities. However, the respondent's mother had consented to the sterilization, and the Court stated that, "his mother unquestionably is in a position to know what is best for the future of her child." 289 N.C. at 109, 221 S.E. 2d at 316. In addition, the court cited with approval the case of *Cook v. State, supra.* In *Cook,* the respondent was both mentally ill and mentally retarded. As a child she had been physically and sexually abused by her family. The petition to sterilize the respondent was filed only after she had engaged in a series of indiscriminate and impulsive sexual involvements while she was in the State Hospital. 495 P. 2d at 770. Under these conditions, the *Cook* court found strong evidence that the respondent was a potential parent whose inability to care for a child due to mental illness and retardation presented a threat of immediate harm to a vital state interest—the public health and welfare. Thus, a compelling state interest in the sterilization of a particular mentally retarded individual would seem to require that conditions created by the party against whom the State seeks to act must create a threat of immediate harm to that interest. It must be shown that procreation is now at risk. *See Akron v. Akron Center for Reproductive Health, Inc., supra. See generally* Note, 12 Wake For. L. Rev., *supra* at 1075; Sherlock, *Sterilizing The Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C. L. Rev. 943, 970 (1982).

Petitioner argues, in effect, that it is sufficient to show only (1) procreative capacity and (2) the prospective unfitness of the potential parent to justify sterilization. We reject this interpretation of G.S. 35-43 as it would raise serious constitutional ques-

tions. The existence of a situation justifying sterilization depends upon more than a bare capacity for procreation. Logic and reason indicate that unless and until a person is sexually active, there is no likelihood that the person will procreate a child and, unless and until procreation has occurred, there is no likelihood that the person will be a biological parent, fit or unfit. We are persuaded by the reasoning of the federal court in *N.C. Association for Retarded Children* that, "it must have been the sense of the legislature to require only that which is necessary, and unless sexual activity and inability or unwillingness to utilize contraception is indicated by the evidence, there would be no occasion for resort to sterilization." 420 F. Supp. at 457. Furthermore, as other courts have observed, sterilization of the mentally retarded is a drastic and extraordinary means of contraception, a means to prevent birth that "as it is now understood by medical science is . . . substantially irreversible." *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W. 2d 881, 894 (1981); *Matter of Moe*, 385 Mass. 555, 432 N.E. 2d 712, 716-717 (1982).

[1] Thus, sterilization irreparably deprives a person of the capacity to exercise a fundamental right and great care must be taken to determine whether the respondent is an appropriate candidate. As the court in *N.C. Association for Retarded Children* found, involuntary sterilization will be in the best interests of either the mentally retarded person, or the State or both only in *rare and unusual* cases. The concededly legitimate purpose to be achieved by compulsory sterilization here is the prevention of the birth of a child to a person who would be incapable of discharging the responsibilities of parenthood due to mental retardation. *In re Moore, supra; N.C. Association for Retarded Children, supra.*[3]

3. *Compare Matter of A.W.*, 637 P. 2d at 368-369 ("Today, compulsory sterilization based on eugenic theories can no longer be justified as a valid exercise of governmental authority . . . [It] would be an unconstitutional infringement of the fundamental right to procreate"); *Matter of Moe, supra* at 717. ("The State has no recognizable interest in compelling the sterilization of its citizens.") *Accord In re Grady*, 85 N.J. 235, 426 A. 2d 467, 481 n. 8. (1981). *See also* Ferster, *supra* at 601-602, 613-616, 633 (As late as 1966 twenty-six states had eugenic sterilization laws; twenty-three of these were compulsory and all applied to the mentally retarded. The author notes that there has been some trend recently toward repeal of compulsory sterilization laws as well as a decrease in the number of sterilizations performed; that the decrease may be due to growing doubts about the constitutionality and efficacy of eugenic sterilization. North Carolina, whose sterilization statutes prior to 1975 provided procedures for sterilization upon consent of the per-

However, the recognition that procreation is a fundamental right renders suspect all but the most compelling justifications for the exercise of the awesome power of sterilization. Nevertheless, there are compelling societal and individual interests that can be furthered by sterilization in some cases. *In re Moore, supra.* To ensure that the State's interest may be furthered without unnecessary and unwarranted infringement upon the mentally retarded person's rights of personal privacy, bodily integrity and autonomy in matters of conception, procreation and child rearing, we hold that the petitioner must meet the following standards by clear, strong and convincing evidence:

(1) That the respondent is a mentally ill or retarded person subject to the sterilization statutes (Art. 7, *supra*);

a. has a physical, mental or nervous disease or deficiency,

b. the disease or mental deficiency is not likely to materially improve, and

c. the respondent is likely to procreate a genetically defective child, or

d. would probably be unable to care for a child or children; AND

(2) The respondent is physically capable of procreation. Where, however, the respondent has reached sexual maturity, the court may presume fertility, absent medical evidence to the contrary; AND

(3) There is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation; AND

(4) The respondent is unable or unwilling to control procreation by alternative birth control or contraceptive methods, including, but not limited to, supervision, education and training; AND

---

son or a relative and primarily on the non-eugenic grounds of unfitness for parenthood, reported over 50% of the nation's sterilizations in 1963; only five states performed more than twenty-five sterilizations during 1963, with 240 performed in North Carolina.)

(5) That the proposed method of sterilization entails the least invasion of the body of the respondent. In other words, the proposed surgical intervention is the least intrusive and least burdensome method for sterilization of the respondent.

In addition to the foregoing, in the case of a proposed female candidate for sterilization, such as respondent Truesdell, the court must consider and make findings relative to the possibility that the respondent will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation. The latter consideration, of course, would also be applicable to a male candidate for sterilization.

The foregoing standards are based soundly upon the requirements of Article 7, *supra*, and the decisional law of involuntary sterilization. *Skinner v. Oklahoma, supra; In re Moore, supra; In re Johnson, supra; N.C. Association of Retarded Children v. State of North Carolina, supra.* In addition, the standards are substantially identical to those developed by courts in other jurisdictions when called upon to give judicial authorization to a sterilization requested by a mentally retarded person's parents on behalf of their child. In general, these courts have concluded that although the United States Supreme Court has not acknowledged a constitutional right to *obtain* a sterilization, "the right to bear or beget children implies a more general right to reproductive autonomy which must include under certain circumstances the opportunity to prevent procreation through a variety of means including *non-compulsory sterilization.*" (Emphasis added.) *Matter of A.W.*, 637 P. 2d at 369. Most courts have developed a constitutional "best interests" standard whereby the incompetent person's right to make this profoundly personal decision could constitutionally be exercised on his or her behalf in the absence of a statutory procedure. The New Jersey Supreme Court recognized that in such a case, the sterilization could not be characterized as either "compulsory" or "voluntary," but fell into a third category the court labelled, "lacking personal consent because of a legal disability." *In re Grady*, 426 A. 2d at 473. In each such case, the courts have held that the findings must include a determination in one form or another, that the respondent is likely to engage in sexual activity likely to cause impregnation,

and that all less drastic contraceptive methods have been proved unworkable or inapplicable before sterilization may be ordered. *In re Grady,* 426 A. 2d at 483 ("The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her . . . [T]he feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances."); *Matter of Guardianship of Hayes,* 93 Wash. 228, 608 P. 2d 635, 641 (1980) (en banc) ("[L]ikely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy . . . [A]ll less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable."); *Wentzel v. Montgomery General Hosp. Inc.,* 293 Md. 685, 447 A. 2d 1244, 1254 (1982), *cert. denied,* --- U.S. ---, 103 S.Ct. 790, 74 L.Ed. 2d 995 (1983) ("[T]he extent of the child's exposure to sexual contact that could result in pregnancy, the feasibility of utilizing effective contraceptive procedures in lieu of sterilization."). *Accord Matter of A.W.,* 637 P. 2d at 375-376; *Matter of Guardianship of Eberhardy,* 307 N.W. 2d at 914 (Callow, J., dissenting); *Matter of Moe,* 432 N.E. 2d at 720-722 (Best interests standard as such rejected because based on external criteria; doctrine of "substituted judgment better adapted to promote best interests of the individual by requiring court to determine values and desires of the affected individual."). *See also Wyatt v. Aderholt,* 368 F. Supp. 1383, 1384 (N.D. Ala. 1974) (Even though consent obtained, a determination that a proposed sterilization is in institutionalized individual's best interest must include a determination that "no temporary measure for birth control or contraception will adequately meet the needs of such resident, and shall not be made on the basis of institutional convenience or purely administrative considerations.") and Sherlock, *supra* at 966, 969, 971 ("There must be a reformulation of the best interests test to incorporate a presumption that sterilization is a *last resort* to be used only in a particularly difficult situation . . . [T]he retarded person must be sufficiently sexually active to create a likelihood of pregnancy or paternity . . . [T]he cornerstone of a last resort showing is a demonstration that alternative means of contraception will not work."). These authorities, by requiring a finding that the respondent is likely to engage in sexual activity without using contraceptive devices, make it clear that sterilization is to be used only as a last resort for a clear

and present problem, not for a hypothetical problem that may only surface in the distant future.

A fortiori these minimum basic conditions must be convincingly demonstrated when the State seeks an order of *compulsory sterilization*, for if there are other reasonable ways to achieve the legislative goals with a lesser burden on the constitutionally protected activity, the way of greater interference may not be chosen. *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed. 2d 274, 285 (1972). Sterilization may not be ordered if there is a less drastic means available. *Shelton v. Tucker, supra.* Application of the standards set forth above to the case under discussion reveals no error in the trial court's denial of the petition for sterilization of Sophie Truesdell.

III

[2] It is undisputed that Sophie Truesdell is a mentally retarded individual subject to the sterilization statutes and that she is severely retarded and is not likely to improve.

Inability to Care for a Child

Findings of Fact Nos. 6, 7, 8, 9 and 29, taken together, detail the degree of Sophie's mental deficiencies and her inability to care for her own basic needs. Accordingly, the trial court found as a fact and concluded as a matter of law that Sophie's mental retardation renders her unable to provide a minimal level of care for a child. "The statutory phrase 'care for the child' is not defined, but the courts in construing the phrase must find whether the evidence establishes a minimum standard of care consistent with both state interest and fundamental parental rights. The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child." *In re Johnson, supra* at 653, 263 S.E. 2d at 809. The petitioner has met this burden with regard to Sophie's probable inability to care for a child. DSS presented clear and convincing evidence that Sophie's severe deficiencies in adaptive behavior render her unable to adequately care for her own most basic needs for food, clothing, and personal hygiene, and that these deficiencies would probably render her incapable of meeting even the most basic

physical needs of a child.[4] The court specifically found that Sophie herself will always need to live in a very closely supervised setting just to exist. We conclude that the findings of fact support the conclusion of law that Sophie would probably be unable to adequately care for a child.

Capable of Procreation

Finding of Fact No. 10 states there is no indication that respondent is infertile; her regular monthly menstruation makes it reasonable to assume that respondent ovulates and is fertile. Sophie was 18 years of age at the time of trial. There was no medical evidence presented to otherwise raise doubts as to her fertility, and the court was entitled to presume that Sophie is capable of procreation.

Sexual Activity

The court specifically found as a fact and concluded as a matter of law that "there is no evidence that respondent, at present, is likely to engage in sexual activity." Although petitioner took exception to the application of this standard, in its brief DSS submits that Findings of Fact Nos. 16-20 are sufficient to satisfy the sexual activity requirement. We disagree.

As a preliminary matter, we note that in each case the trial court must carefully review the living conditions of the respondent to determine the substantial likelihood that he or she will voluntarily, or otherwise, engage in sexual activity likely to cause impregnation. This will necessarily include an inquiry into the respondent's home environment, daily schedule, social activities, and the degree of supervision entailed in each aspect of this schedule.

4. We note that this determination may be more difficult to make in the case of a moderately retarded person whose social skills and adaptive behavior are less severely impaired than respondent's. This Court recently recognized that the due process rights of parents to conceive and raise their children required the court to consider the intangible, non-economic aspects of the parent-child-relationship in making the decision whether to terminate parental rights on the basis of neglect. *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983). Significantly, the parents in *Montgomery* were only moderately retarded, the children earned satisfactory grades in school, and the order terminating their parental rights was vacated because the petitioner failed to show that the children's emotional and physical needs were so insufficienlty addressed that termination was justifiable.

The testimony taken as a whole tends to show that Sophie is severely retarded with some psycho-motor impairment. She is a very shy, withdrawn young woman who lives a highly structured and closely supervised existence. Sophie rides the bus to and from school, and never leaves home or school except in the company of school authorities or her foster mother. She has never wandered away from her classroom. Sophie has never voluntarily and publicly engaged in any acts of a sexual nature. Although evidence was presented that some acts of genital self-stimulation had occurred in the past, and may continue in private at present, this clearly is not sexual activity likely to cause impregnation. Therefore, Finding of Fact No. 21, that there is no evidence of sexual activity at the present time is fully supported by the evidence. Findings of Fact Nos. 16-20 concern Sophie's ability to derive pleasurable sensations from her genital area and her social environment. It is the State's contention that these findings demonstrate a sufficient likelihood of sexual activity to warrant sterilization.

Finding of Fact No. 20 contains mere speculation as to Sophie's "likely" passive reaction to a sexual advance by a male and is unsupported by the evidence. The testimony clearly indicated that Sophie reacts strongly against, rather than acquiesces in, most physical contact. Dr. Warner and the group of physicians who have been examining the respondent since she was four and a half years old are unable to perform a routine physical examination without having four adults hold her down. Findings of Fact Nos. 18 and 19 state that one of Sophie's classmates at the Center for Human Development has been observed to place his arm around her shoulder and that other students at the Metro Center have engaged in heterosexual activity. The latter finding is, of course, not relevant to the question of Sophie's own voluntary sexual activity, however, it is relevant to the question of whether a substantial likelihood exists that Sophie will engage in sexual activity with her classmates that was not an initial action on her part.

The record discloses that the young man who considered Sophie his "girlfriend" and was observed to place his arm around her shoulder, was described as being "totally unaware of his sexuality" and the significance of that contact. The Center's supervisor testified that the young man was protective of Sophie and

often helped her get around because of her unsteady, wobbly gait. The need to carefully review the actual sexual activity of the individual retardate was stressed by the authors of *Sterilizing the Retarded*, 60 N.C. L. Rev., *supra* at 968-970. They quote several studies on the matter which indicate that many mentally retarded persons have reduced capacity to reproduce or are in fact sterile. Moreover, among severely retarded individuals, sexual drive appears to be lower than normal. The authors conclude that there is significantly decreased sexual activity among those at the lower end of the retardation spectrum, due in part to decreased sexual drive, physical abnormalities that hinder heterosexual interaction and living situations which offer severely limited opportunities for sexual intercourse. *Id.* at 969. All of these factors are, to some degree, present in respondent's case. On re-direct examination, Dr. Holscher testified that "presently she is in a situation which has good supervision, and the risk of pregnancy is not extremely high at this time." Therefore, to the limited extent that Findings of Fact Nos. 16-20 are supported by the evidence, they do not, as petitioner contends, support a conclusion of law that Sophie was (1) sexually active herself, (2) substantially likely to engage in voluntary sexual activity likely to result in impregnation or, (3) that a substantial likelihood exists that Sophie will engage in sexual activity which she did not initiate. We conclude that the relevant and material finding of the court, that there is *no evidence of sexual activity at present*, is supported by clear, strong and convincing evidence, and it, in turn, supports the court's conclusion of law on the matter.

Unable or Unwilling to Use Alternative Birth Control Methods

The petitioner must establish by clear, strong and convincing evidence that respondent is unable or unwilling to control procreation by alternative, less drastic contraceptive methods, including, but not limited to, supervision, education and training. Presumably, the trial judge's conclusion of law that sterilization would be in respondent's best interest is based in part on Findings of Fact Nos. 22, 23, and 24. These findings, taken together, and No. 22 in particular, state that respondent is not capable of effectively using any known method of birth control short of some form of sterilization.

The respondent contends that these findings are not supported by clear, strong and convincing evidence. Further, that the standard "unwilling or unable" necessitates that petitioner must take affirmative steps to prevent impregnation *and* must show that *after* these attempts have been made, the respondent is unwilling or unable to control her reproductive capacity. Such a showing was made by the petitioner in *In re Johnson, supra* at 651, 263 S.E. 2d at 807, where Social Services made an attempt to prevent impregnation first by insertion of an IUD and then by means of birth control pills. The respondent had the IUD removed and refused to take the birth control pills. Thus, both the petitioner's attempts and the respondent's unwillingness were amply demonstrated. However, to some extent, the steps that the petitioner must take in ascertaining the unworkability or medical infeasibility of contraceptive alternatives must necessarily vary according to the nature of the device or method and the limitations of the individual respondent.

We conclude that the petitioner has adequately met its burden of proof on the unworkability of the IUD. In view of Sophie's extreme fear of pelvic examinations, her poor reporting skills and the nature of the IUD, the court may draw the inference that respondent is unable to effectively use the IUD without a showing that insertion of the device was in fact attempted. However, the record is devoid of evidence that petitioner has taken any affirmative steps at all to control respondent's reproductive capacity by any alternative form of birth control that is medically feasible for her.

Finding of Fact No. 23 states that respondent is incapable of administering birth control pills *on her own*. That fact alone does not establish that she is *unable to be given* birth control pills under the supervision of her guardian or caretaker. The evidence is overwhelming that Sophie will always need close supervision to meet her other most basic needs, therefore, her inability to take birth control pills on her own is not dispositive. Respondent's present caretaker testified that although Sophie prefers liquid medicines to tablets, she was able to take aspirin pills. There is no evidence that anyone ever attempted to administer birth control pills to the respondent. Therefore, the evidence presented is insufficient to support Finding of Fact No. 22 that respondent is

not capable of effectively using any known method of birth control short of some form of sterilization.

Findings of Fact Nos. 32 and 33 concern sterilization by means of hysterectomy as a birth control alternative, and state that such an operation, in the opinion of Drs. Holscher and Warner and the court, would be in the best interests of respondent. These findings are not supported by clear and convincing evidence. To a large degree, the findings are based upon respondent's menstrual hygiene difficulties, which are not material to the issue of birth control or contraception. As to the immediate need for contraception by means of sterilization, Dr. Holscher testified that he didn't think that there is "an extreme amount of danger in leaving things as they are now." When asked if it was his medical opinion that sterilization by means of hysterectomy was in Sophie Truesdell's best interest, the doctor replied, "Yes, I think, with a moderate amount of conviction. I don't feel like this is an urgent requirement, but I do think that, all things considered, it would be to her advantage." The court's findings do not adequately reflect the lack of immediate need for such a drastic surgical invasion of respondent's body. It is only the rare and unusual, the particularly difficult case, where sterilization will be the only adequate method of contraception available. The record demonstrates that this is not such a case. In short, it has not been established by clear, strong, and convincing evidence that respondent is unwilling or unable to use less drastic, alternative methods of birth control.

Least Intrusive and Least Burdensome Method of Sterilization

A fundamental right may be invaded only by the least drastic or burdensome means available to accomplish the State's compelling objective. *Shelton v. Tucker, supra.* Article 7 does not define sterilization or indicate which medical procedure is to be used when a sterilization is ordered. G.S. 35-40 suggests the existence of various alternative means of sterilization by its requirement that the petition contain a statement of any contra-indications of "the requested surgical procedure." The statutes are otherwise silent as to the procedures to be used. The petition and the amended petition from DSS do not indicate which surgical procedure was requested, however, the medical testimony at trial focused on sterilization by means of hysterectomy. The trial

court allowed extensive evidence and found facts regarding problems posed by menstruation to Sophie herself and to her caretaker due to Sophie's inability to adequately attend to her own personal hygiene. Findings of Fact Nos. 11-15, 30, 32 and 33 are to the effect that sterilization by means of hysterectomy would be in respondent's best interest because it would stop her menstrual cycle *and* insure that she would not get pregnant in the future.

It must be remembered that the purpose of the standards is to prevent unnecessary and unwarranted abridgment of the respondent's fundamental procreative rights while at the same time allowing the State to further its interests. However beneficial it might possibly be to respondent to have her monthly menstrual cycle cease, for the purposes of determining whether the petitioner's request for sterilization may be granted, the two concerns—menstrual hygiene and fertility—must be kept separate and apart. In *Wentzel v. Montgomery General Hosp., Inc., supra,* the aunt and grandmother who cared for a severely retarded 13 year old female sought an order of court approving sterilization by means of a subtotal hysterectomy. Difficulties connected with the girl's menstruation, rather than the problems arising from pregnancy had apparently been the primary motivation of the aunt in her request for the operation. The Court of Appeals of Maryland affirmed the trial court's denial of the petition.

> [W]e think the trial judge was correct in determining that the evidence failed to disclose that sterilization by hysterectomy was in Sonya's best interest as being necessary for her medical or mental health. Manifestly, the fact that Sonya experiences pain and irritation during her menstrual cycle, which she does not understand and with which she has difficulty in coping, does not in itself provide any basis for authorizing a hysterectomy . . . [I]ndeed, in considering the best interests of an incompetent minor, the welfare of society or the convenience or peace of mind of the ward's parents or guardian plays no part.

447 A. 2d at 1254.

There is no statutory or constitutional authority for considering menstrual problems with respect to involuntary sterilization. The State's compelling interest is in the prevention of conception,

not in the problem respondent's menstruation may pose for her, and certainly not in the problem it poses for her caretaker. Rather, the inquiry must focus on which method or surgical procedure for sterilization poses the least health risk and the least intrusion into respondent's bodily integrity. No findings were made relevant to the other possible sterilization procedures known to medical science, although evidence was received from Dr. Warner on the comparative risks of tubal ligation and hysterectomy. Accordingly, the petitioner failed to demonstrate that the proposed surgical hysterectomy is the least burdensome and least intrusive means of sterilization.

Best Interests

The petitioner contends that notwithstanding the lack of sexual activity, the evidence taken as a whole shows that sterilization is in the best interests of the respondent. Many of the findings of fact and conclusions of law are indeed couched in terms of respondent's best interests. Although G.S. 35-39 states that Social Services shall petition for sterilization if it would be in the "best interests" of the mentally retarded individual, this language is not contained in G.S. 35-43, the provision which specifically outlines the findings to be made by the trial judge. It is, therefore, doubtful whether compulsory sterilization can be ordered on the basis of undefined "best interests" alone in view of the fundamental interest at stake. Moreover, for purposes of instituting sterilization proceedings under G.S. 35-39, a determination that a proposed sterilization is in the respondent's best interests must include a determination that the respondent is sexually active *and* that no temporary measure for birth control or contraception will adequately meet the respondent's needs, in addition to the statutory grounds regarding defective offspring and parental unfitness. While petitioner adequately demonstrated, through medical testimony, the reasonable probability that a full term pregnancy and delivery would pose significant health risks and trauma for respondent, this evidence establishes only the fact that birth control or contraception are in her best interests. It does not establish that sterilization is in respondent's best interests. We are not inadvertent to petitioner's arguments that some permanent form of contraception might enable respondent to live under a slightly lessened degree of supervision. However, this justification is inadequate to establish the immediate need for

such an intrusive operation. The problem of Sophie's pregnancy is at most a possibility, while State action to compel a sterilization constitutes an irreversible certainty. It would permanently and irrevocably deprive Sophie of her procreative capacity. In *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 572-573, 72 L.Ed. 944, 957 (1927) (Brandeis, J., dissenting), Justice Brandeis, one of the original developers of the theory of a "right of privacy" made the following pertinent observation about governmental invasions of individual liberties under the banner of best interests:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning, but without understanding.

We are confident that the standards set forth in Part II, B adequately insure that the constitutional best interests of the respondent, as well as the State, will be served, while "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt v. Baird, supra*, will be avoided. Accordingly, petitioner has failed to show that sterilization is in Sophie's best interests and the court's conclusion of law to that effect is erroneous.

Consideration of the decisions petitioner relies upon to argue that a "sexual activity" requirement violates the non-sexually active retardate's fundamental right not to procreate does not mandate a different result. *See e.g. In re Grady, supra; Matter of Moe, supra; Matter of A. W., supra; Matter of Guardianship of Hayes, supra.* While it is true that respondent's inability to make an intelligent choice between the complementary rights to procreate or not to procreate should not spell forfeiture of these rights, it should be obvious that at present, respondent is exercising her right not to procreate. Furthermore, the key recognition in the area of reproductive liberty is that for the person involved, these are matters of individual, private choice. As the majority in *Eberhardy*, 307 N.W. 2d at 893, observed:

> Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into

> the determination of whether or not a person who makes no choice shall be allowed to procreate.

The majority declined to exercise its jurisdiction to authorize a sterilization on the basis of a best interests standard. The court reasoned that although the Constitution mandates the personal right of free choice of whether to procreate or not, which requires equal protection, in the absence of legislation in that troublesome area a greater burden would be inflicted by a judicial decision to act than a decision to withhold action.

> We are dealing with a special class of persons—the severely mentally retarded who cannot, on an informed and voluntary basis, give their consent to an irreversible procedure. And the irrevocability of sterilization in itself places it in a different classification from usual situations where the United States Supreme Court has considered the choice to procreate or not. *The choices thus far considered by the Supreme Court are not irreversible, for they involve only a decision affecting a present choice. They do not preclude a different choice at a later time. Sterilization does.* (Emphasis added.)

Id. at 896. These same concerns are implicated when a court must determine whether to order sterilization pursuant to G.S. 35-43. The petitioner's argument that denial of the request for sterilization through application of the foregoing standards was violative of respondent's constitutional rights is without merit.

Conclusion

In sum, we affirm the denial of the petition on the grounds that petitioner has failed to carry its burden of proving by clear, strong and convincing evidence that (1) there is a substantial likelihood (a) that respondent will voluntarily engage in sexual activity likely to cause impregnation or (b) will engage in sexual activity which she did not initiate; (2) that respondent is unable or unwilling to control procreation by alternative birth control or contraceptive methods; and (3) that the proposed method of sterilization entails the least intrusive and least burdensome surgical intervention for respondent.

The trial court correctly denied the petition to sterilize respondent pursuant to G.S. 35-43 because the petitioner has

failed to meet its burden of establishing that sterilization of Sophie Truesdell *at this time* will further the State's interest in preventing the conception and birth of a child whose parent is unable to adequately care for it. However, because of the many erroneous findings of fact and conclusions of law contained in the order of 18 December 1981 pertaining *inter alia* to respondent's best interests and inability to use other forms of birth control, we remand the case to the trial court for entry of findings of fact and conclusions of law not inconsistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judges WELLS and HILL concur.

BYRD MOTOR LINES, INC. v. DUNLOP TIRE AND RUBBER CORPORATION

No. 8222SC940

(Filed 19 July 1983)

1. **Uniform Commercial Code § 11— warranty limiting damages effective**

The limitation of damages in defendant's warranty on its tires sold to plaintiff was effective in that (1) plaintiff failed to show that the limitation was unconscionable, and (2) the loss was commercial and plaintiff did not have the benefit of the presumption of unconscionability. G.S. 25-2-316(4) and G.S. 25-2-719(3).

2. **Sales § 14.1— breach of warranty— statute of limitations**

The three-year statute of limitations applicable to contract actions barred two of plaintiff's breach of warranty claims. G.S. 1-52(1).

3. **Sales § 17.1— express warranty—insufficient evidence**

Statements by defendant's service manager fell short of being express warranties in that they were made over two years after the plaintiff started to buy tires from defendant, and G.S. 25-2-313(1)(a) requires that the representations be part of the basis of the bargain. Further, defendant's limited warranty effectively limited defendant's liability based on a representative of the company's statements.

4. **Sales § 22— strict liability not recognized in North Carolina**

North Carolina does not recognize strict liability in tort as a theory of liability.

5. **Sales § 22— strict liability—claims arising in other states—N.C. statutes of limitations barring**

Although two of plaintiff's claims arose in states which apply strict liability in tort, the North Carolina statute of limitations for negligence under G.S. 1-52(16) barred these claims.

6. **Sales § 22— strict liability—claims arising in other states—summary judgment proper**

The trial court properly entered summary judgment on plaintiff's claims which arose in Tennessee and South Carolina, states which apply strict liability in tort, since the plaintiff did not forecast sufficient evidence which would allow it to recover under their respective laws.

7. **Sales § 22.2— action for negligent manufacture of tires—insufficient evidence**

Plaintiff's claims for negligent manufacture of tires failed in that (1) the three-year statute of limitations for negligence barred them, or (2) plaintiff failed to forecast that it would be able to produce the relevant tire or any evidence about its condition at trial, or (3) plaintiff failed to show that a particular loss could be shown to have been caused by a certain tire.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 1 March 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 June 1983.

This is an action for damages caused by over 150 allegedly defective tires purchased from the defendant for use in the plaintiff's trucking business as front tires on tractor-trailer units.

The complaint contains eight claims for relief. The first five claims are based on five separate accidents which occurred in North Carolina, South Carolina, West Virginia and Tennessee between 18 January 1976 and 10 August 1977. All of these accidents involved blowouts of the defendant's tires. Each of the first five claims sought compensation for the plaintiff's property damage.

The sixth claim for relief sought recovery for property damage caused by the blowout of ten tires sold to the plaintiff by the defendant. The seventh claim alleges that the plaintiff reasonably relied on the negligent recommendations of W. M. O'Connell, the defendant's service manager, on appropriate use of the tires. O'Connell made a number of suggestions, including that the plaintiff should reduce its average load size. The plaintiff alleges that this recommendation did not improve tire performance and resulted in a loss of profit.

The final claim seeks damages for the cost of replacing ninety-six tires that the defendant sold to it. The eight claims for

relief were based on theories of breach of warranty, strict liability and negligence.

The defendant denied liability and alleged that any damage was caused by improper use and care by the plaintiff. It pointed to the limited warranty that it gave on its tires as excluding its liability for the property damage that the plaintiff suffered.

After a hearing on this matter and consideration of pleadings, affidavits, depositions, exhibits, briefs, and oral arguments by both parties, the trial judge granted the defendant's motion for summary judgment. From that order, the plaintiff appealed.

Brinkley, Walser, McGirt, Miller & Smith, by Gaither S. Walser and Stephen W. Coles, for the plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin and Jeri L. Whitfield, for the defendant-appellee.

ARNOLD, Judge.

Because this case was decided on summary judgment under G.S. 1A-1, Rule 56, it is important to understand when that rule applies.

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). In ruling on a summary judgment motion, the record should be viewed in the light most favorable to the party opposing the motion. *Brice v. Moore,* 30 N.C. App. 365, 367, 226 S.E. 2d 882, 883 (1976).

We now consider the plaintiff's theories of liability separately.

I. BREACH OF WARRANTY

A. *The Defendant's Limited Warranty*

1. *North Carolina*

All eight claims for relief in the complaint rely on breach of warranty as a ground for liability. Claims three, six, seven, and eight arose in North Carolina and are determined by our law.

The limited warranty given by the defendant here stated in part:

> Every new Dunlop truck tire is warranted to be free from defects in materials and workmanship. If Dunlop's examination shows such tire to be unfit under the terms of this warranty, an allowance will be made toward the purchase of a new Dunlop tire based upon (1) the thirty-seconds of an inch (/32") worn and (2) the Adjustment Unit Charge shown on the current Dunlop price sheet. . . .
>
> NO IMPLIED WARRANTIES, EITHER OF MERCHANTABILITY OR OTHERWISE, ARE EXTENDED BEYOND THE TIME WHEN THE ORIGINAL TIRE TREAD IS WORN TO ONE OR MORE TREAD WEAR

INDICATOR (TWI) BARS [REPRESENTING TWO THIRTY-SECONDS OF AN INCH (2/32") TREAD DEPTH REMAINING]. DUNLOP SHALL NOT BE RESPONSIBLE (1) FOR ANY COMMERCIAL LOSS, (2) FOR ANY DAMAGE TO, OR LOSS OF PROPERTY OTHER THAN THE TIRE ITSELF, OR (3) FOR ANY OTHER TYPE OF CONSEQUENTIAL DAMAGES OF A NON-PERSONAL INJURY NATURE. . . .

No dealer or representative has authority to make any commitment, promise or agreement binding upon Dunlop except as stated herein.

The limitations in this warranty were an attempt by the defendant to limit the plaintiff's remedies as a buyer.

G.S. 25-2-316(4) states: "Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§ 25-2-718 and 25-2-719)."

G.S. 25-2-719(3) provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

[1] The limitation of damages in the defendant's warranty was effective for two reasons. First, the plaintiff has not shown that the limitation was unconscionable.

Although that term is not defined in North Carolina's version of the Uniform Commercial Code (G.S. 25-2-302 only describes how an unconscionable contract or clause should be treated), it is rare that a limitation of remedy will be held unconscionable in a commercial setting since the relationship between business parties is usually not so one-sided as to force an unconscionable limitation on a party. J. White and R. Summers, Handbook of the Law Under the Uniform Commercial Code § 12-11 (1972). *See also,* Black's Law Dictionary 1367 (5th ed. 1979) (cites "gross one-sidedness of a term . . . limiting damages" as a typical example of unconscionability); *Billings v. Harris Co.*, 27 N.C. App. 689, 695, 220 S.E. 2d 361, 366 (1975), *aff'd,* 290 N.C. 502, 226 S.E. 2d 321 (1976). ("Unconscionability relates to contract terms that are op-

pressive. It is applicable to one-sided provisions, denying the contracting party only opportunity for meaningful choice.")

Second, this is not a case of personal injury. Thus, the plaintiff does not have the benefit of the presumption of unconscionability of a limitation of damages in case of personal injury that the second sentence of G.S. 25-2-719(3) provides because the loss was commercial. In such a situation, the plaintiff has the burden of showing unconscionability. *See Billings*, 27 N.C. App. at 695, 220 S.E. 2d at 366.

We also note that the limited warranty meets G.S. 25-2-719(1)(a)'s provision for limited remedies. The defendant's warranty provides for an allowance on the purchase of new tires if tires that were previously purchased turn out to be unfit. This appears to be "a fair quantum of remedy" that the commentary to the statute mandates. *See* Official Comment 1 to G.S. 25-2-719.

2. *Other States*

[2] Claims one and two, which arose in Tennessee and West Virginia, respectively, are barred by the three-year statute of limitations applicable here. G.S. 1-52(1); *B-W Acceptance Corp. v. Spender*, 268 N.C. 1, 149 S.E. 2d 570 (1966). We apply the North Carolina limitation period because remedies are governed by the laws of the jurisdiction where the suit is brought. "The *lex fori* determines the time within which a cause of action shall be enforced." *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E. 2d 875, 876 (1945) (citations omitted). *See also*, Restatement (Second) of Conflict of Laws § 142 (1971); Wurfel, *Statutes of Limitations in the Conflict of Laws*, 52 N.C.L. Rev. 489, 492 (1974).

Claims four and five, which occurred in Tennessee and South Carolina, respectively, are not barred by the North Carolina three-year statute of limitations. As a result, we consider the validity of the defendant's limited warranty under the law of those states since that is where the accidents on which those claims are based occurred. *See Williams v. General Motors Corp.*, 19 N.C. App. 337, 341, 198 S.E. 2d 766, 769, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 659 (1973).

a. *Tennessee*

Under Tennessee law, the limitation of damages in the defendant's warranty was effective. That state has identical sections

of the Uniform Commercial Code on this point to those of North Carolina and applies the law the same way. *See* Tenn. Code Ann. §§ 47-2-316(4) and -2-719(3). *See also, Hardimon v. Cullum and Maxey Camping Centers, Inc.*, 591 S.W. 2d 771 (Tenn. Ct. App. 1979); *Beaunit Corp. v. Volunteer Natural Gas Co.*, 402 F. Supp. 1222 (E.D. Tenn. 1975).

b. *South Carolina*

The limitation was also effective under South Carolina law, whose relevant provisions are identical to those of North Carolina. *See* S.C. Code Ann. §§ 36-2-316(4) and -2-719(3) (Law. Co-Op. 1977); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974).

B. *Representations by O'Connell*

The seventh claim for relief alleges that recommendations made by O'Connell, the defendant's service manager, were negligently made and caused the plaintiff to rely on them to its detriment. It is also averred that O'Connell's statements were oral warranties.

The evidence about O'Connell's statements, even when viewed in the light most favorable to the plaintiff, does not amount to a warranty. The plaintiff's evidence shows that O'Connell recommended changing the ply rating of the tires, reducing the weight of loads, and increasing tire pressure.

[3] This evidence falls short of being an express warranty because G.S. 25-2-313(1)(a) requires that the representations be part of the basis of the bargain. The plaintiff's evidence shows that the statements were made, if at all, during 1977, which was over two years after the plaintiff started to buy tires from the defendant. Thus, they could not have been part of the basis of the bargain between the parties.

Assuming *arguendo* that O'Connell's statements were oral warranties, they did not bind the defendant. The limited warranty states in part: "No dealer or representative has authority to make any commitment, promise or agreement binding upon Dunlop except as stated herein." This sentence effectively limits the defendant's liability and prevents any recovery by the plaintiff based on O'Connell's statements.

O'Connell's statements were also not negligent misrepresentations. There is no evidence that he failed to exercise reasonable care or competence in obtaining or communicating information to the plaintiff as this theory requires. *See* Restatement (Second) of Torts § 552 (1965) [hereinafter cited as Restatement].

Thus, we affirm the grant of summary judgment for the defendant on the breach of warranty and negligent misrepresentation theories.

II. STRICT LIABILITY

[4] Seven of the plaintiff's eight claims for relief include strict liability in tort as a theory of liability. Because North Carolina does not recognize this doctrine; *see Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980), claims three, six and eight cannot succeed on a strict liability theory. All of the incidents in those claims occurred in North Carolina.

[5] Claims one and two both arose over three years before the plaintiff filed its complaint. Although those claims arose in Tennessee and West Virginia, states which apply strict liability in tort, the North Carolina statute of limitations for negligence under G.S. 1-52(16) bars these claims. As discussed above, "The *lex fori* determines the time within which a cause of action shall be enforced." *See Sayer*, 225 N.C. at 643, 35 S.E. 2d at 876.

[6] Claims four and five, which occurred in Tennessee and South Carolina, respectively, are not barred by the North Carolina three-year statute of limitations. As a result, we must consider strict liability as applied to these claims under the law of the states in which these two incidents occurred.

Because strict liability creates a substantive right, the rights of the parties will be determined by the *lex loci deliciti commissi*, which is the law of Tennessee and South Carolina. *Williams*, 19 N.C. App. at 341, 198 S.E. 2d at 769.

A. *Tennessee*

Strict liability in tort for products liability cases was first embraced by Tennessee in *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W. 2d 240 (1966). The doctrine has been followed in a number of cases and is reflected in the Tennessee Products

Liability Act adopted in 1978. Tenn. Code Ann. § 29-28-101 *ff.* (1980). That statute defines "defective condition" and "unreasonably dangerous" in § 29-28-102 and closely follows Restatement § 402A in § 29-28-105(a).

In Tennessee, "it is ordinarily a question for the trier of fact whether the product is in a defective condition unreasonably dangerous to the user." *Young v. Reliance Electric Co.*, 584 S.W. 2d 663, 668, *cert. denied*, --- S.W. 2d --- (1979). But this claim was properly decided on a summary judgment motion.

In its 15 September 1981 answer to the defendants' second set of interrogatories, the plaintiff listed the serial numbers of all the tires that it possessed or had sent to Dunlop or Chem-Bac Laboratories. Except for those tires, "the locations and custodians of the remaining tires are unknown."

Our examination of all the evidence leads us to conclude that the plaintiff will be unable to produce the tire that is the basis of this claim and that it cannot produce evidence about its condition prior to its being lost. Absent such a forecast, we affirm grant of summary judgment for the defendant on claim four.

"If no examination of the tire was made before loss or destruction and no other evidence is introduced to establish a defect or causation, recovery on the part of the injured plaintiff would be unlikely in face of a motion for a summary judgment" by the defendant. Annot., 81 A.L.R. 3d 318, 329 (1977). These matters are usually jury questions "unless the facts and inferences establish beyond dispute that all reasonable men would agree on the outcome." *Caldwell v. Ford Motor Co.*, 619 S.W. 2d 534, 536 (1981) (citations omitted). Because the plaintiff did not forecast that it will be able to produce the tire on which claim four is based or evidence concerning its condition, it was proper to prevent this claim from going to the jury.

B. *South Carolina*

Strict liability in tort for sellers of products in a defective condition unreasonably dangerous to users, consumers or their property became the law of South Carolina in 1974. *See* 1974 S.C. Acts 1184. This Act adopted verbatim the rule of Restatement § 402A and the comments to that section as its legislative intent. *See* S.C. Code Ann. § 15-73-10 through 15-73-30.

S.C. Ann. § 15-73-10 and Restatement § 402A state:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Holding the defendant strictly liable in tort under South Carolina law in this case depends on whether the tires sold to the plaintiff were in a "defective condition unreasonably dangerous." In accord with S.C. Code Ann. § 15-73-30, we look to the comments following Restatement § 402A for guidance.

Comment g deals with "defective condition." It places the burden of proving that the product was defective when it left the seller's hands upon the plaintiff and adds that the section applies "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."

South Carolina courts state the test for defectiveness as "whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product." *Claytor v. General Motors Corp.*, 277 S.C. 259, ---, 286 S.E. 2d 129, 131 (1981).

Comment i discusses "unreasonably dangerous." "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." A number of South Carolina cases have looked to

this comment for help in determining if a product is "unreasonably dangerous." *See, e.g., Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E. 2d 671 (1978). South Carolina is what one commentator termed a "pure Restatement jurisdiction" since it focuses on the consumer expectation definition of unreasonably dangerous. J. Beasley, *Products Liability and the Unreasonably Dangerous Requirement* 208 (1981).

Our interpretation of the evidence under South Carolina law leads us to believe that state's courts would affirm the grant of summary judgment as to claim five on a strict liability theory.

The plaintiff has not shown that there is a fact issue as to whether the tire involved in the 10 August 1977 accident was in a "defective condition unreasonably dangerous." In fact, it has not shown that it can produce the tire or any evidence about its condition before the accident.

In its answer to the defendant's interrogatories, the plaintiff said that the tire involved in claim five was sent to Chem-Bac Laboratories in Charlotte. Brady Bostian, the plaintiff's shop foreman, stated in a deposition, however, that he does not remember taking the tire to Chem-Bac. In addition, Melvin Byrd, the plaintiff's general manager, said in an affidavit that the tire was sent to Dunlop.

An insufficient showing of a defective condition or unreasonable danger has been made when the tire cannot be found, no evidence that it was defective was forecast, in the form of expert testimony or otherwise, and no examination of the tire by one who could make a meaningful evaluation was shown.

As a result, we affirm summary judgment for the defendant on claim five.

III. NEGLIGENT MANUFACTURE

[7] Seven of the plaintiff's eight claims for relief contained a count based on negligent manufacture of tires. These counts alleged that the negligent manufacture caused the tires "to separate and/or explode and cause damages to the tractor trailer unit upon which it was used." They also stated that the defects in the tires were latent and could not have been discovered by the plaintiff in the exercise of reasonable care.

As discussed, *supra*, in the section on strict liability, the three-year statute of limitations for negligence bars claims one and two. Thus, only five claims based on negligent manufacture will be considered.

Of the five remaining claims containing a count based on negligent manufacture, two were based on accidents that occurred in other states. Because the plaintiff's property damage occurred in those two states, the substantive rights of the parties are governed by the law of those states. *See Williams*, 19 N.C. App. at 342, 198 S.E. 2d at 769.

A. *Tennessee*

Claim four was based on an accident that occurred in Tennessee on 9 December 1976. The law of that state on negligence requires that there be a duty, a breach thereof, causation, and resulting harm therefrom. *See, e.g., Shouse v. Otis*, 224 Tenn. 1, 448 S.W. 2d 673 (1969). Before a negligence case will be prevented from going to the jury, the facts must be established by "evidence free from conflict and the inference from the facts . . . so certain that all reasonable men, in the exercise of a free and impartial judgment, must agree upon." *Berry v. Whitworth*, 576 S.W. 2d 351, 353, *cert. denied*, --- S.W. 2d --- (1978) (citations omitted).

Applying Tennessee law on negligence to claim four, we find that it was correct to grant the defendant's summary judgment motion on this issue. As we stated, *supra*, in the section on Tennessee strict liability law, the plaintiff did not forecast that he will be able to produce the relevant tire or any evidence about its condition at trial.

B. *South Carolina*

Claim five was based on an accident that occurred in South Carolina on 10 August 1977. The law of that state is that a breach of duty is essential to negligence. *See, e.g., S.C. Elec. & Gas Co. v. Util. Constr. Co.*, 244 S.C. 79, 135 S.E. 2d 613 (1964). Negligence is normally a jury question but can be a matter of law for the court if the evidence admits of only one reasonable inference. *See Rogers v. Atl. Coastline R.R.*, 222 S.C. 66, 71 S.E. 2d 585 (1952).

Because the plaintiff has not shown that it can produce the tire involved in claim five or any evidence about its condition, it

was proper to grant summary judgment on this claim under South Carolina law.

C. *North Carolina*

Claims three, six and eight all contain counts based on negligent manufacture and occurred in North Carolina.

It is an accepted tenet of our jurisprudence that summary judgment is rarely proper in negligence cases. "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). But where there is no genuine issue of material fact and reasonable men could only conclude that the defendant was not negligent, entry of summary judgment is proper. *Dendy v. Watkins*, 288 N.C. 447, 455, 219 S.E. 214, 219 (1975).

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. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E. 2d 363, 366 (1982).

Claims three and six seek damages for injury to the plaintiff's property caused by blowout of tires that the defendant sold to the plaintiff.

Sixteen tires are involved in these two claims. The location of tires six through eleven and twenty, as listed in defendant's appendix II, is unknown. It was proper to enter summary judgment as to these tires since they cannot be produced and no evidence of their condition was forecast by the plaintiff. In addition, claims for tires six through eleven are barred by North Carolina's three-year statute of limitations for negligence since the cause of action for those tires accrued more than three years before this case began on 14 May 1979.

Tire three, which is the basis of claim three, and tires twelve through nineteen, which are the remaining tires in claim six, are in the possession of either the plaintiff or the defendant. But the

plaintiff has made an insufficient forecast of evidence to survive summary judgment on these remaining tires.

Before a plaintiff can recover for damage caused by negligent manufacture, it must present evidence "which tends to show that the product manufactured by the defendant was defective at the time it left defendant's plant, and that defendant was negligent in its design of the product, in its selection of materials, in its assembly process, or in its inspection of the product." *Jolley v. General Motors Corp.*, 55 N.C. App. 383, 385, 285 S.E. 2d 301, 303 (1982). *See also, Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980).

No analysis of the evidence shows a genuine issue of material fact on the negligent manufacture theory. As already discussed, the claims based on tires that are gone or whose condition was not determined before they were lost, do not survive summary judgment.

As for the remaining tires in the hands of the parties, the plaintiff has not shown that a particular loss can be shown to be caused by a certain tire. Bostian, the plaintiff's shop foreman, stated in his deposition that all blown tires were put into a trailer for storage. The only mark that Bostian put on the blown tires was a chalk mark. He said that he did not know which of these tires went with which claim for relief.

The serial numbers on each tire also do not help the plaintiff link tires to certain claims because the numbers are not unique. As explained by Thomas M. Johnson, Jr., the defendant's tire quality engineer, each serial number of the tires in this case has ten characters.

"DA", the first two characters, represent the defendant's designation. The next five characters relate to the size, type, and ply rating of each tire. The final three characters tell when the tire was made.

The plaintiff did not forecast evidence that would allocate these numbers to tires involved in certain accidents, especially given the fact that many of the tires contained identical serial numbers. Thus, even if a tire could be shown defective, the plaintiff would be unable to prove that the defect caused him any damage. As the court concluded in *Jolley*, "negligence cannot be

inferred from the mere happening of an accident or injury." 55 N.C. App. at 386, 285 S.E. 2d at 304. *See also Shramek v. General Motors Corp., Chevrolet Motor Div.*, 69 Ill. App. 2d 72, 78, 216 N.E. 2d 244, 247 (1966) ("The mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective.").

Claim eight seeks recovery for the cost of replacing ninety-six tires that the defendant sold to the plaintiff because they allegedly were negligently manufactured.

As discussed throughout this opinion, the plaintiff has not forecast evidence to show that he could prove at a trial that the tires were defective or negligently manufactured. Absent such a showing, it cannot recover the replacement cost of the tires alleged to be defective in this eighth claim for relief.

We conclude that summary judgment was properly entered for the defendant on all claims.

Affirmed.

Judges WEBB and BRASWELL concur.

CLAUDE TOLSON MURDOCK v. ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

CONNER HOMES CORPORATION v. ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, AND CECILIA UZOH, WIDOW OF DECEASED, PATRICK ENYI UZOH v. MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

No. 8210SC855

(Filed 19 July 1983)

1. Rules of Civil Procedure § 50— directed verdict motion—made after charge to jury

Where it seems clear from the record that as a matter of convenience the parties agreed to put all their formal motions and stipulations in the record

after the jury retired, there was no merit to appellant's argument that two parties' motions for directed verdict were not timely because they were not made immediately after the close of defendant's evidence, but were made after the charge to the jury. Further, the fact that the trial judge withheld his ruling on the directed verdict motion until after the jury announced that it was unable to reach a verdict, was not grounds for reversal.

2. **Automobiles and Other Vehicles § 55; Rules of Civil Procedure § 56.6— summary judgment in negligence action proper—credibility manifest**

Where all the evidence at trial, viewed in the light most favorable to appellant, unequivocally showed that appellant's decedent either suddenly stopped or almost stopped on the highway, his car was hit from behind by Moss' truck, it crossed the center line, and then it collided with Conner Homes' truck, the evidence showed a violation of the standard of care required by G.S. 20-141(h) which constituted negligence *per se*. Appellant's evidence neither contradicted any evidence of appellant's decedent's negligence nor materially impeached the appellees. The credibility of the movants' evidence was manifest, and directed verdict in their favor was proper.

3. **Rules of Civil Procedure § 50.2; Trial § 6.1— admission of party's complaint into evidence—judicial admission**

In a negligence action in which movants' motion for directed verdict was granted, appellant admitted the truth of movants' allegations by introducing the movants' complaint into evidence.

Judge BECTON dissenting.

APPEAL by defendant from *Preston, Judge.* Judgments entered 3 September 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1983.

This claim arose from a car accident that occurred on 17 August 1979. The accident involved three vehicles. Claude Tolson Murdock was driving a 1977 Ford truck owned by Conner Homes Corporation eastbound on highway 64. Patrick Enyi Uzoh, who was killed in the accident, was driving a 1979 Plymouth westbound on highway 64. His car was owned by the North Carolina Department of Administration. Behind Uzoh, a 1974 Mack 18-wheeler truck, owned by Ernest Ray Cardwell, and operated by Michael Lane Moss, was travelling west on highway 64. As Uzoh approached Murdock, he suddenly stopped or slowed down almost to a stop, and Moss' truck struck Uzoh's car in the rear, causing the Plymouth to cross the center line into Murdock's path and strike Murdock's vehicle head-on. Murdock was injured in the collision, and the Conner Homes' truck and the trailer it was carrying were damaged. The Plymouth and the Mack truck were also

damaged. Subsequently, the following lawsuits were brought. Conner Homes sued Ernest E. Ratliff, Administrator of Uzoh's estate, and Moss and Cardwell, alleging that their negligence caused property damage to Conner Homes' truck and trailer. Ratliff denied any negligence by Uzoh, and asserted crossclaims for contribution against codefendants Moss and Cardwell. Defendants Moss and Cardwell also denied negligence and asserted crossclaims against Ratliff for contribution and for property damage to Cardwell's truck. Murdock sued Ratliff and Moss and Cardwell alleging their negligence caused his personal injuries. The defendants denied negligence. Ratliff asserted crossclaims for contribution against Moss and Cardwell. Moss and Cardwell asserted crossclaims for contribution and for property damage against Ratliff. Cecilia Uzoh, Uzoh's widow, and Ratliff sued Moss and Cardwell seeking recovery for Uzoh's wrongful death and for loss of consortium. Moss and Cardwell denied negligence and counterclaimed for property damage to the truck. Ratliff and Mrs. Uzoh replied asserting the doctrine of last clear chance.

All three cases were consolidated for trial. The issues of damages in the wrongful death action and the loss of consortium action were severed; the issues remaining were: Murdock's claim for personal injuries, Conner Homes' claim for property damage, Ratliff's claim for wrongful death, Mrs. Uzoh's claim for loss of consortium, and Cardwell's claim for property damage.

Defendants Ratliff and Moss and Cardwell moved for directed verdicts at the close of Conner Homes' and Murdock's evidence. The motions were denied. Just before Ratliff's last witness testified, Ratliff introduced Murdock's complaint into evidence. The complaint alleged that Uzoh had been negligent by stopping on the highway, and his negligence was the proximate cause of the accident. At the close of Ratliff's evidence, Moss and Cardwell moved for a directed verdict. Their motion was denied. Cardwell asked for a voluntary dismissal on his counterclaim for property damage to his truck. Ratliff, Murdock and Conner Homes renewed their directed verdict motions, which were denied.

The parties stipulated that the following three issues would be submitted to the jury:

1. Were the plaintiffs, Conner Homes Corporation and Claude Tolson Murdock, damaged or injured as a result of the negligence of Patrick Enyi Uzoh, as alleged in their complaints?

2. Were the plaintiffs, Conner Homes Corporation and Claude Tolson Murdock, damaged or injured by the negligence of the defendant, Michael Lane Moss, as alleged in their complaints?

3. What amount of damages, if any, is the plaintiff Claude Tolson Murdock, entitled to recover?

While the jury was deliberating, Murdock, Conner Homes, Moss, and Cardwell renewed their motions for directed verdicts. The trial judge did not rule on these motions until the jury returned to the courtroom and the foreman announced they had not reached a verdict. Then the judge granted Moss', Cardwell's, and Murdock's motions for directed verdicts against Ratliff, and dismissed the wrongful death case. Judgment was entered in favor of Conner Homes in the amount of $24,231.00, the stipulated amount of property damage. Murdock's damages for his personal injury as against Ratliff were left to be determined at a subsequent trial. A mistrial was declared on issues two and three.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Paul L. Cranfill; Young, Moore, Henderson and Alvis, by Edward B. Clark and Joseph C. Moore, III; Jones and Wooten, by Lamar Jones, for plaintiff appellees, Claude Tolson Murdock and Conner Homes Corporation.

Haywood, Denny and Miller, by James Aldean Webster III, and George W. Miller, Jr., for defendant appellees, Michael Lane Moss and Ernest Ray Cardwell.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James G. Billings, for defendant appellant, Ernest E. Ratliff.

VAUGHN, Chief Judge.

[1] All four of appellant's assignments of error are that the trial court erred in directing verdict for Murdock, Conner Homes, Moss, and Cardwell. His first argument is that a procedural error was committed in allowing Murdock's and Conner Homes' motion

because it was not timely since it was not made immediately after the close of defendant's evidence, but was made after the charge to the jury. Neither at trial nor on appeal has appellant suggested there might be other evidence he could have offered if he had known the motion was going to be made. Indeed, it seems clear from the record that as a matter of convenience the parties had agreed to put all their formal motions and stipulations in the record after the jury had retired. Appellant's argument is without merit.

Appellant also argues that it was procedurally incorrect for the trial judge to withold his ruling on the directed verdict until after the jury announced that it was unable to reach a verdict. To support his argument, appellant relies on *Hamel v. Young Spring & Wire Corp.*, 12 N.C. App. 199, 182 S.E. 2d 839, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 687 (1971). In *Hamel*, the trial judge did not rule on the motions for directed verdict until after the jury returned a verdict. This Court said:

> We do not approve of this procedure and think it preferable to rule upon a motion for a directed verdict prior to the submission of a case to the jury. After a case has been submitted to a jury, the proper motion to be ruled upon at that time is a motion for judgment notwithstanding the verdict under Rule 50.

Hamel v. Young Spring & Wire Corp., 12 N.C. App. at 205, 182 S.E. 2d at 843. The Court's statement that it is *preferable* to rule on the motion before submitting the case to the jury is hardly grounds for reversal in the instant case. Moreover, the situation in *Hamel* is distinguishable from this case because in *Hamel* the jury had reached a verdict and a motion for judgment notwithstanding the verdict would have been appropriate, but here there was no verdict from which to request a judgment notwithstanding the verdict.

[2] Appellant's next argument is that even if the motion for directed verdict was timely, it should not have been granted as a matter of law because Murdock and Conner Homes had the burden of proof. We do not agree. A verdict may be directed 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); *E. F.*

Hutton v. Stanley, 61 N.C. App. 331, 300 S.E. 2d 463 (1983); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2535 (1971). In *Burnette*, the Court listed three recurrent situations where credibility is manifest:

(1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. [citations omitted.]

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. [citations omitted.]

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradiction." [*Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).]

North Carolina National Bank v. Burnette, 297 N.C. at 537-38, 256 S.E. 2d at 396.

In the instant case, credibility was manifest under the third category set forth in *Burnette*. Latent doubts are "doubts which stem from the fact that plaintiffs are interested parties." *Kidd v. Early*, 289 N.C. at 371, 222 S.E. 2d at 411. Aside from any consequences resulting from appellant's introduction of plaintiff's complaint into evidence, all the evidence at trial, viewed in the light most favorable to appellant, unequivocally shows that Uzoh either suddenly stopped or almost stopped on the highway, his car was hit from behind by Moss' truck, it crossed the center line, and then it collided with Conner Homes' truck. Regardless of whether Uzoh came to a full stop or almost stopped, it is clear that his conduct constituted negligence as a matter of law. Uzoh violated G.S. 20-141(h) which provides, in part: "No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movemant of traffic except when reduced speed is necessary for safe operation or in compliance with law; . . ." Violation of the standard of care required by G.S. 20-141(h) is negligence *per se*. *Page v. Tao*, 56 N.C. App. 488, 289 S.E. 2d 910, *affirmed per curiam*, 306 N.C. 739, 295 S.E. 2d 470 (1982). Appellant's evidence, introduced in their case in chief, neither contradicted any evidence of Uzoh's negligence nor materially impeached the appellees, it only tended to show that the

weather was clear, the road in front of Uzoh's path was straight and unobstructed, the speed limit was fifty-five miles per hour, Uzoh's death was due to injuries received in the collision, and there was no evidence of alcohol or other drugs in his blood. On cross-examination, appellants attempted to impeach Moss and Murdock, but the contradictions brought out on cross-examination were trivial. They did not tend to show a lack of credibility, and had no bearing on the issue of Uzoh's negligence. The contradictions concerned the following questions: whether Uzoh came to a full stop, or almost stopped; how far away Moss' truck was before Murdock saw it; how fast Murdock thought Moss was going; whether Uzoh was 100 feet away or 100 yards away before Murdock saw him; whether smoke was coming from Uzoh's tires; and whether Moss saw Uzoh when he was 235, 750, or 1,500 feet away. These contradictions have no bearing on the issue of Uzoh's negligence, and they do not tend to show any contributory negligence by Murdock. There was no evidence which tended to refute the allegations that Uzoh was negligent, and his negligence was the proximate cause of the collision, and, aside from latent doubts, there were no doubts as to the credibility of the witnesses, therefore no reasonable jury could have drawn any contrary inferences. In short, the credibility of the movants' evidence was manifest, and directed verdict in the movants' favor was proper.

[3] Additionally, credibility was manifest under the first category set forth in *Burnette* because appellant established Murdock's and Conner Homes' case by admitting that Uzoh was negligent when he introduced Murdock's complaint into evidence. The following occurred out of the presence of the jury:

> Mr. Billings [counsel for Ratliff]: . . . I would like to introduce in evidence on behalf of Uzoh the Murdock complaint. I don't know the procedure for doing that.
>
> Mr. Miller [counsel for Moss and Cardwell]: The defendants Moss and Cardwell will object.
>
> . . .
>
> Court: I understand, unverified. Any objection? Mr. Cranfill [counsel for Murdock and Conner Homes]: No sir.

Court: No objection. The Murdock complaint will be received into evidence with respect to Claude Tolson Murdock. The objection—

Mr. Miller: . . . I still object.

. . .

Court: Objection is sustained with respect to Moss and Cardwell. The complaint comes in then in terms of Murdock only.

. . .

Mr. Miller: If your Honor please, . . . if I may qualify that objection.

Court: All right, you may.

Mr. Miller: Is to that portion of the complaint as it relates to the two defendants that I represent. That is the purpose of my objection. Other than that, I have no objection.

Court: All right. Then the ruling is that it is sustained with respect to that portion of the complaint.

Murdock's complaint, which is his judicial admission, McCormick on Evidence § 265 (2d ed. 1972), can only be offered as competent evidence as against Murdock, and the trial judge gave an appropriate limiting instruction. As against Murdock, however, it was offered without any limitations. The complaint, after alleging the circumstances of the collision alleges, in paragraph seven:

> The aforementioned accident occurred as the direct and proximate result of the negligence of Patrick Enyi Uzoh in that he:
>
> (a) Operated a vehicle upon the highways of the State of North Carolina without maintaining proper control over it.
>
> (b) Operated a vehicle upon the highways of the State of North Carolina without maintaining a proper lookout.
>
> (c) Operated a vehicle upon a highway of the State of North Carolina to the left side of the center line of the highway while meeting a vehicle being operated in the opposite direction.

(d) Brought his vehicle to a sudden and unexpected stop upon a highway of the State of North Carolina at a time when he knew or should have known that this would cause a collision.

(e) Attempted to stop a vehicle upon a highway of the State of North Carolina without first seeing that such movement could be made in safety.

(f) Attempted to stop a vehicle upon a highway of the State of North Carolina at a time when the operation of another vehicle might be affected by such movement, without giving the clear and plainly visible signal required by law.

A party offering into evidence, without limitation, as in the instant case, a portion of his opponent's pleading, is bound thereby. *Smith v. Goldsboro Iron & Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377 (1962); *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970). *Smith v. Burleson* also involved a car accident. The defendants were two brothers, Rabon and Tony Burleson. Tony died in the accident. At trial, plaintiff's witness, who had been a passenger in Tony's car, testified about the events that led up to the accident. She said that Rabon and Tony were driving west on Highway 64-70 at a speed between eighty and one hundred miles per hour. Tony pulled into the left lane to pass Rabon. Tony and Rabon overtook plaintiff's car, which was driving at fifty-five miles per hour in a westerly direction. Rabon pulled out into the left lane in front of Tony to avoid hitting plaintiff. When Rabon did this, Tony hit his brakes to avoid hitting Rabon, and skidded. The witness did not remember anything else about the accident. Defendants, however, offered evidence which filled in all the missing pieces of plaintiff's case. Rabon admitted he pled guilty to reckless driving in connection with the accident. He also introduced a portion of plaintiff's complaint which alleged that Rabon had been driving very fast, he collided with Tony's car causing Tony to lose control of his car and hit plaintiff's car, which caused it to drive off the road, into an embankment. The Court held that Rabon's evidence, including the portion of plaintiff's complaint which he introduced, established that he was negligent, Rabon was bound by the portion of plaintiff's pleading which he introduced without limitation, and, as there was no factual issue of negligence remaining, a directed verdict for plaintiff was proper.

In this case, appellant offered no evidence which materially contradicted the allegations of negligence in paragraph seven of Murdock's complaint. Murdock testified that Uzoh's vehicle came to a complete stop. Although Moss said both that Uzoh had completely stopped, and that he was not sure if Uzoh had completely stopped, this is only a slight variation in the evidence. Since Murdock's evidence as to Uzoh's negligence was not contradicted by appellant, and appellant admitted the truth of Murdock's allegations by introducing his complaint, the credibility of Murdock's evidence was manifest as a matter of law according to the first example set forth in *Burnette*, and Murdock's motion for a directed verdict was properly granted. Similarly, as it was undisputed that Murdock was driving Conner Homes' truck, and the parties stipulated the amount of damages sustained by Conner Homes was $24,231.00, the trial court properly granted Conner Homes' motion for a directed verdict.

Appellant's next argument is that the trial court erred in granting defendants Moss' and Cardwell's motions for directed verdict. A defendant's motion for directed verdict may be granted only if, as a matter of law, the evidence, when viewed in the light most favorable to plaintiff, is insufficient to justify a verdict for plaintiff. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). As we mentioned above, although Murdock's complaint was Murdock's judicial admission, appellant, when he offered it into evidence, became bound by the allegations in the complaint which were not contradicted by other evidence at the trial. Appellant, therefore, has admitted that Uzoh negligently stopped or attempted to stop his car on the highway. Since appellant has admitted his negligence was the proximate cause of the accident, he was contributorily negligent as a matter of law. In order for contributory negligence to apply plaintiff need not be actually aware of the unreasonable danger he has exposed himself to by his conduct, he may be contributorily negligent if he has ignored unreasonable risks which would have been apparent to a prudent person exercising ordinary care. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). The negligence of plaintiff need not be the sole proximate cause of his injury, his contributory negligence bars his recovery if the negligence is one of the proximate causes of the injury. *Wallsee v. Carolina Water Co.*, 265 N.C. 291, 144 S.E. 2d 21 (1965); *U.S. Industries, Inc. v.*

Tharpe, 47 N.C. App. 754, 268 S.E. 2d 824, *review denied*, 301 N.C. 90, 273 S.E. 2d 311 (1980). On appeal, appellant does not argue that the doctrine of last clear chance applies to this case, so we have not addressed that issue. Since the evidence, even when viewed in the light most favorable to appellant, establishes contributory negligence as a matter of law, the trial court did not err in granting Moss' and Cardwell's motion for directed verdict.

For the reasons stated, the trial court's granting of appellee's motions for directed verdict is affirmed.

Affirmed.

Judge HILL concurs.

Judge BECTON dissents and files written opinion.

Judge BECTON dissenting.

Although Patrick Uzoh was instantly killed when the Plymouth he was driving was struck in the rear by an eighteen-wheel Mack truck, was lifted off the pavement, and was propelled into the path of a Ford truck which was towing a mobile home, Patrick Uzoh's administrator found himself in the awkward position of defending property damage claims by the owners of the trucks (Conner Homes and Ernest Cardwell) and a personal injury claim by the driver of one of the trucks (Murdock). If the best defense is a good offense, then Patrick Uzoh's administrator had not only the "laboring oar" but the tide, as well, against him.[1] Even though the administrator had to forge upstream, the trial judge erred, in my view, by taking from the trier of fact classic jury issues—negligence, contributory negligence, intervening negligence, and last clear chance—and by, apparently, concluding that the Murdock complaint had been offered into evidence without limitation. I, therefore, dissent.

1. Not only was the administrator's claim for wrongful death and Patrick Uzoh's widow's claim for consortium consolidated with the cases of the other parties, but also (a) the issues of damages in the wrongful death case and the loss of consortium claim were severed for trial purposes, and (b) no issue involving wrongful death was submitted to the jury as counsel for the parties stipulated that a first issue relating to Patrick Uzoh's negligence and a second issue relating to the negligence of the driver of the 1974 Mack truck would resolve the administrator's wrongful death suit.

I

It is not without significance that the jury, after deliberating two full days, was divided 7 to 5 on the first issue and 9 to 3 on the second issue, and even later advised the court that it was hopelessly deadlocked. The following excerpt from Uzoh's Administrator's Brief points out why, in my view, all issues of negligence and last clear chance should have been submitted to the jury:

> The evidence, taken in the light most favorable to Ratliff, Administrator, would indicate that Moss was proceeding at a speed of approximately 55 miles per hour when he rounded a moderate curve to his right. At that point, he, by all the evidence, had a clear and unobstructed view of the roadway in front of him up to the point of impact, which was approximately 1500 feet. By his own testimony, Moss admitted that when he rounded the curve, he saw the Conner Homes vehicle and shortly thereafter observed the Uzoh vehicle. (Of course, he later gave a recorded statement in which he indicated he was only 750 feet from the Uzoh vehicle when he first observed it, and even later gave sworn deposition testimony that he was a mere 235 feet from the Uzoh vehicle when he first observed it.) At trial, Moss admitted that he saw the various warning devices contained on the Wide Load which Murdock was towing, and further conceded that these various warning devices indicated to him that he should exercise caution and slow down. . . . Thus, the evidence taken in the light most favorable to Ratliff, Administrator, would support the inference that Moss rounded the curve at approximately 55 miles per hour, saw the Murdock vehicle, saw the Uzoh vehicle, yet never slowed down and was still traveling at approximately 55 to 60 miles per hour when he suddenly applied his brakes. The physical evidence . . . supports the inference of excessive speed by Moss, and Moss' failure to keep a proper lookout and maintain proper control over the logging truck he was operating. The uncontroverted testimony of Officer Marks indicated that the logging truck left 199 feet of skid marks prior to impact with the Uzoh vehicle. According to the testimony of Murdock, even after skidding a total of 199 feet, the Moss logging truck still struck the Uzoh vehicle with such force that the front of the Uzoh vehicle was

lifted off the pavement. Then, the Moss truck still had enough speed and momentum left to travel for an additional 66 feet, before finally coming to rest. Based upon the foregoing, clearly there was sufficient evidence of negligence on behalf of Moss for jury consideration.

II

As I read the record, the allegations in Murdock's complaint were not offered for unlimited substantive purposes. In no way can the allegations in Murdock's complaint be binding as to Moss and Cardwell. But even as to Murdock directly and Conner Homes indirectly, the trial court's decision that the complaint was admissible as evidence must be viewed in context.

Counsel for the administrator, after having been stymied when the trial court sustained an objection to a question asked on re-cross examination sought, when he was next presenting evidence, to show that Murdock's complaint contained statements inconsistent with the position Murdock had earlier asserted while on the stand. Indeed, before any matter in the complaint was submitted to the jury, counsel for all parties, with the court's indulgence, refined their positions and, in some instances, changed their minds. Even the lawyer whose intuitive faculties allows him or her to reach decisions instantaneously sometimes changes his or her mind upon further reflection. Courts do, too. For example, the trial court in this case, after thrice rejecting the motions for directed verdict on behalf of Murdock, Conner Homes, Moss and Cardwell, changed its mind after the jury failed to reach a verdict and directed a verdict for those parties.

Specifically, after Murdock had testified that in his opinion the "accident was caused by the automobile [driven by Uzoh] coming to a sudden stop in the traffic lane in front of the log truck," counsel for the administrator asked the following question on re-cross examination: "Well, if that is your opinion of the cause of the wreck, why did you sue Mr. Moss?" When the trial court sustained an objection to that question, counsel for the administrator could do no more since he was not then presenting evidence. Later, when counsel for the administrator was presenting evidence, he sought to complete the impeachment by using Murdock's complaint. The following transpired out of the presence of the jury:

Mr. Billings: Let me ask that I be allowed to have marks—I don't know whether I should mark it or not, but I would like to introduce in evidence on behalf of Uzoh the Murdock complaint. I don't know the procedure for doing that.

Mr. Miller: The defendants Moss and Cardwell will object.

Court: Let me see it. I have the tender. I have the objection.

Mr. Miller: That is the only part that we are concerned with.

Court: I understand, unverified. Any objection.

Mr. Cranfill: No sir.

Court: No objection. The Murdock complaint will be received in evidence with respect to Claude Tolson Murdock. The objection—

Mr. Miller: Let me think a minute. Just a moment, your Honor. I still object.

Court: Still object to it?

Mr. Miller: Yes sir.

Court: Objection is sustained with respect to Moss and Cardwell. The complaint comes in then in terms of Murdock only.

Mr. Billings: Your Honor, my witness has just walked in.

Court: Fine.

Mr. Miller: If your Honor please, may I on the last offer of evidence, my objection to that, if I may qualify that objection.

Court: Alright, you may.

Mr. Miller: [A]s to that portion of the complaint as it relates to the defendants that I represent. That is the purpose of my objection. Other than that, I have no objection.

Court: Alright. Then the ruling is that it is sustained with respect to that portion of the complaint.

Mr. Miller: Yes, sir. I will not itemize each paragraph but the record will indicate those portions directed to these two defendants.

Court: Alright, Mr. Billings, examine the witness.

Mr. Billings: In response to that, *may I simply identify those portions of the complaint had I been allowed to do so that I would have read to the jury so we will have a clear record?* (Emphasis added.)

Court: Indeed.

Mr. Billings: Your Honor, those portions of the Uzoh Exhibit 36 that had I been permitted to do so, I would have read to the jury, *are contained on page 3 beginning at line 8, on paragraph 8, including paragraph 9 and 10.* (Emphasis added.)

Court: Alright, sir.

Mr. Billings: Thank you. *Of course, the purpose that I wanted to read them was in response to Mr. Murdock's statement brought out by Mr. Miller that he didn't consider—that he considered the cause of the accident to be the Uzoh vehicle stopping in the roadway in front of him and I had intended to ask him about these allegations of Mr. Moss.* (Emphasis added.)

Mr. Miller: The three that you are tendering would be as to Mr. Moss and Cardwell, are 8, 9 and 10, is that right?

Court: That is correct.

Mr. Miller: Alright, sir.

The colloquy above shows vividly how the parties and the court defined and redefined their positions. For example, Mr. Miller, representing Moss and Cardwell, was allowed to object, reflect on his objection, object twice again before the Murdock complaint was deemed admissible, and then qualify the objection after the court stated: "Objection is sustained with respect to Moss and Cardwell. The complaint comes in then in terms of Murdock only." Moss and Cardwell should not be heard to complain that Uzoh's administrator did not timely qualify his tender of the Murdock complaint. Ultimately, then, in my view, only certain portions of the Murdock complaint were actually received into evidence, and no portion of the complaint was admitted for substantive purposes.

Even if the Murdock complaint was offered without limitation, the allegations concerning the negligence of Uzoh would still not be binding on the Administrator, because the allegations of Uzoh's negligence as contained in the complaint were contradicted by the evidence. The majority points out some of the contradictions, ante, p. 6.1, but then concludes that "these contradictions are trivial." *Id.* I disagree. These contradictions all related to the issues of negligence, contributory negligence, intervening negligence, and last clear chance. I therefore find *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377 (1962) and *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970), both of which were cited by the majority, supportive of the position I now take, since in those cases the adversaries' extrajudicial declaration was completely uncontradicted by any other evidence.

For the reasons stated, the trial court's order granting the appellee's motions for directed verdict should be reversed.

JOHNNIE GAYLON HARDEE, INDIVIDUALLY AND JOHNNIE GAYLON HARDEE AS ADMINISTRATOR OF THE ESTATE OF LAVELLE HARDEE, DECEASED v. WALTON E. HARDEE AND WIFE, LURA G. HARDEE, VERNA H. PARRISH AND ODELL F. HARDEE

No. 8211SC915

(Filed 19 July 1983)

1. **Evidence § 11.6— evidence relating solely to mental capacity—dead man's statute not precluding**

G.S. 8-51 allows an interested witness, when the decedent's mental capacity of free exercise of will is at issue, to relate personal transactions and conversations between the witness and the decedent as support for his opinion as to the mental capacity of that decedent. Therefore, it was not error for the trial court to allow into evidence testimony which tended to show that plaintiff's father was mentally competent when he was able to point out the lines of his property but was mentally incompetent when his father was in the hospital just prior to signing the questioned deed.

2. **Cancellation and Rescission of Instruments § 10.2— issue of undue influence—sufficiency of evidence**

Plaintiff's evidence that during the week before a deed was executed, decedent was experiencing a post-operative "down" phase, had recently undergone surgery for the removal of a brain tumor the size of a large egg, was incoherent, could not engage in conversation, and that the deed conveyed

the bulk of decedent's property to persons other than his offspring, was evidence sufficient to justify submission of that issue to the jury on the question of undue influence.

Chief Judge VAUGHN dissenting.

APPEAL by defendants from *Britt, Judge.* Judgment entered 17 March 1982 in Superior Court, HARNETT County. Heard in the Court of Appeals 8 June 1983.

Morgan, Bryan, Jones & Johnson, by Robert C. Bryan, for defendant appellants.

Johnson & Johnson, P.A., by W. A. Johnson and Sandra L. Johnson, for plaintiff appellee.

BECTON, Judge.

I

Plaintiff instituted this suit to contest the validity of a deed from his father, Lavelle Hardee, now deceased, to his grandparents, Walton and Lura Hardee. That deed purportedly conveyed the decedent's remainder interest in a forty-nine (49) acre timber tract to the life tenants, plaintiff's grandparents.

Plaintiff alleged that on the date the deed was executed, 13 June 1980, his father lacked sufficient mental capacity to convey realty, and that because of the exertion of undue influence on his father by the defendants, Walton and Lura Hardee were conveyed the forty-nine (49) acre tract. They later conveyed it to the defendants Verna Parrish and Odell Hardee and retained a life estate. Plaintiff also alleged that at the time of the conveyance the land contained valuable timber; that after acquiring the land defendants sold that tract to a timber company; and that the company cut the timber and inflicted approximately $14,000 damages upon the tract itself when it removed $30,000 worth of timber.

Defendants timely filed an Answer, controverting the material allegations of the Complaint.

A jury trial was held. Defendants moved, both at the end of plaintiff's evidence and at the close of all the evidence, for an involuntary dismissal,[1] contending that plaintiff's evidence was in-

1. This motion should have been denominated as one for directed verdict.

sufficient to go to the jury on the issues of decedent's alleged lack of mental capacity and on the undue influence allegedly exerted upon him. The motions were denied, and the evidence was thus submitted to the jury. The jury found that the decedent possessed the requisite mental capacity to execute the deed on 13 June 1980, but that Lavelle Hardee was induced to execute the deed by the overwhelming influence of the defendants or one of them. The jury assessed damages against the defendants in the amount of $17,400. Defendants moved for judgment notwithstanding the verdict, for a new trial, and for a reduction of damages. Those motions were denied, and judgment was entered for plaintiff. Defendants appealed.

II

Defendants bring forth seven (7) assignments of error and raise five (5) arguments on appeal.

[1] By their first argument, defendants contend that the trial court erred when it allowed plaintiff to testify concerning a conversation about, and their walk around, the property that is the subject of this controversy, because that testimony allegedly violates N. C. Gen. Stat. § 8-51 (1981), the Dead Man's Statute. The entire colloquy follows:

> Q. During this period between March of 1980 and May 26 of '80, did you have any discussions with your father about this property?
>
> OBJECTION BY THE DEFENDANT.
>
> OBJECTION OVERRULED.
>
> A. Yes sir.
>
> Q. And what was that discussion?
>
> OBJECTION BY THE DEFENDANT.
>
> COURT: Step into your room, members of the jury. Do not begin to discuss this case among yourselves. I'll send for you in just a few minutes. This is a matter I want to take up outside your presence.
>
> (Jury absent.)

COURT: The jury is outside the room. I'll hear you now, Mr. Bryan.

MR. BRYAN: Your Honor, any conversation or communications which Johnnie Hardee had with his father relative to what was going to happen to the land or really to anything other than to prove mental capacity or undue influence is barred by the dead man statute.

OBJECTION OVERRULED.

COURT: When was the time of this discussion, sir?

A. The first time that I went back and saw him after his wife's death.

. . . .

COURT: Members of the jury, the objection of the defendants is overruled at this point and I will allow this conversation to come into evidence as bearing upon the mental capacity of the deceased, Lavelle Hardee, at the time of the conversation and you will be the final judge of what it shows or what it does not show in that respect, as to the mental capacity of Lavelle Hardee.

Q. What was that discussion?

OBJECTION BY THE DEFENDANT.

OBJECTION OVERRULED.

A. He stated that he would like to walk over the property lines with me so I would know where the points were.

Q. And what property was he referring to, if you know?

OBJECTION BY THE DEFENDANT.

OBJECTION OVERRULED.

A. The forty-nine acres of land.

Q. Now your father had a house in this same general area, did he not?

OBJECTION BY THE DEFENDANT.

OBJECTION OVERRULED.

A. Yes sir.

The house was on the uppermost part of the property going toward Coatsboro Road. There were two pieces of land on the same side of the road and it adjoined each other. When I was referring to my father's wife, it was his second wife, and was not my mother.

Q. Mr. Hardee, did you thereafter walk over this tract of land in question with your father and look at the lines and corners?

OBJECTION BY THE DEFENDANT.

OBJECTION OVERRULED.

A. Yes sir.

Defendants concede that our courts recognize an exception to G.S. § 8-51 for evidence that shows the basis for the witness's opinion of the decedent's mental capacity during the relevant period. *See, e.g., Whitley v. Redden*, 276 N.C. 263, 171 S.E. 2d 894 (1970). Defendants nevertheless contend that the testimony complained of in the case *sub judice* does not fall within that or any other exception to the statute, especially since plaintiff had the burden of proving Lavelle Hardee's mental incapacity, not his mental capacity. In short, defendants argue that the evidence excepted to is primarily probative of Lavelle Hardee's dispositive intent and whether the intent expressed in the deed was formed through the exercise of his own free will. We disagree.

G.S. § 8-51 allows an interested witness, when the decedent's mental capacity of free exercise of will is at issue, to relate personal transactions and conversations between the witness and the decedent as support for his opinion as to the mental capacity of that decedent. *Whitley v. Redden.* Such evidence is inadmissible, however, "when it is offered for the purpose of proving and does tend to prove vital and material *facts* which will fix liability against the representative of a deceased person. . . ." *Id.* at 272, 171 S.E. 2d at 901. The crucial distinction, then, is whether the evidence is offered primarily to show the basis for the witness's opinion as to the decedent's mental condition or whether it is offered to prove some other controverted fact. *In Re Will of Ricks*, 292 N.C. 28, 231 S.E. 2d 856 (1977).

Our review of the record evidence reveals only four statements that arguably pertain to decedent's dispositive intent:

(i) that Lavelle Hardee told plaintiff that he wanted to walk over the tract so that plaintiff would know where the boundaries were; (ii) that Lavelle Hardee had a house in the general area of the tract; (iii) that the tract referred to is the forty-nine (49) acres in dispute; and (iv) that Lavelle Hardee and plaintiff did in fact walk over the property.

When the evidence complained of is considered in conjunction with the question and answer immediately following it, that evidence bears *primarily*, if not wholly, on the accuracy of plaintiff's assessment of his father's mental capacity.[2] It was proper for plaintiff to show that he knew when Lavelle Hardee was mentally competent (when Lavelle Hardee was able to point out his lines in March) and mentally incompetent (when Lavelle Hardee was in the hospital just prior to signing the questioned deed). We do not view the challenged testimony as having been "weighted towards proving facts essential to establishing plaintiff's claim." *Whitley v. Redden* at 273, 171 S.E. 2d at 901.

The propriety of that conclusion is bolstered by our Supreme Court's decision, on similar facts, *In Re Will of Ricks* cited above. Reversing the decision of this Court granting a new trial, our Supreme Court held that the trial court had not erred when it allowed testatrix's son, the sole beneficiary of her will, to testify over a G.S. § 8-51 objection, that testatrix told him she wanted (i) to make a will; (ii) to leave the bulk of her estate to him; (iii) to rely on his choice of legal counsel; and (iv) to rely on him to provide transportation to and from counsel's office. Rather, the Court concluded, after a thorough discussion of leading precedent:

---

2. The question asked next was:

What was your father's mental condition as you observed it there in March and April of 1980?

OBJECTION BY DEFENDANT.

COURT: Do you have an opinion about that?

A. Yes, sir, I have an opinion.

COURT: Objection is overruled.

Q. And what is that opinion?

OBJECTION BY DEFENDANT.

In March or April of 1980, he seemed perfectly normal, in my opinion.

> The transactions and communications with the deceased which he related, considered in the context of his other testimony and other evidence in the case, seem clearly to have been offered mostly for the purpose of showing the basis for his opinion that his mother at the crucial time in question had the mental capacity to execute a will. The declarations or statements which he attributed to the deceased were not offered primarily to prove the truth of any assertion contained therein. Their probative value depends more on the fact that they were made.

In Re Will of Ricks at 42, 231 S.E. 2d at 866.

Considering, then, the Supreme Court's decision in *Ricks;* the fact that the trial court in the case *sub judice* gave adequate and numerous limiting instructions each time the evidence was tendered; the context of the evidence tendered; and the content of the answers themselves, we hold that the evidence objected to was properly admitted. The probative value of "the walk around" the acreage lies in the fact that it occurred and that Lavelle Hardee knew where his lines were, rather than in any of the plethora of inferences that could be drawn therefrom. We therefore find defendant's primary argument unpersuasive.

III

[2] Defendants next argue that plaintiff failed to meet his burden on the issue of undue influence, that the case should not have been submitted to the jury, and that their motion for directed verdict should have been allowed.

When considering a motion for directed verdict, a trial court must consider the non-movant's evidence in its most favorable light, treat that evidence as true, and resolve all permissible inferences in favor of that non-movant.

The issue before us, then, is whether plaintiff's evidence, when considered in its most favorable posture, was sufficient to establish a *prima facie* showing that decedent's 13 June 1980 deed was the product of the exertion of undue influence upon him.

A *prima facie* case of undue influence consists of evidence of a set of facts, circumstances, and inferences from which a jury could find that the challenged document is not the product of its

executor's free will, but instead, the result of an overpowering influence on that person, sufficient to cause him to create a document he would not otherwise have executed. *In re Andrews*, 299 N.C. 52, 56, 261 S.E. 2d 198, 200 (1980).

Plaintiff's evidence showed that during the week before the deed was executed, decedent was experiencing a post-operative "down" phase, had recently undergone surgery for the removal of a brain tumor the size of a large egg, was incoherent, could not engage in conversation, and that the deed conveyed the bulk of decedent's property to persons other than his only offspring. That evidence is, in our view, sufficient to justify submission of that issue to the jury. We thus find this argument unpersuasive.

IV

We have examined the remainder of defendants' arguments and find them to be without merit. The trial below was free of prejudicial error.

No prejudicial error.

Judge HILL concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

The following evidence may be helpful to an understanding of why I must dissent.

Odell Hardee testified that in 1973 his father, Walton Hardee, who is now ninety years old, divided his land into four parcels. He gave each of his four children a remainder interest in a parcel of the farmland, and he retained a life estate. Walton's children were Verna, Lavelle (the decedent), Elmer, and Odell. The conveyance in dispute is the deed Lavelle executed conveying the property back to his father. After Lavelle's death, Walton conveyed that property to Odell and Verna. Odell and Verna sold timber that was on the property.

The plaintiff, Johnnie Hardee, is Lavelle's only child. He testified on cross-examination that he and his mother left his father's house when he was one year old. He lived with his mater-

nal grandparents until he was fourteen, then he lived with an uncle for two years and with his mother for two years. Lavelle remarried, and his second wife, Betty, died in March of 1980. Johnnie did not attend the funeral. Johnnie, who is now twenty-five years old, said he had been completely estranged from his family until two months before Lavelle went into the hospital. When Johnnie visited Lavelle at that time, it was the first time he had visited him in two and one-half years. Johnnie lived about twenty-five miles from Lavelle. In the absence of the jury, Johnnie was asked: "Prior to that time [March 1980] hadn't your relationship with the Hardee family been about nil?" Johnnie answered, "Yes sir, that is true."

Plaintiff introduced testimony through several other witnesses which tended to show that Lavelle was without sufficient mental capacity to execute the deed to Walton.

At the close of plaintiff's evidence, defendants moved for an "involuntary dismissal," which should have been a motion for directed verdict, on the ground that there was no evidence of either mental incapacity or undue influence. The motion was denied.

Defendants introduced evidence through five witnesses that tended to show that Lavelle had sufficient mental capacity to execute the deed. The parties stipulated that on 9 June 1980, Lavelle attempted to deliver a power of attorney to appoint David Stroud as his attorney in fact. The power of attorney was filed on 10 June 1980. David Stroud, Lavelle's employer, testified that he and Lavelle were friends, and he visited Lavelle every day in the hospital. He said that while Lavelle was in the hospital, except for his drowsy periods, he was competent and capable of doing whatever he wanted to do.

William Parrish, Lavelle's brother-in-law, said he was present when Lavelle executed the deed to Walton and his wife, Lura, on 13 June 1980. He described the event as follows:

> We returned the day that the deed was executed, and I was present on that occasion in the hospital. At that time, my wife, Verna, Mr. Hardee, Ms. Castlebury, the notary public, and Lavelle Hardee were there. Mr. Walton Hardee was there too. Mr. Odell Hardee and his wife were not there;

Mr. Walton Hardee took the deed. At that time, Mr. Walton Hardee was very weak. I understand Mr. Walton Hardee had been up to see Lavelle before this time. We got to the hospital between 11 & 12 o'clock.

Before we went to the hospital, we went by Mr. Penny's office in Lillington and Mr. Walton Hardee went in and got some legal papers. When we got the deed, we went to Wake Memorial Hospital, and got there between 11 and 12 o'clock, and went up to Lavelle Hardee's room. Mr. W. E. Hardee, Verna, and I went up to Lavelle's room. When we got there, we talked and inquired of his welfare. When we got there, Lavelle Hardee was reading the paper, and was in bed with his head propped up. We had a conversation with him at that time.

. . .

We stayed in Lavelle's room about 30 to 45 minutes before the deed was mentioned. During this period of time, I saw and observed his condition. He seemed very alert and knew what he was talking about. . . .

During the signing of the deed, the hospital attendant came in. At this time, Mr. Walton Hardee was sitting in a wheelchair and the hospital attendant started to remove his shoes and put him in the vacant bed. Mr. Lavelle Hardee, like the rest of us, laughed about it.

After that transpired, Mr. Lavelle Hardee asked his father, Mr. W. E. Hardee, if he had the papers, and his father told him he did. Mr. W. E. Hardee took the papers out of the envelope and handed them to Lavelle, unfolded them and handed them to Lavelle, and this was the deed. Nobody else other than Verna, Mr. Hardee, Lavelle and I were in the hospital room at the time. Subsequently, the notary came in the room.

. . .

At that time, Lavelle said that he had some papers he wanted her to notarize. She asked him if he knew what the papers were, had he read the papers. He said he had. She asked him what his room number was, and he told her what

> the room number was. She asked him what his telephone number was and he told her the telephone extension number. She reminded him that this was serious and did he know what he was doing and he said yes, and again she asked him if that's what he wanted to do and he said yes and he reached for papers.

At the close of all the evidence, defendants moved for a directed verdict on the issues of mental incapacity and undue influence. The motion was denied. The jury found that Lavelle had sufficient mental capacity, but was induced to execute the deed by the undue influence of the defendants. Defendants' motions for judgment notwithstanding the verdict, and for a new trial, were denied.

Defendants' first assignment of error is that the trial judge violated the Dead Man's Statute, G.S. 8-51, when he permitted Johnnie Hardee to testify as to personal transactions and communications with Lavelle. The testimony excepted to by defendants is set out in the majority opinion. G.S. 8-51 prohibits an interested party from testifying on his own behalf as to personal transactions or communications between the witness and the decedent when the testimony is against a person deriving his title or interest from the decedent. *See Peek v. Shook*, 233 N.C. 259, 63 S.E. 2d 542 (1951). Notwithstanding G.S. 8-51, in an action to set aside a deed it has long been the rule that an interested party may testify to communications with the deceased to show the basis upon which the witness has formed an opinion as to the decedent's lack of mental capacity. *McLeary v. Norment*, 84 N.C. 235 (1881). *Accord, In re Will of Ricks*, 292 N.C. 28, 231 S.E. 2d 856 (1977); *Goins v. McLoud*, 231 N.C. 655, 58 S.E. 2d 634 (1950). In *Ricks*, the Supreme Court explained the above exception to G.S. 8-51, and enlarged it to include evidence of undue influence. The Court said

> Thus it seems an oversimplification of the rules to say that an interested witness may testify to transactions and communications with a deceased only if such testimony is considered on the mental capacity issue but not if it bears on the question of undue influence. The real distinction in the cases is whether the testimony is offered mostly to show the basis for the witnesses' opinion as to the deceased's mental condi-

> tion or whether it is offered mostly to prove some other fact in issue. In the former instance the probative value of the testimony rests simply on the fact that the transactions or communications *occurred.* In the latter it rests on the truth of whatever assertions are contained in the transactions or communications related. In the former instance there is no hearsay involved and the testimony is generally admissible, while in the latter the hearsay nature of the testimony renders it inadmissible.

In re Will of Ricks, 292 N.C. at 38, 231 S.E. 2d at 863-864.

Johnnie testified, over objection, that Lavelle "stated that he would like to walk over the property lines with me so I would know where the points were." The question is whether the probative value of this statement rests on the fact it was made or on the truth of what is asserted. I believe that the testimony was offered to show Lavelle's dispositive intent. The statement has little bearing on Lavelle's mental capacity because there was no evidence as to whether the boundaries were correct. The statement, however, is the *only* evidence in the record which tends to show that Lavelle had any intention of giving his property to Johnnie. Obviously, the statement's real significance was that it tended to show Lavelle's alleged dispositive intent, and thus was inadmissible hearsay and in violation of G.S. 8-51. I conclude, therefore, that, at the very least, this error would entitle defendants to a new trial.

Appellants' second argument is that their motion for directed verdict on the issue of undue influence should have been granted. Defendants' motion for directed verdict may be granted only if the evidence, considered in the light most favorable to the plaintiff, is insufficient to justify a verdict for plaintiff. *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974). So viewed, plaintiff's evidence tends to show that Lavelle's mental condition in March and April 1980 was normal, but in June he was, at times, incoherent, had poor memory, was often drowsy, and had little interest in what was going on around him.

Undue influence is the exercise of an improper influence over the mind of another so that his professed act is, in reality the act of the third person who procured the result. *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634 (1948). *See also In re Andrews,* 299

N.C. 52, 261 S.E. 2d 198 (1980). In *Andrews*, the Supreme Court listed the following seven factors which are relevant on the issue of undue influence:

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

In re Andrews, 299 N.C. at 55, 261 S.E. 2d at 200, *quoting In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915). *See also In re Coley*, 53 N.C. App. 318, 280 S.E. 2d 770 (1981).

In the instant case, none of these factors were both present and probative of undue influence. The first factor, old age and physical and mental weakness, although present, was not relevant because Walton Hardee, the grantee, was ninety years old and in a wheelchair. Obviously, Walton was in no position to take advantage of Lavelle's age and weakness. The fourth factor, prior dispository intent, was shown only in Johnnie's inadmissible testimony. The sixth factor was not present because, although Johnnie is the biological son of the grantor, all the evidence shows that there was no parent-child relationship and thus the deed did not disinherit the natural object of the grantor's bounty. The grantor merely returned the gift his father had made to him seven years earlier. None of the other factors are present.

In short, the testimony, viewed in the light most favorable to plaintiff, does not tend to show any evidence of influence over the mind of Lavelle by the defendants. Consequently, I believe defendants' motion for directed verdict on the issue of undue influence should have been granted.

For the foregoing reasons, I would reverse and remand for entry of judgment in favor of defendants.

WILSON BROTHERS, A CO-PARTNERSHIP; AND BONEY WILSON & SON, INC., A NORTH CAROLINA CORPORATION v. MOBIL OIL, A FOREIGN CORPORATION; MOBIL CHEMICAL CORPORATION, A FOREIGN CORPORATION; MILLER BUILDING CORPORATION, A NORTH CAROLINA CORPORATION; GRAVES ELECTRIC CORPORATION; AND MOBIL OIL CORPORATION, A FOREIGN CORPORATION

No. 825SC789

(Filed 19 July 1983)

1. **Negligence § 29— sufficiency of evidence against company alleged to have installed wires**

The plaintiffs presented sufficient evidence to create an issue as to whether defendant Graves installed the wiring that caused a fire in plaintiffs' store, and plaintiffs' evidence was sufficient to raise a question as to whether defendant Graves was negligent in installation of the wires.

2. **Master and Servant § 22; Negligence § 29— sufficiency of evidence of contractor-subcontractor relationship in negligence action**

There was a conflict in the evidence over the relationship between a contractor, defendant Miller, and an electrical subcontractor, defendant Graves, which created an issue of fact over a possible relationship which could result in holding defendant Miller liable for the alleged negligence of defendant Graves.

3. **Negligence § 30; Sales § 22.2— manufacture of material burned in fire—insufficient evidence of negligence**

The trial court properly granted summary judgment in favor of defendant Mobil, who manufactured plastic trays burned in plaintiffs' store, since the fact that Mobil's plastic trays burned when molten metal dripped on them did not make them so dangerous as to require a warning about their use.

APPEAL by plaintiffs from *Rouse, Judge.* Judgment entered 8 and 12 March 1982 in Superior Court, PENDER County. Heard in the Court of Appeals 17 May 1983.

This is an action to recover damages caused by a fire which occurred at the plaintiffs' retail food supermarket on 18 December 1977 in Burgaw. The plaintiffs allege that defendant Miller Building Corporation was negligent in construction and remodeling of the premises and failed to supervise and inspect installation of electrical wiring by defendant Graves Electric Corporation and that defendant Graves was acting as Miller's agent and employee.

The plaintiff further alleged that Graves negligently installed electrical wiring which caused the combustion of plastic packaging material negligently manufactured, sold, and distributed by

Mobil Oil Corporation. Mobil Chemical Corporation, a subsidiary of Mobil Oil, is alleged to have negligently manufactured the chemical components of the packaging material.

The complaint also included a strict liability claim against the Mobil defendants, a breach of the warranty of merchantability claim against Miller Building and Graves Electric, and a claim for $1,000,000 in punitive damages against the Mobil defendants for failure to warn of the risk of fire associated with the plastic packaging material. Actual damages were alleged to have exceeded $1,000,000.

It is undisputed that the fire was caused by the failure of certain electrical wiring in the storage area above the plaintiff's meat cutting room. Sam Berkowitz, a professional engineer, said in a deposition that wires inside the metal conduit were exposed due to the conductor insulation being stretched during installation and eventually breaking down. The electrical failure caused arcing, which melted a hole in the conduit pipe. Hot, molten metal dripped down onto the plastic materials, which ignited and caused the fire.

The plaintiffs presented affidavits of three people with personal knowledge of the installation of electrical work during a 1972 addition to the store. All three said that in their best recollection, Graves Electric installed electrical conduit in the area in which the fire started. Graves denies that it did any work in that area of the store.

Evidence presented by the plaintiffs showed that plastic packaging material was stored below the conduit that melted down, that it would ignite under facts alleged by the plaintiffs, and that there was no warning or instructions for proper storage on the material. The Mobil defendants point to the deposition of Charles Tiderman, an employee at the plaintiffs' Burgaw store, as contrary evidence. Tiderman said that the packaging materials were not in the room where the fire started when it allegedly started and that he does not consider the material hazardous.

The defendants also emphasize the deposition of Burgaw Fire Chief John Frazier. Frazier testified that the fire department would have been able to get to the fire quicker if the plaintiffs' storeroom was not full of goods. An affidavit of professional

engineer Wayne Carson stated that the crowded storage conditions in the storeroom at the time of the fire were in violation of the Fire Prevention Code, upon which the Burgaw fire ordinances were based.

After consideration of oral arguments by the parties and the evidence before him, the trial judge entered summary judgment in favor of all defendants. From that judgment, the plaintiffs appealed.

Moore & Biberstein, by R. V. Biberstein, Jr., and Lommen, Nelson, Sullivan & Cold, by John P. Lommen and Daniel J. Buivid, Jr., for the plaintiff-appellants.

Hogue, Hill, Jones, Nash & Lynch, by David A. Nash, and Carr, Abney, Tabb & Schultz, by W. Pitts Carr and David H. Pope, for the Mobil defendant-appellees.

Crossley & Johnson, by Robert W. Johnson, for defendant-appellee Graves Electric Corporation.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for the defendant-appellee Miller Building Corporation.

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). 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). In ruling on a summary judgment motion, the record should be viewed in the light most favorable to the party opposing the motion. *Brice v. Moore,* 30 N.C. App. 365, 367, 226 S.E. 2d 882, 883 (1976).

It is an accepted tenet of our jurisprudence that summary judgment is rarely proper in negligence cases. "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). But where there is no genuine issue of material fact and reasonable men could only conclude that the defendant was not negligent, entry of summary judgment is proper. *Dendy v. Watkins,* 288 N.C. 447, 455, 219 S.E. 214, 219 (1975).

We now consider the defendants separately.

GRAVES ELECTRIC

[1] The plaintiffs contend that there is a fact issue as to whether Graves installed the wiring that caused the fire. Graves denies that it installed the wiring in question. It contends that its material lists did not show any of the type of conduit which caused the fire and that it was not the electrical contractor when the building was built in 1965. The conduit which caused the fire was connected to panels that were installed in 1965.

The plaintiffs' evidence raises a fact issue on this point. They submitted affidavits of three people who were plaintiff's em-

ployees in 1972. All three stated that their "best recollection" was that Graves installed the conduit which caused the fire.

Graves attacks these affidavits as insufficient under G.S. 1A-1, Rule 56(e). That rule states in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

The requirements of the rule were met here.

The affidavits were based on personal knowledge. The phrase "best recollection" is equivalent to the phrase "to the best of my knowledge" that was held to be on personal knowledge in *Faulk v. Dellinger*, 44 N.C. App. 39, 259 S.E. 2d 782 (1979). As *Faulk* commented, "[I]n the case at hand, we do not have a situation of manufactured fact but merely a self-imposed limitation to the affiant's personal knowledge which is all the rule requires." 44 N.C. App. at 42, 259 S.E. 2d at 784. The affiants were competent to testify on what they stated in their affidavits.

Although there is a fact issue as to whether Graves installed the conduit in question, it must also be shown that there is a fact issue as to Graves' negligence for the plaintiff's case to survive a summary judgment motion.

Graves argues that offering Berkowitz's testimony about how the fire started, when his conclusions were based on photographs of the conduit after the fire, was not sufficient. It contends that because his testimony was not based on a personal examination of the burned conduit, he was not speaking from personal knowledge and thus, was not competent to testify. We reject these arguments.

It should first be remembered that there is a presumption against granting summary judgment in negligence cases. It is a jury question if a defendant met the reasonable man standard. *See, e.g., Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979).

The pertinent portion of Berkowitz's deposition is as follows:

Q. . . . do you have any explanation for why it [the conduit] arced at this particular time?

A. . . . I have seen cables that will be pulled into a conduit and will be damaged and will sit there for years until the insulation finally breaks down. . . . It may not fail immediately. It may sit there for a period of years under a condition of tension and then ultimately break down.

Also, because of the localized nature of this arcing, I have the feeling that that cable was bent while it was being pulled in. That is, that it had a crimp in it and that this ultimately broke down.

Q. You are saying that the insulating material was under tension while it was there in the conduit?

A. That is correct.

Q. Which would cause it to break down in one particular point?

A. That is correct.

Q. Where it had a crimp; is that correct?

A. That is correct.

Q. Is that all theory? Do you have any facts to support that?

A. I didn't have the conduit itself or the cable. What I am going by is my own experience in having found cable under that condition that did fail as a consequence of that, of that kind of condition.

Q. Now, assuming that this point in the conduit which has the hole in it was caused by arcing of the nature that you have described, do you have an opinion as to how the heat spread from that point and started a fire?

A. Yes, sir, the molten metal and the sparks falling from the arc point would have fallen into combustible material that was stored beneath it.

This testimony raises questions of whether Graves was negligent in installation and if such negligence could have caused

the fire. Although Berkowitz did not personally examine the conduit in question, his opinion was based on a personal examination of the burned building, photographs of the melted conduit, and his experience in other cases, and was therefore competent to testify as to the cause of the fire.

MILLER BUILDING CORPORATION

[2] The plaintiffs argue that there is a fact issue on whether an employer-employee or contractor-subcontractor relationship existed between Miller and Graves so as to make Miller liable for any possible negligence of Graves. We agree.

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. *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.

Id. at 16, 29 S.E. 2d at 140. These factors are considered along with all other circumstances to determine the relationship.

The facts here show a possible relationship which could result in holding Miller liable for the alleged negligence of Graves. An affidavit of J. A. Kuske, Miller's Vice-President, states the following contentions:

> 1. Wilsons took separate bids from general contractors and from electrical, plumbing, heating, and air conditioning contractors.

2. Graves did all of the electrical installation in connection with the 1972 project, as far as Miller knows. None of the electrical work was done by Miller or at its request.

3. Miller exercised no control over Graves in the 1972 installation.

4. Miller included the bids of all contractors in one contract as a matter of convenience at the plaintiffs' request.

An affidavit of Lawrence Allan Wilson, a partner in the plaintiffs' business, however, contradicts Kuske's assertions. Wilson states in his affidavit: "The electrical subcontractor for Miller Building Corporation was Graves Electric Company. Wilson Brothers did not contract separately with Graves Electric Company for the electrical work. The contract with Miller Building Corporation included the electrical work."

This conflict in the evidence over the relationship between Miller and Graves creates an issue of fact that must be decided by a jury. We express no opinion on the alleged negligence of Graves or Miller's responsibility for it. We only decide that summary judgment was improperly entered for Miller.

THE MOBIL DEFENDANTS

[3] The plaintiffs argue that the Mobil defendants should be strictly liable in tort because the plastic trays which they manufactured and sold were unreasonably dangerous. They contend that RESTATEMENT (SECOND) OF TORTS § 402A (1965), which extends strict liability to sellers in products liability cases, should be adopted in North Carolina.

We note first that the Supreme Court rejected the same argument recently in *Smith v. Fiber Controls Co.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). In this State, a plaintiff's claim in a products liability case must be determined by the principles of negligence or breach of warranty. *Maybank v. S. S. Kresge Co.*, 46 N.C. App. 687, 689, 266 S.E. 2d 409, 411 (1980), *modified and aff'd*, 302 N.C. 129, 273 S.E. 2d 681 (1981).

G.S. 99B, the North Carolina Products Liability Act, is not an enactment of strict liability in products liability cases. In fact, G.S. 99B-4(3) reaffirms the applicability of contributory negligence

as a defense in product liability actions. Contributory negligence is not a defense in a strict liability action.

The plaintiffs also contend that the Mobil defendants may be liable in negligence for failure to warn of the dangers of the plastic trays. We find this argument to be feckless.

The fact that Mobil's plastic trays burned when molten metal dripped on them does not make them so dangerous as to require a warning about their use. Almost any material would have burned under the facts of this case. That fact does not mandate a warning on the product. *See* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

As a result, we hold that it was proper to grant summary judgment in favor of all Mobil defendants.

In conclusion, summary judgment was improperly granted in favor of Graves Electric and Miller Building. It was properly granted for the Mobil defendants.

Reversed and remanded in part. Affirmed in part.

Judges WELLS and BRASWELL concur.

W. R. ALLEN AND WIFE, ANNETTE ALLEN v. ROY LEE DUVALL, MELBA JEAN DUVALL, AND CHARLIE BYRD DUVALL

No. 8230SC786

(Filed 19 July 1983)

1. Slander of Title § 1— elements

The elements of slander of title, which is a part of the common law of this State, are (1) the uttering of slanderous words in regard to the title of one's property, (2) the falsity of the words, (3) malice and (4) special damages.

2. Easements § 4.1; Slander of Title § 1— description of easement too vague—new trial to determine easements by necessity or prescription

The falsity of defendant's words in a slander of title action depended on the validity of the title to plaintiff's easements across the property of the defendants. Pursuant to *Oliver v. Ernul*, 277 N.C. 591 (1971), which overrules *Borders v. Yarbrough*, 237 N.C. 540 (1953), the defendants' predecessor in title did not reserve an easement in that the description was too vague. In that

there was sufficient evidence for the court to find that the easements had been established by prescription or necessity, there must be a new trial in order to allow the court to make sufficient findings of fact on the evidence as to an easement by prescription or by necessity.

3. Easements § 11— insufficient evidence of abandonment of easement

Where an easement was still a valuable adjunct to plaintiffs' property, the fact that they did not maintain the road for a period when no one was living on plaintiffs' land need not be construed as evidence that they intended to abandon the right to use the easement.

4. Slander of Title § 1— sufficiency of evidence of malice

Evidence that the deed to defendants' property referred to an easement across their property and that a right-of-way had been used to cross the property for many years, was evidence from which the court could find that there was probable cause for defendant Duvall to believe the right-of-way did exist when he stated that it did not.

5. Evidence § 31— best evidence rule not applicable to contract between plaintiff and third party

Where there was no evidence that there was a written contract between the plaintiffs and a third party, there was no error in the court's findings that the plaintiffs had made a contract to sell the property to the third party. The fact that the third party might be able to plead the statute of frauds if the plaintiffs sued him does not affect the plaintiffs' claim against the defendant.

6. Slander of Title § 1— damages proper

In plaintiffs' action for slander of title, the trial court did not err in calculating the damages for the loss of the use of money at thirteen per cent of $13,000.00 annualized from the date a third party refused to pay the full purchase price of a parcel of land to plaintiffs due to defendants' statements to the third party concerning the title to the property. Nor did the court err in awarding damages for the expenses the plaintiffs incurred in having the easement surveyed. The court was further correct in failing to include in the award of damages plaintiffs' attorney fees.

APPEAL by defendants from *Thornburg, Judge.* Judgment entered 11 February 1982 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 17 May 1983.

This is an action for slander of title tried before the court without a jury. The plaintiffs' evidence showed that they owned a tract of land adjacent to a tract of land owned by the defendants. The plaintiffs contended they had an easement over the land owned by the defendants. This claim to an easement is based in part on a deed which was executed in 1914 to a predecessor in title of the defendants. The deed contained the following reservation:

"Reserving however a right of way for a road for wagons and all purposes, beginning at G.L. Allen's line and running up on East side of creek over this land; also a right of way for road to be kept open from the above road out to the Beaverdam Road near Austin's Chapel, or school house."

The deed to the defendants contained the following reference:

"SUBJECT TO road rights of way set out in Deed dated October 7, 1914, from R.G. White and wife to W.S. McCracken registered in Deed Book 43, page 401. . . ."

Three witnesses testified as to the location of the roadway across the defendants' land. Their testimony was to the effect that since 1914 there had been a road following a certain course across the defendants' property with another road running off the first road to the Beaverdam Road. A surveyor testified as to a survey he had made of the roads as shown by the plaintiffs' evidence. A map of the roads was introduced into evidence.

The plaintiffs' evidence showed further that they had made a contract to sell their property to Bud Mehaffey for $25,000. After the contract was made the defendant told Mr. Mehaffey that there was not an easement of right of way across the defendants' land and that if he purchased the land from the plaintiffs, he would not have a right of way. Mr. Mehaffey paid the plaintiffs $12,000 on the agreed purchase price and held back $13,000 until he could be assured he would have a right of way easement if he bought the land from the plaintiffs.

The defendant Roy Lee Duvall testified that he had told Mr. Mehaffey the plaintiffs did not have a right of way from the Beaverdam Road. Mr. Duvall testified further that when he bought the property the lawyer who searched the title did not tell him there was such a right of way. He had put a gate across the road and it had not been used since he purchased the land in 1970. Other witnesses testified for the defendants that the road had not been maintained or used for many years.

The court found that there is a recognizable roadway which is the first easement reserved in the deed to defendants' predecessor in title, and that a second easement exists from Beaverdam Road to the first road. The court further found that the plaintiffs entered into a contract to sell their property to Bud

Mehaffey for $25,000; that Roy Lee Duvall told Bud Mehaffey the plaintiffs did not have an easement of right of way across the defendants' property; that this statement was false and Roy Lee Duvall knew it was false; and that the statement was made maliciously. The court entered a judgment holding that the plaintiffs had right of way easements over the property of the defendant and awarding damages against the defendant Roy Lee Duvall.

The defendants appealed.

Erwin, Winner and Smathers, by Patrick U. Smathers, for plaintiff appellees.

Redmond, Stevens, Loftin and Currie, by Thomas R. West, for defendant appellants.

WEBB, Judge.

[1] This appeal brings to the Court an action for slander of title. Slander of title actions are rare in this state. Our research has revealed only three cases in which it is mentioned. *See Texas Co. v. Holton*, 223 N.C. 497, 27 S.E. 2d 293 (1943); *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897) and *McElwee v. Blackwell*, 94 N.C. 261 (1886). Slander of title is recognized as a part of the common law. *See* 50 Am. Jur. 2d, *Libel and Slander*, § 541 at page 1060 and 53 C.J.S., *Libel and Slander*, § 269 at page 391. We believe it is a part of the law of this state. The elements of slander of title are (1) the uttering of slanderous words in regard to the title of someone's property, (2) the falsity of the words, (3) malice and (4) special damages.

[2] In this case the defendants argue the Superior Court was in error because the plaintiffs did not prove the words of Roy Lee Duvall were false, that he uttered them with malice, or that the plaintiffs suffered any damage. The falsity of Mr. Duvall's words depends on the validity of the title to the plaintiffs' easements across the property of the defendants. The defendants argue that the description in the deed of their predecessor in title is too vague to create an easement. We believe that pursuant to *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971), we must hold that the deed to the defendants' predecessor in title did not reserve an easement. In that case the grantor purported to give an easement described as follows:

> "We, the undersigned, do hereby give, grant, bargain and convey a 20-foot rightaway for public use for now and forevermore—
>
> Described as follows:
>
> In Morehead Township, in the Mansfield Section, lying between A and E.C. Railway on the North Hwy 70 on the South. The Mike Ebron Subdivision Running a Southerly direction Bounded on the East by George Huntley line and on the West, by Fred Ernul, Garfield Oliver and M. L. Mansfield line."

Our Supreme Court held this was not a sufficient description because the description contained "no beginning and no ending." As we read *Oliver* there can be little left to inference for a description of an easement to be good. As Justice Sharp (later Chief Justice) pointed out in her concurrence, it could have been inferred from the description in *Oliver* that the beginning was Highway 70 on the south and A and E.C. Railroad on the north, but the majority would not make this inference.

Were it not for *Oliver*, we believe the description in this case might be held to create an easement pursuant to *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541 (1953). We believe that case holds that if an easement is reserved and a specific part of the servient property is used for the easement with the acquiescence of the parties, this makes the description good. That is what the evidence shows in this case. The difficulty with following *Borders*, however, is that the evidence also showed this in *Oliver*. The Supreme Court in *Oliver* cited *Borders* but did not discuss it. Apparently they gave no credence to the principle that an otherwise vague description can be made good by the use and acquiescence of the parties. We believe *Borders* was overruled by *Oliver*. We believe pursuant to *Oliver* that the description in the 1914 deed in the present case is too vague to allow identification with reasonable certainty.

We believe there may have been sufficient evidence for the court to find that the easements had been established by prescription. *See Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981) and *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966) for the proof necessary to support an easement by prescription. The

court did not make any findings of fact as to prescription, however. We also believe the evidence may support findings of fact that easements by way of necessity had been established. *See Oliver, supra,* and *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969) for the proof necessary to establish an easement by way of necessity. The court did not make any findings of fact as to an easement by way of necessity. We hold that there must be a new trial since the court did not make sufficient findings of fact on the evidence as to an easement by prescription or by necessity.

[3] In light of the fact that there must be a new trial, we shall discuss some of the defendants' assignments of error, as the questions they raise may recur. The defendants argue it was error not to find the plaintiffs had abandoned the easement. An abandonment requires an intention to relinquish a right in property and the external acts necessary to effectuate that intent. *See Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942). There was evidence that the plaintiffs had not maintained the roads for several years prior to the commencement of the action. We do not believe this evidence required the court to find the plaintiffs had abandoned the easement. So long as there was no one living on the plaintiffs' land, there was no need for the plaintiffs to maintain the road. It was still a valuable adjunct to the plaintiffs' property, however, and the fact that they did not maintain the roads need not be construed as evidence they intended to abandon the right to use them.

[4] The defendants also contend there was not sufficient evidence of malice to establish a claim for slander of title. In order to succeed in an action for slander of title, the plaintiffs must prove that the defendant uttered the false words maliciously, that is, there was no probable cause for the defendant's belief. If the defendant's assertion was made in good faith, no action will lie. *See Cardon v. McConnell, supra.* In this case the evidence showed that the deed to the defendants referred to an easement across their property. There was evidence that a right of way had been used across the property for many years which was known to the defendant Roy Lee Duvall. This is evidence from which the court could find there was not probable cause for Roy Lee Duvall to believe the right of way did not exist. The fact, as we have held, that the reservation in the deed did not create an easement is

evidence that Mr. Duvall acted in good faith as is other evidence introduced by Mr. Duvall. This element of the case may be determined at the next trial.

[5] The defendants also argue that it was error for the court to find as a fact that the plaintiffs had made a contract to sell the property to Mr. Mehaffey. They contend that the best evidence rule was violated in that the original written contract was not offered into evidence. We do not believe the best evidence rule applies. There was no evidence that there was a written contract between the plaintiffs and Mr. Mehaffey. *See State v. Miday,* 263 N.C. 747, 140 S.E. 2d 325 (1965). The fact that Mr. Mehaffey might be able to plead the statute of frauds if the plaintiffs had sued him does not affect the plaintiffs' claim against the defendants. *See Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176 (1954).

[6] The defendants assign error to the amount of damages. We believe that the evidence which showed Mr. Mehaffey had agreed to pay $25,000 for the property but would pay only $12,000 pending the plaintiffs' assuring him of a good title to the property is evidence from which the court could conclude the plaintiffs lost the use of $13,000. There was testimony that the interest rate on certificates of deposit was 13% at the time Mr. Mehaffey refused to pay the full purchase price. The court calculated the damages for the loss of the use of the money at 13% of $13,000 annualized from the date Mr. Mehaffey refused to pay. In this we find no error.

The court also awarded damages for the expenses the plaintiffs incurred in having the easement surveyed. The plaintiffs' evidence showed this was necessary to prepare for the action for slander of title. We do not believe the expenses of preparing for an action in court is such a natural and probable result of the action of Roy Lee Duvall that it was properly considered as a part of the damages.

The plaintiffs have cross-assigned error to the court's failure to include their attorney fees as part of the damages. We believe the court was correct in refusing to do so. The plaintiffs argue that as a direct result of the slander of their title, they had to retain attorneys. If this were a proper element of damages, it should be included in every case in which a person retains an at-

torney as a result of some damage done to him. We believe the court was correct in not including legal fees as a part of the damages.

For the reasons stated in this opinion, we hold there must be a new trial.

New trial.

Judges ARNOLD and BRASWELL concur.

JAMES D. McKAY, ADMINISTRATOR OF THE ESTATE OF ALVA LEE CARTER v. WAVERLY SHANE PARHAM AND LINDA PARHAM

No. 829SC882

(Filed 19 July 1983)

1. **Automobiles and Other Vehicles § 45.4— reconstructing accident—expert opinion in response to hypothetical**

The trial court properly allowed an expert in the field of civil engineering and registered land surveying to answer in response to hypothetical questions by the defendant where two cars would have come to rest under two different factual situations.

2. **Automobiles and Other Vehicles § 108.2— family purpose doctrine—sufficiency of evidence**

Although the trial judge erred in directing a verdict in favor of defendant's husband in that the elements of the family purpose doctrine could have been found to have been established by the evidence in that (1) the defendant was a member of her husband's household, (2) the car was provided for family use, and (3) the car was being used with the husband's consent at the time of the accident, it was harmless error in that the jury decided that defendant wife was not negligent.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 19 April 1982 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 7 June 1983.

This wrongful death action results from the death of Alva Lee Carter on 19 October 1979 from injuries received in a collision with a car driven by the defendant Linda Parham.

The plaintiff's evidence tended to show that the decedent was a passenger in her car, which was being driven by James

Downey. Downey testified that he was traveling west on Cherry Street in Oxford on the date in question. He was struck from the right by a "blue haze" at the intersection of Harris and Cherry Streets.

When Downey regained consciousness after the accident, the car that he was driving was in the southern part of Harris Street pointed in a northeast direction. The defendant's car was in a yard in the southeast part of Harris Street pointed in a northwest direction.

Officer Wilber Morton of the Oxford Police Department testified that he investigated the intersection following the accident. The car driven by the defendant was in the southeast part of the lawn and was sixty-nine feet from the intersection. It was facing northwest.

The Pontiac that Downey had been driving was facing northeast and was seventy-nine feet from the center of Cherry Street. Its left front wheel was in the road and the right front wheel was on the lawn.

Morton said that there was a stop sign at the northwest intersection of the two streets. It was erect and facing traffic coming north down Harris Street when he arrived at the scene.

Although Morton testified that the defendant's husband owned the car that she was driving and that she told him that she goes down Cherry Street in the afternoon after work to pick up her husband, the trial judge granted a directed verdict in favor of the husband as a defendant at the close of the plaintiff's evidence. This ruling was based on the fact that the plaintiff presented insufficient evidence of an agency relationship between the defendant and her husband.

The defendant testified that she was driving on Cherry Street on the accident date. The car that she hit came from her left.

Frederick Tyner, who was qualified as an expert in the field of civil engineering and registered land surveying, testified for the defense. He conducted an on site investigation of the accident about one month after it happened. Tyner made a number of photographs and measurements at the scene.

In response to hypothetical questions by the defendant, Tyner said that had the defendant's car been traveling east on Cherry Street and the plaintiff's car traveling south on Harris Street, that the two cars would have come to rest in the southeast quadrant of the intersection following a collision. All of the evidence in the case tended to show that the two cars came to rest in the southeast part of the intersection.

Tyner stated further that had the plaintiff's car been traveling west on Cherry Street and the defendant's car south on Harris Street when they collided, that the cars would have come to rest in the southwest quadrant of the intersection. The plaintiff's evidence showed that the cars were traveling in the directions consistent with this second hypothetical.

In reaching these conclusions, Tyner relied on the laws of physics, the speed of the cars, their weight and the direction in which they were traveling before and at impact.

Following a jury verdict in favor of the defendant, the plaintiff appealed to this Court.

Currie, Simmons, Pugh & Joyner, by Irving Joyner, for the plaintiff-appellant.

Haywood, Denny & Miller, by George W. Miller, Jr. and James Aldean Webster, III, for the defendant-appellees.

ARNOLD, Judge.

Before we address the merits of this case, we must first determine if the plaintiff properly preserved exceptions to the alleged errors in the trial below.

The plaintiff excepted to allowing Tyner to give an opinion on the likely path of the vehicles after the collision. This preserved the alleged error for review on appeal under Rule 10(b)(1), N.C. Rules App. Proc.

The defendant argues, however, that this exception cannot be raised on appeal because substantially the same evidence objected to came in later. We disagree.

Under G.S. 1A-1, Rule 46(a)(1), "when there is objection to the admission of evidence involving a specified line of questioning, it

shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." Although the line of questioning objected to was not specified here, it is enough if the line objected to is apparent to the court and the parties, as it was in this case. *Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E. 2d 227, 234 (1980).

The plaintiff also raised the grant of a directed verdict in favor of the defendant husband as an assignment of error in the record. His exception refers to pages in the transcript where no proper exception was made.

Although this is a violation of the appellate rules, we will review this contention on appeal. G.S. 1A-1, Rule 46(b) provides that an exception to grant of a motion like this one is preserved if the party "makes known the action which he desires the court to take and his ground therefor" when the ruling is made. *See also*, W. Shuford, N.C. Civil Practice and Procedure § 46-6 (2d ed. 1981). The transcript shows that the plaintiff informed the court of his opposition to the directed verdict and the grounds for his opposition. As a result, this exception was properly preserved. We now turn to the merits of this case.

[1] The plaintiff first objects to allowing Tyner to testify as to where the cars would have come to rest under two hypothetical fact situations. He argues that the testimony only served to confuse the jury, was unnecessary, and courts generally look with disfavor on reconstructing accidents.

We find that it was proper to allow Tyner to answer the two hypothetical questions. G.S. 8-58.13 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Although it was once said that expert testimony had to relate to a trade requiring special knowledge, "the only question [now] is whether the particular matter under investigation is one on which the witness can be helpful to the jury because of his superior knowledge." 1 Brandis, N.C. Evidence § 134 (2d rev. ed. 1982).

The transcript shows that Tyner was adequately qualified and accepted by the court as an expert. His testimony, based on

his training and knowledge, helped the jury reach a decision and was properly admitted.

The case of *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351 (1960), which the plaintiff cited as disapproving accident reconstruction by expert testimony, also stated: "The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like.... An automobile, like any other moving object, follows the laws of physics. . . ." 253 N.C. at 180, 116 S.E. 2d at 355. Tyner properly answered hypothetical questions here and applied the laws of physics to the post-collision movement of the two cars.

[2] The plaintiff also attacks the directed verdict entered in favor of the defendant's husband at the close of the plaintiff's evidence. He sought to hold the husband liable under the Family Purpose Doctrine.

On a directed verdict, "the court must consider the evidence in the light most favorable to the non-movant. . . ." *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).

It is true that when considering the evidence in the light most favorable to the plaintiff at the close of his evidence, the elements of the Family Purpose Doctrine could be seen as established. That is, 1) the defendant was a member of her husband's household, 2) the car was provided for family use, and 3) the car was being used with the husband's consent at the time of the accident. *See Williams v. Wachovia Bank & Trust Co.*, 292 N.C. 416, 419-20, 233 S.E. 2d 589, 592 (1977).

But it must be shown that the defendant was negligent in the operation of the car before the husband can be held liable under the Family Purpose Doctrine. *Williams*, 292 N.C. at 419, 233 S.E. 2d at 592. The jury here decided that the defendant was not negligent.

Although it was incorrect to grant a directed verdict in favor of the husband at the close of the plaintiff's evidence because facts sufficient to survive the motion had been shown, we find this to be harmless error under G.S. 1A-1, Rule 61. The jury verdict could not have been affected by the presence of the husband

as a defendant. His liability was dependent on his wife. The real issue in the case was her negligence.

No error.

Judges WEBB and BRASWELL concur.

BEATRICE L. POLLARD, EMPLOYEE, PLAINTIFF v. KRISPY WAFFLE #1, EMPLOYER, NEW HAMPSHIRE INS. CO., CARRIER, DEFENDANTS

No. 8210IC881

(Filed 19 July 1983)

Master and Servant § 96.1— determination of credibility different from hearing officer—Commission's finding and conclusions supported by evidence

Although the Full Commission rejected the Deputy Commissioner's determination of credibility of witnesses, there was evidence to support the Commission's finding and conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment. Under the laws of this state, the Full Industrial Commission has the power to review determinations made by Deputy Commissioners on the credibility of witnesses. G.S. 97-85.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 22 June 1982. Heard in the Court of Appeals 7 June 1983.

This case involves a claim for benefits under the Workers' Compensation Act for back injuries plaintiff received while employed by defendant-employer. After a hearing, Deputy Commissioner Ben A. Rich on 4 December 1981 denied plaintiff's claim on the ground that her testimony regarding a slip and fall prior to onset of back pain was not accepted as credible. Upon appeal, the Full Commission, Chairman Stephenson dissenting, set aside the Deputy Commissioner's Opinion and Award and on 22 June 1982 entered its own Opinion and Award granting plaintiff temporary total disability and permanent partial disability benefits. Defendants appeal.

Staton, Perkinson, West & Doster, by William W. Staton, and Stanley W. West for plaintiff appellee.

Teague, Campbell, Conely & Dennis by Richard B. Conely and Dayle A. Flammia for defendant appellants.

BRASWELL, Judge.

The issue to be resolved by this appeal is whether the Full Commission may reject the Deputy Commissioner's determinations of credibility of witnesses.

At the hearing plaintiff testified that she was injured when she bent over to pick up a box of french fries, lost her footing and fell down with the box. This account, however, was inconsistent with the history she gave to her physician and with a statement taken by an insurance adjuster and signed by plaintiff concerning the back injury. In both instances plaintiff stated that her injury occurred when she reached down to pick up the box and felt something pull in her back. This discrepancy is, of course, critical in that an injury which arises out of lifting objects in the ordinary course of an employee's business is not caused by accident so as to be compensable when the lifting is performed in the ordinary manner with no unusual circumstances existing. *Rhinehart v. Market*, 271 N.C. 586, 157 S.E. 2d 1 (1967).

After hearing the evidence, Deputy Commissioner Rich found that "the testimony of plaintiff regarding a slip and fall prior to the onset of back pain is not accepted as credible," and denied plaintiff's claim for compensation. The Full Commission's majority opinion rejected the Deputy Commissioner's determination of plaintiff's credibility and allowed compensation.

Defendant contends that the Commission failed to consider all the competent evidence of record, that the evidence does not support the findings and the findings do not support the conclusions of law in that plaintiff failed to prove by the greater weight of the evidence that she suffered injury by accident arising out of and in the course of her employment.

The scope of our review of the Opinion and Award of the Full Commission is to determine whether there is evidence in the record to support the Commission's findings. The findings are conclusive on appeal when supported by competent evidence, even

though there is evidence that would have supported a finding to the contrary. G.S. 97-86; *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). The Commission's legal conclusions are subject to appellate review. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968).

The Full Commission made factual determinations of the credibility of witnesses without the benefit of live testimony. On review of the cold record of the evidentiary hearing before the Deputy Commissioner (who was the only official to see, hear, and observe the witnesses in person), the Full Commission in a 2-1 decision set aside the Deputy Commissioner's opinion, which rejected the plaintiff's claim for lack of credibility of her evidence, and made an award in favor of the plaintiff.

The majority opinion acknowledged the general rule that "the Commissioner or Deputy Commissioner who actually hears witnesses in a case is in the best position to decide questions pertaining to the credibility or truthfulness of witnesses." However, the majority wrote that failure to recognize exceptions to the rule would "shut off a statutory avenue of appeal for plaintiffs and defendants in cases decided purely on the basis of credibility at the hearing level." The majority opinion concluded that "the decision in the case at hand borders on—if it does not in fact amount to—an unintentional abuse of discretion by the Hearing Officer which should be adjudged an exception to the credibility rule."

The majority stated that the Deputy Commissioner had decided the case based solely upon a statement taken from plaintiff by an agent of the insurance carrier who had a direct interest in the outcome and who could have elicited certain answers by the way he asked questions. The Commission believed that the inconsistent statement was insufficient grounds to discredit plaintiff's version of the accident, since her testimony was supported by that of her supervisor.

In Chairman Stephenson's dissent he argued that the majority decision establishes a bad "precedent which could destroy the discretion our deputy commissioners have historically enjoyed to decide cases based on their distinct expertise in analyzing the evidence." Prior to 1951 the deputy had the duty to transmit all testimony to the Commission for its determination. In 1951 G.S. 97-84 was amended to require that the "deputy shall proceed to a

complete determination of the matters in dispute, file his written opinion, and cause to be issued an award pursuant to such determination." Chairman Stephenson stated that in the 53-year history of the Commission this is the first time that "the original hearing officer has been reversed solely on the questions of credibility."

We find the reasoning expressed in Chairman Stephenson's dissent persuasive and we agree with him that the hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses whose testimony he must weigh and accept or reject. However, we must hold, under the laws of this State, that the Full Commission has the power to review determinations made by deputy commissioners on the credibility of witnesses. In so holding, we disagree with the Commission's majority opinion that this power is an exception to the general rule on credibility. Rather, the Commission is granted such authority by virtue of G.S. 97-85 which provides that the Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . ."

The majority rule on review of awards is that conclusiveness applies to findings of the Commission, not to those of the hearing officer. 3 A. Larson, Workmen's Compensation Law § 80.12(b) at 15-426.345 (1983). "The fact that the commission took no new evidence is immaterial. Moreover, in states adhering to the orthodox rule, no exception is made even when the issue is credibility of a witness, and when only the referee and not the Commission had the benefit of first-hand observation of the witness." *Id.* at 15-426.345, -.349. *See, e.g., Travelers Ins. Co. v. Buice*, 124 Ga. App. 626, 185 S.E. 2d 549 (1971); *Irving v. Industrial Comm'n*, 59 Ill. 2d 207, 319 N.E. 2d 758 (1974).

Our Supreme Court in *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E. 2d 577, 580 (1976), in considering basic procedure under the Workers' Compensation Act, announced these fundamental principles:

> "In reviewing the findings found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner, the Commission may review, mod-

ify, adopt, or reject the findings of fact found by the hearing commissioner. The Commission is the fact-finding body . . . ."

In discussing the standard of review in *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 627, 292 S.E. 2d 144, 149 (1982), our court said, "The full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner."

Our court in *Hollar v. Furniture Co.*, 48 N.C. App. 489, 497, 269 S.E. 2d 667, 672 (1980), discussed the plenary powers of the Commission and recognized that the Full Commission upon review "may adopt, modify, or reject the findings of fact of the Hearing Commissioner, and in doing so *may weigh the evidence and make its own determination as to the weight and credibility of the evidence.*" (Emphasis added.)

There was evidence to support the Commission's finding and conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment. Plaintiff testified that she "started to pick the box up and lost [her] footing and fell down with the box." The restaurant manager, Mrs. Fulton, testified that plaintiff reported the fall to her the morning of the accident.

We find no merit to defendants' argument that they were denied due process in that the Commission made determinations of credibility without the benefit of live testimony. Defendants were given appropriate notice and opportunity to be heard as required by the Fourteenth Amendment to the United States Constitution and Art. I, § 18, of the North Carolina Constitution. The hearing and the review by the Full Commission were conducted according to the prescribed statutory law and in a reasonable manner. *See In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976).

We hold that the Full Commission exercised authority granted to it by G.S. 97-85 to reconsider the evidence and that the Commission's findings are supported by competent evidence of record.

The Opinion and Award of the Commission is

Affirmed.

Judges ARNOLD and WEBB concur.

MARY ALICE BURNSIDE CHURCH, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR HER UNBORN ISSUE, FOR THE UNBORN ISSUE OF MORTON L. CHURCH, III, HELEN DAY CHURCH PEERY, MARY BURNSIDE CHURCH, JOHN WARREN CHURCH; EDWARD BRADFORD CHURCH, MORTON L. CHURCH, III, HELEN DAY CHURCH PEERY AS GUARDIAN AD LITEM FOR WALTON STUART PEERY, IV AND ELLIOTT LEBARON PEERY v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA

No. 8226SC879

(Filed 19 July 1983)

1. **Trusts § 11— language in note excluding trustee from personal liability**

The trial judge correctly gave defendant a directed verdict on plaintiffs' breach of promissory note claim where defendant signed the note "in our fiduciary capacity, but not individually . . . . First Union National Bank of North Carolina, Trustee." Under G.S. 36A-74(c), this language excluded the defendant as trustee from any personal liability.

2. **Trusts § 7— combining plaintiff's stock with others to be sold—no breach of fiduciary duty**

Combining plaintiff's stock with that of others to be sold was not a breach of duty by defendant in its fiduciary capacity.

APPEAL by both parties from *Howell, Judge.* Judgment entered 29 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 June 1983.

This action seeks damages and other relief based on an alleged breach of promissory note and breach of trust and mismanagement by the defendant as trustee.

This dispute arises from a trust created by plaintiff Mary Church on 16 October 1973. The primary purpose of the irrevocable inter vivos trust was to provide the plaintiff a way to sell her Wachovia stock under the most advantageous tax rate. The trust was funded with a nominal sum and the defendant was appointed the trustee.

To obtain the tax advantages, the plaintiff sold her stock to the defendant as trustee on 17 October 1973 and took an install-

ment note as payment. This note required the defendant to pay $621,843 plus 5 percent interest to the plaintiff in 12 annual installments of $51,820.25 on each 1 December, beginning in 1974. If there was a default on any payment due, the entire balance could be declared due and payable by the plaintiff.

On 18 October 1973, the plaintiff's stock was combined with that of her father's estate, her brother and another woman who had created a similar trust. This formed a block of over 65,900 shares of Wachovia stock.

Although the stock was selling for about $89.50 per share on the New York Stock Exchange on 18 October 1973, the best price for the block that could be obtained by Interstate Securities was $82 per share. The defendant rejected this offer. Interstate Securities was hired by the defendant.

Henry Mummaw, an Assistant Vice President and Trust Officer with the defendant, contacted the plaintiff during the fall of 1974 to discuss the trust's problems. On 21 November 1974, the plaintiff, her lawyer, and her husband, met with Mummaw and Ernest Hunter, head of the defendant's trust department. The plaintiff demanded payment at this meeting.

F. L. Rodenbeck, Jr., a Vice President and Senior Trust Officer with the defendant, wrote the plaintiff on at least three occasions in 1978. In those letters, he stated that 150 shares of the stock was being sold each month to meet the trust's liquidity needs.

A 29 November 1978 letter informed the plaintiff that the defendant could not meet the 1 December 1978 principal payment due without selling stock. The defendant did not consider a sale wise at that point and proposed making a partial payment on the principal and the entire interest payment due on 1 December 1978.

In a 31 August 1979 letter, Rodenbeck informed the plaintiff that the trust assets were exhausted. The balance of the 1 December 1978 principal payment due and the balance of the 1 June 1979 interest payment due were paid. The defendant as trustee also paid off a loan due to itself in a non-fiduciary capacity. That loan had been taken out by the defendant as trustee to meet earlier payments due to the plaintiff under the trust.

When all of the plaintiff's stock was sold, the defendant owed $362,741.75 on the note to the plaintiff.

The trial judge granted the defendant's directed verdict motion on the breach of promissory note claim at the close of the plaintiffs' evidence. Two issues were submitted to the jury: 1) Did the defendant breach its duty as trustee and 2) If so, what damages are the plaintiffs entitled to?

After the evidence was completed, the trial judge gave instructions to the jury on three separate occasions. When the jury came out for the fourth time, the trial judge inquired as to how they were divided.

On the fifth time that they came into the courtroom after deliberation, the jury answered "yes" to the breach of trust issue and $10,000 on the damages question. The trial judge informed the jury that those verdicts were inconsistent and gave another instruction.

The jury deliberated for a final time and returned with a verdict of $10 in damages. Post-trial motions by both parties were denied.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for the plaintiff-appellants.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., for the defendant-appellee.

ARNOLD, Judge.

We first note that the defendant's statement of facts is over twenty pages long. Although Rule 28(c), N.C. Rules App. Proc. calls for a "full, non-argumentative summary" of facts, it also seeks only those "material facts necessary to understand" the case. The defendant's voluminous statement of the facts was unnecessary and we discourage this waste of time and resources in the future.

Although the massive briefs, record, exhibits, and oral arguments in this case indicate that this is a complicated matter, resolution of two issues disposes of all questions.

[1] First, the trial judge was correct to give the defendant a directed verdict on the plaintiffs' breach of promissory note claim. On a G.S. 1A-1, Rule 50(a) motion for a directed verdict,

> 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 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).

Although the note here allowed the plaintiff to accelerate the entire balance of the unpaid note upon failure or default in making payment by the defendant, the defendant signed it "in our fiduciary capacity, but not individually. . . . First Union National Bank of North Carolina, Trustee."

Under G.S. 36A-74(c), the current statute on trustee contracts, this language excluded the defendant as trustee from any personal liability. That statute states in part: "The addition of the word 'trustee' or the words 'as trustee' after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability."

The plaintiffs did not offer sufficient evidence to overcome the defendant's prima facie showing, even when considering all evidentiary conflicts in their favor. G.S. 36-35(c) was the relevant statute during much of this case until its repeal in 1977. *See* 1977 N.C. Sess. Laws Ch. 502, § 1. Because its provisions were verbatim to the current G.S. 36A-74(c), the result is the same under both statutes.

[2] The second issue here is whether combining the plaintiff's stock with that of others to be sold was a breach of duty by the defendant in its fiduciary capacity. We hold that it was not.

G.S. 36A-2(a) states the standard of care for a fiduciary.

> In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an or-

> dinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

This standard is the same one stated in the RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

We find no breach of trust by the defendant under this prudent man standard and reverse the verdict on the issue of breach of trust. The plaintiff argues that the defendant should be held to a higher standard of care because it represented special skills and induced the plaintiff to create the installment trust.

The record does not support this contention. The plaintiff's husband, an officer of American Credit when the trust was created, testified that he encouraged the plaintiff to enter into the trust. Mr. Church was present at the plaintiff's two meetings with the defendant's representatives held to discuss the creation of the trust.

No overbearing by the defendant or financial duress of the plaintiff required her to sign the trust instrument. A reading of the entire transcript does not show a representation of skills greater than the average trustee. Absent such a representation, we refuse to hold that the defendant breached the prudent man standard.

The plaintiff also contends that the defendant breached its duty of loyalty by combining other shares of Wachovia stock with her stock for sale. She points to blockage discount, market overhang, and Wachovia's status as a thinly traded stock as evidence that combination for sale is a breach of trust.

We find no authority holding that the combination of stock for sale like this case is a breach of a trustee's duty of loyalty. In fact, Jimmie Tillman, a Vice-President of Interstate Securities in October, 1973 and the plaintiff's witness at trial, testified that the marketing of stock was a matter of professional judgment and experience. This Court on appeal cannot substitute its business judgment for that of a company with years of expertise in the sale of publicly traded stock. As a result, the defendant will not be held liable for hiring Interstate Securities to market the stock.

Because we find that the defendant is not liable, it is unnecessary to discuss any alleged errors in the jury instruction on damages or the jury's award of $10.

Reversed in part. Affirmed in part.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA v. J. T. TAYLOR, JR., J. H. SIMPSON, AND HARRELL M. CARPENTER

No. 823SC419

(Filed 19 July 1983)

1. **Trespass to Try Title § 2— constitutionally valid presumption that State has title to otherwise unclaimed lands**

G.S. 146-79 which creates a presumption that the State has title to otherwise unclaimed land is valid and constitutional. Since title to land is originally acquired from the State, it is reasonable to assume that, absent proof otherwise, title to any parcel within its boundaries reposes there.

2. **Trespass to Try Title § 4— sufficiency of evidence**

In an action in which the State asserted ownership of certain lands, defendant failed satisfactorily to prove good and valid title in and to himself, and thus rebut the presumption raised by G.S. 146-79 that the State owned the land in question.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 12 November 1981[1] in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 March 1983.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen and Assistant Attorney General R. Bryant Wall, for plaintiff appellee.

Henderson & Baxter, P.A., by David S. Henderson and Nelson W. Taylor, III, for defendant appellant.

---

1. The judgment was signed 26 October 1981 out of session and out of district with the parties' consent.

BECTON, Judge.

I

This controversy concerns the title to a large tract of timberland in Craven County, North Carolina.

Plaintiff, the State of North Carolina (State) filed suit against the defendants, J. T. Taylor, Jr., J. H. Simpson, and Harrell M. Carpenter on 1 May 1978. The State alleged that it owns the tract in question, that defendants committed acts of trespass on the tract, and prayed for an adjudication of title, an order restraining defendants from further trespass, and damages. Defendants Taylor and Carpenter each answered and denied the material allegations of the State's complaint; defendant Simpson failed to file any responsive pleadings, and judgment for default was entered against him. Defendant Carpenter did not appear at trial and did not present evidence. Taylor was thus the sole defendant at trial and appears in this Court alone.

Taylor was allowed to amend his answer to add a constitutional challenge to N. C. Gen. Stat. § 146-79 (1983) on the ground that the statute raises an impermissible presumption of title in the State in violation of the Equal Protection and Law of the Land Clauses of the United States and North Carolina Constitutions, respectively, since the presumption shifts the burden of proof of title to the party in possession of the tract.

A trial was held before the Honorable Julius A. Rousseau, sitting without a jury, in Craven County Superior Court on 14 September 1981. Taylor moved for dismissal of the State's case pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (1969) at the conclusion of the State's case in chief. That motion was denied. At the conclusion of all the evidence, the trial court found facts and concluded, as a matter of law, that G.S. § 146-79 creates a valid presumption that the State has title to otherwise unclaimed lands, and that Taylor failed to prove, by a preponderance of the evidence, that he had title superior to that of the State. The trial court then decreed that the State had title free of Taylor's claim, permanently enjoined Taylor from entering the tract, taxed costs against Taylor, and retained the matter for a later determination of the damages issue. Taylor appealed.

II

Taylor brings forth nineteen (19) assignments of error and makes twelve (12) arguments on appeal. However, we find that his contentions present just two (2) dispositive issues for our review: First, whether the trial court erred when it rejected Taylor's constitutional attack on G.S. § 146-79; and second, if the statute is valid, whether defendant successfully proved that he has valid title to the lands in question. For the reasons that follow, we affirm the judgment of the trial court.

III

[1] *G.S. § 146-79*

The portion of the statute pertinent here reads:

> In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself.

Taylor argues that because this is an action to quiet title, the State, but for the statute, would have the burden to prove title in itself. The sovereign, as other plaintiffs, should have to rely on the strength of its own title.

Although this argument is more properly denominated a due process attack, we note that the operation of G.S. § 146-79 does not effect an uncompensated taking. *See, State v. Chadwick*, 31 N.C. App. 398, 229 S.E. 2d 255 (1976).

Taylor fares no better on his burden of proof argument. As early as 1896 North Carolina courts recognized that the Legislature has the power to change the burden of proof imposed at common law. *Moore v. Byrd*, 118 N.C. 688, 23 S.E. 968 (1896). The Legislature has virtually untrammeled authority to codify and change the rules of evidence so long as due process is accorded and no other constitutional provisions are infringed. 1 *Brandeis on North Carolina Evidence* § 6 (2d rev. ed. 1982). Further, our courts have consistently held that presumptions are lawful so long as there is a rational connection between the fact to be proven and the facts which provide the basis for the presumption.

See, e.g., State v. McAuliffe, 22 N.C. App. 601, 207 S.E. 2d 1, *cert. denied and appeal dismissed*, 285 N.C. 762, 209 S.E. 2d 286 (1974) (possession to distribute presumed from possession of over 5 grams of marijuana). This is especially so when, as here, the presumption created by the statute is rebuttable and not conclusive: "The presumption of title in the State lasts only until the rival claimant establishes valid title in himself." *State v. Chadwick*, at 399, 229 S.E. 2d at 256.[2]

That there is a rational connection between the fact to be proven (State's ownership) and the underlying facts (State a party to the title action) is not in doubt. The State has the ultimate title to the soil.

> Upon the Declaration of Independence, the people of the original thirteen states succeeded to all rights of the Crown and became the owners of all lands within the limits of the state which had not been granted to others, and the same principle held true with respect to later admitted states; title to vacant, ungranted lands in them vested in the states. The presumption is, therefore, that the people of these states own all lands which have never been granted by them, until the contrary appears.

72 Am. Jur. 2d, *States, Territories, and Dependencies*, § 66 (1974); *Moore v. Byrd*. Since title to land is originally acquired from the State, it is reasonable to assume that, absent proof otherwise, title to any parcel within its boundaries reposes there. We therefore find unpersuasive defendant's argument that G.S. § 146-79 creates a constitutionally impermissible presumption of title in the State, and expressly hold that it passes constitutional muster. *Accord, State v. J. T. Taylor, et al.*, 60 N.C. App. 673, 300 S.E. 2d 42 (1983).

IV

Title

[2] In an action to try title, the party with the burden of proof (Taylor, in the case *sub judice*) must make at least a *prima facie* showing of title, one method of which is by the offer of a con-

2. *See generally, State v. Brooks*, 279 N.C. 45, 181 S.E. 2d 553 (1971) (good discussion of the legislative history of G.S. § 146-79).

nected chain of title from the State to himself. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). Taylor elected this method at trial. Although Taylor may have shown a connected chain of title from the State in and to himself, considering the Statute of Uses, we need not reach that issue.

Assuming, *arguendo*, that the documents of record offered by Taylor constitute a connected chain, he nevertheless failed to pull the "laboring oar." It is axiomatic that the description contained in the record documents must include the tract claimed. That identity of description and tract is missing here.

The trial court found, and there is support in the record for its finding, *inter alia*, that the plat offered *sub judice* was based neither on "an actual survey of the property at that time," nor research of filed land records. Rather, the plat and description based thereon were so inaccurate that "it would be impossible to locate the boundaries of [the tract in question] on the ground independent of other information regarding its location." Because the court below sat as fact finder, and competent evidence was adduced at trial to support its findings, we are bound thereby, and the conclusions based thereon must be affirmed. *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 301 S.E. 2d 523 (1983).

We therefore hold that Taylor failed satisfactorily to prove good and valid title in and to himself, and thus to rebut the presumption raised by G.S. § 146-79 that the State owns the land in question.

V

Because of the result reached in part IV of this opinion we find it unnecessary to address any of defendants' other arguments. Accordingly, the decision of the trial court is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

RICHARD LEE HOLIDAY v. LAWRENCE M. CUTCHIN, M.D.

No. 823SC453

(Filed 19 July 1983)

Witnesses § 5.2— character evidence improperly allowed

In a medical malpractice action in which the jury was dealing strictly with a medical question of what was the applicable standard of care, the trial judge erred in allowing character and reputation evidence to be introduced on the behalf of defendant.

APPEAL by plaintiff from *Winberry, Judge.* Judgment entered 8 September 1981 in Superior Court, PITT County. Heard in the Court of Appeals 10 March 1983.

Davis & Atkins, and McLeod & Senter, P.A., by Joe McLeod, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Nigle B. Barrow, Jr., and Timothy P. Lehan, for defendant appellee.

BECTON, Judge.

This medical negligence action arises out of Dr. Lawrence M. Cutchin's alleged failure properly to diagnose and treat Richard Holiday, who complained of pain in his left leg and foot when seen in the Edgecombe General Hospital on 1 April 1980. Richard Holiday's left leg was subsequently amputated.

I

The facts in this case are virtually uncontroverted. On 1 April 1980, Dr. Lawrence Cutchin examined Richard Holiday who was crying and complaining of pain in his left leg and foot. Holiday's history revealed that he had been injured while playing basketball two days prior thereto. Dr. Cutchin manipulated Holiday's ankle and knee and found full range of motion. Additionally, Dr. Cutchin had an x-ray taken of Holiday's leg; the x-ray did not reveal any fracture. Dr. Cutchin diagnosed Holiday as having muscle strain and prescribed heat and Darvon for pain. Dr. Cutchin did not take the peripheral pulse of Mr. Holiday on either leg, nor did he consider, during his examination, that Mr. Holiday might have a vascular problem.

Two days later, on 3 April 1980, Holiday again returned to the Emergency Room complaining of pain in his left foot and ankle. This time he was seen by Dr. James Kelsh, who, upon examination, discovered that Holiday's left leg was pale and cold to the touch. Additionally, the peripheral pulse in the left leg was absent. Holiday was immediately diagnosed as having vascular insufficiency of the left leg and was rushed to Pitt Memorial Hospital in Greenville, where his left leg was amputated below the knee. Later, an above the knee amputation was necessary.

II

Upon these undisputed facts, Holiday contends that Dr. Cutchin was negligent in not considering that Holiday might be suffering from vascular insufficiency and in not taking the peripheral pulse of Holiday's leg on 1 April 1980. Indeed, two of Holiday's medical experts expressed their opinions that Dr. Cutchin's care of Holiday did not meet the standard of care within the community in which Dr. Cutchin practiced.

On the basis of the same undisputed evidence, Dr. Cutchin's three medical experts concluded that the treatment and care which Dr. Cutchin provided Holiday were within the standard of care for physicians in the community in which Dr. Cutchin practiced. Similar testimony was given on Dr. Cutchin's behalf by Dr. James Kelsh, although Dr. Kelsh was called as a witness by Holiday.

As can be seen, this case does not involve a factual dispute about what Dr. Cutchin did or did not do; it does not involve Dr. Cutchin's good or bad judgment. Indeed, the issue to be resolved—whether Dr. Cutchin's treatment was in accord with the applicable standard of care—is not dependent on the credibility of Dr. Cutchin.

The dispositive issue in this case concerns the introduction into evidence of testimony concerning Dr. Cutchin's character and reputation, and with the trial court's charge to the jury concerning that evidence. Because we find that Dr. Cutchin's character had not been impeached and because the issues presented to the jury did not require it to resolve Dr. Cutchin's credibility, we hold that the trial court erroneously admitted evidence of Dr. Cutchin's character and reputation. It is not necessary therefore to

discuss the trial court's instruction on character and reputation evidence.

III

> Evidence of the good or bad character of a party to civil action is generally inadmissible. Such evidence is ordinarily too remote to be of substantial value, tends to confuse the issues and unduly protract the trial, and (most important of all) offers a temptation to the jurors to reward a good life or punish a bad man instead of deciding the issues before them.

1 *Brandeis, North Carolina Evidence* § 103 (2d rev. ed. 1982), p. 385. This general rule, like most others, is subject to court engrafted exceptions. Therefore, character evidence is admissible when character is directly in issue as in actions involving moral intent: seducing an innocent or virtuous woman, defamation, or malicious prosecution. Similarly, character evidence is admissible when the credibility of the party witness has been challenged or impeached. *See, e.g., Lorbacher v. Talley,* 256 N.C. 258, 260, 123 S.E. 2d 477, 479 (1962) in which our Supreme Court said: "Where a party testifies and the credibility of his testimony is challenged, testimony that his general character is good is competent and proper evidence for consideration upon the truthfulness of his testimony." The general rule cited in *Lorbacher* was subsequently followed in *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22 (1966).

We are aware of this Court's statement in *Wesley v. Greyhound Lines, Inc.,* 47 N.C. App. 680, 698, 268 S.E. 2d 855, 866, *pet. for disc. review denied,* 301 N.C. 239 (1980), that "cross examination is one form of impeachment" and that since defendant cross examined plaintiff at trial, "plaintiff was free to prove her good character although there [had been] no direct attack upon it." [Citation omitted.] That statement, however, must be considered along with the facts in *Wesley.* In the *Wesley* case, " 'moral intent [was] marked and prominent in the nature of the issue.' " Brandeis, § 103, p. 387. For example, (1) the complaint alleged that Darrel Banks, armed with a knife, assaulted, raped and forced Lucille Wesley to submit to violent and unnatural sex acts with him in the women's restroom of the Greyhound Bus Station; and (2) defendant Greyhound Lines, Inc., in the face of allegations that they negligently maintained their premises, filed an Answer averring that plaintiff (a) was at fault for what happened

to her because she arrived at the Greyhound Bus Station at 3:00 in the morning with full knowledge that she would not be met upon her arrival, (b) left a place of safety and went into and remained in a place of danger, and (c) was placed on notice by her prior conversations with Banks that she might be sexually molested. Thus, the whole tenor of the trial put Lucille Wesley's character in issue. (There was more testimony in the record concerning the pimps, prostitutes and homosexuals who frequented the area of the Greyhound Bus Station than there was testimony concerning what Banks actually did to Ms. Wesley.) Again, viewed in this context, *Wesley* must be limited to its facts.

Clearly, *Wesley* does not mean, for example, that a plaintiff in a personal injury case can put on evidence of his or her good character when that witness has only been asked the following question on cross examination: "Are you married?" Nor does *Wesley* suggest that a witness in a civil case can put on evidence of his or her good character when the entire cross examination of the witness consists of the following:

Q. Did you say on direct examination that you had bacon and eggs for breakfast?

A. Yes.

Q. Didn't you tell me in your depositions that you actually had sausage and eggs for breakfast?

A. Yes.

Not even the most ardent trial advocacy skills proponent would suggest that the witness in either of the above examples had been impeached on any relevant matter.

Nothing we have said waters down the traditional impeachment rule. The credibility of the party or witness in a civil case must be challenged before character evidence is admissible. " 'In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this . . . or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.' " *Lorbacher*, 256 N.C. at 260, 123 S.E. 2d at 479, *quoting Jones v. Jones*, 80 N.C. 246, 250 (1879).

In this case, the character and reputation evidence introduced on Dr. Cutchin's behalf should have been excluded. Dr. Cut-

chin was not impeached or discredited. As indicated in plaintiff's brief, the cross examiner "sought information relating to when Dr. Cutchin saw the plaintiff, what he found, . . . and how he examined him, what he considered in this examination and what instructions were given to the plaintiff." The cross examiner did make reference to an alleged inconsistent statement in Dr. Cutchin's deposition concerning whether Dr. Cutchin was called to the emergency room or went there without being called, but that question, in the context of the cross examination, did not impeach or discredit Dr. Cutchin. Dr. Cutchin's answer—"I may have been called at home, but I believe that I was out to have dinner and then came back at that time. One or the other versions is correct, but I cannot tell which at this time"—did not help the cross examiner in any way. Moreover, as even Dr. Cutchin's attorneys admit in their brief, that question did not relate to a central issue in the case. The jury was dealing strictly with a medical question: What was the applicable standard of care? Whether Dr. Cutchin was a good or bad person or had a good reputation or character was not an issue. As suggested by plaintiff, "[t]o allow evidence of character and reputation in situations as presented by this appeal, would be to open the door in any and every negligence action to a parade of character witnesses that the plaintiff, or the defendant, is a good or bad person, as the case may be."

Because we grant plaintiff a new trial for the reasons stated above, it is not necessary to discuss the plaintiff's remaining assignments of error.

New trial.

Judges ARNOLD and HILL concur.

INCO, INC. v. PLANTERS OIL MILL, INC.

No. 827SC835

(Filed 19 July 1983)

1. **Evidence § 48.2— witness not accepted by court as expert—no abuse of discretion**

There was no abuse of discretion in the trial court's failure to accept defendant's witness as an expert on the speed at which plaintiff's employees performed their work. G.S. 8-58.13.

2. **Contracts § 29.5— award of interest proper**

In an action brought to recover for equipment and services furnished to defendant, the trial court properly awarded interest at the G.S. 24-11(a) rate from a time at which all accounts were more than 30 days overdue.

3. **Contracts § 29.5— no advance agreement on finance charges—interest award proper**

In an action to recover for equipment and services furnished to defendant, the trial court properly awarded interest on the damages even though there was no advance agreement between the parties on finance charges since the finance charge rate of G.S. 24-11(a) was not imposed on the first invoice that defendant received, but rather was imposed on invoices after the first one which provided notice to defendant that finance charges would be imposed. G.S. 58-56.1(c).

APPEAL by defendant from Kivett, Judge. Judgment entered 14 June 1982 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 19 May 1983.

The plaintiff brought this action to recover for equipment and services it furnished to the defendant from September, 1980 to February, 1981. It sought $26,791.96 plus interest at the maximum rate allowable by law from 31 March 1981, the date of its last statement to the defendant.

The defendant's answer alleged that the plaintiff breached the contract between the parties by providing equipment of poor quality. It stated that the plaintiff should only be entitled to the value of the services, labor, and materials actually furnished, not the value of those that it invoiced.

Evidence at trial supported the pleadings of the parties. On the plaintiff's invoices to the defendant were the words: "TERMS: NET." At the bottom of the invoices was the statement: "FINANCE CHARGE is computed by a 'Periodic Rate' of 1½% per month

which is an ANNUAL PERCENTAGE RATE OF 18% applied to the New Balance if not paid by due date Minimum Finance Charge is 50¢."

The jury awarded the plaintiff $26,609.96 in damages. The trial judge then entered a judgment in favor of the plaintiff for $26,486.36 plus 18 percent interest per annum and $123.80 plus interest at the legal rate, interest on each to be computed from 31 March 1981. From the judgment, the defendant appealed.

Moore, Diedrick, Whitaker & Carlisle, by Sam Q. Carlisle, II and J. M. Hester, Jr., for plaintiff-appellee.

Henson, Fuerst & Willey, by Thomas W. Henson, for defendant-appellant.

ARNOLD, Judge.

[1] The defendant first contends that its employee C. M. Stone should have been allowed to testify as an expert on the speed at which the plaintiff's employees performed their work.

We first note that Stone was never accepted by the court as an expert, although he was tendered as "an expert witness on supervising welding crews." When there is no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed. 1 Brandis, N.C. Evidence § 133 (2d rev. ed. 1982); *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980).

Stone's competency to testify as an expert is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion. *State v. Taylor*, 304 N.C. 249, 260, 283 S.E. 2d 761, 770 (1981). There was no abuse of that discretion in this case.

The defendant also contends that Stone's opinions should have been admitted because G.S. 8-58.13 permits witness opinion that will aid the trier of fact. But that statute requires that the witness must first be "qualified as an expert by knowledge, skill, experience, training, or education. . . ." Because there was no explicit or implicit finding that Stone was an expert, it was proper to exclude parts of his testimony.

[2] The defendant's final attack is on the awards of interest by the trial judge. It first contends that because the terms of the ac-

count were "NET," payment was due immediately. As a result, it argues that G.S. 24-11(a), which permits interest of one and one-half percent per month, is not applicable since that subsection applies to accounts on which "no service charge shall be imposed upon the consumer or debtor if the account is paid in full within 25 days from the billing date. . . ."

It is true that Deleon Parker, the plaintiff's president and general manager, defined "net" as meaning that an account "is due and payable when the customer receives the bill." But the judgment only awarded interest at the G.S. 24-11(a) rate from 31 March 1981. All accounts were more than 30 days overdue on that date. Thus, no service charge was imposed within 25 days of any billing date, as the statute prohibits.

[3] The defendant's second attack on the interest award is that there was no advance agreement between the parties on finance charges. As a result, it argues that the one and one-half percent finance charge was improper. We disagree.

This Court addressed a similar contention in *Hyde Ins. Agency, Inc. v. Noland*, 30 N.C. App. 503, 227 S.E. 2d 169 (1976). That case upheld imposition of finance charges by an insurance agency on a policy holder's open account. Relying on G.S. 24-11(a), the Court said that finance charges could be collected on amounts that became due after initial notice by the agency that it was going to collect the charges. This is true even though there was no prior agreement between the parties.

> We think the creditor could collect a finance charge on an open account under the provisions of G.S. 24-11(a) provided the person to whom the credit is extended had been notified by the creditor when the credit was extended of all the details and circumstances pertaining to the imposition of finance charges. . . . [S]ince the statements received by defendant after that date contained detailed information regarding the impositin of finance charges, the plaintiff would be entitled to impose finance charges under G.S. 24-11(a) on all credit extended on purchases made after that date.

30 N.C. App. at 506, 227 S.E. 2d at 171.

In the case before us, the finance charge rate of G.S. 24-11(a) was not imposed on the first invoice that the defendant received. This was in accord with *Hyde* because that invoice was the first notice to the defendant that finance charges would be imposed. As a result, finance charges of one and one-half percent per month were properly imposed on invoices after the first one.

Hyde is not distinguishable from this case because a statute there allowed insurance brokers to impose finance charges as provided in G.S. 24-11(a). *See* G.S. 58-56.1(c). The billing arrangement in this case was "an open-end credit or similar plan" that G.S. 24-11(a) authorizes.

We also find unpersuasive the defendant's argument that any interest after the date of the judgment should be at the legal rate of eight percent. Interest accrues at the G.S. 24-11(a) rate until the judgment is paid. *See* G.S. 24-5.

For these reasons, we find no error in the trial below.

No error.

Judges WEBB and BRASWELL concur.

REBECCA CHAMBERLAIN v. ELLEN B. BEAM

No. 8227SC728

(Filed 19 July 1983)

Partition § 6— actual partition supported by evidence

The trial court properly ordered an actual partition of land held by plaintiff, the only child of deceased, and deceased's widow even though some lands might need to be sold to satisfy the debts of the estate since (1) our law favors a partition in kind over a sale of land and (2) the trial court could properly give great weight to the position that it would not be in the best interest to sell the real property, considering the depressed real estate market and the probability that the real estate would never bring as much at public auction as could be realized from a gradual sale at a later time.

APPEAL by respondent, Ellen B. Beam, from *Thornburg, Judge.* Order entered 15 February 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 12 May 1983.

Hamrick & Hamrick, by J. Nat Hamrick, for respondent appellant.

Whisnant, Lackey & Schweppe, by N. Dixon Lackey, Jr., for petitioner appellee.

BECTON, Judge.

Rebecca B. Chamberlain, the only child of Herman A. Beam, deceased, filed this partition proceeding to have allocated to her in kind, one-half (½) in value of the undevised real estate in the estate of her late father. The trial court ordered an actual partition of the land despite the contention by Ellen B. Beam, the widow of Herman A. Beam and co-executrix of his estate, that "there can be no partition because these same lands must be sold to satisfy debts of the estate of Herman A. Beam." From that order, Ellen Beam appeals. For the reasons that follow, we affirm.

I

In 1978, Rebecca Chamberlain filed a *caveat* proceeding in superior court, but that proceeding terminated in favor of Ellen Beam, the widow, when the jury determined that the paper writing in question was the last will and testament of Herman A. Beam.

In 1979, while the estate was still in probate under the jurisdiction of the clerk, Rebecca Chamberlain brought a declaratory judgment action in superior court, seeking "an interpretation and construction of the Will of Herman A. Beam." The superior court found, among other things, that four tracts of real estate were not devised under the Will of Herman A. Beam and, therefore, passed under the intestate secession laws of the State of North Carolina, giving the petitioner, Rebecca B. Chamberlain, a one-half undivided interest in said property and giving the respondent, Ellen B. Beam, a one-half undivided interest in said property. The parties in their briefs indicate that the four tracts of undevised real property contain nearly four hundred acres of land.

In 1981, and while an order in the 1979 action was pending in this Court, Rebecca Chamberlain brought this special proceeding to partition the nearly four hundred acres of undevised real estate she owned as tenants in common with Ellen Beam. Rele-

vant portions of the trial court's order and supplemental order follow:

> 1. That this action be and is hereby remanded to the Clerk [of] Superior Court, Cleveland County, North Carolina, and that Clerk is hereby directed to proceed with the partition proceeding by actual division as sought in the petition and as provided for in Chapter 46 of the General Statutes of North Carolina all to the end that petitioner and respondent shall each hold their interest in the said real estate in severalty.
>
> 2. Each share shall be held subject to a lien in the amount determined to be proper by an Appellate Court or in the event the appeal taken from the Order of Judge Friday dated October 27, 1981, is dismissed, then in accordance with the Order of Judge Friday dated October 27, 1981.
>
> 3. Either party may discharge such lien upon payment to the Estate of Herman A. Beam of her share of the outstanding indebtedness determined under paragraph 2 just above.
>
> Neither party shall sell or encumber in any manner the share allotted to them until the lien established hereby is fully discharged.
>
> . . . .
>
> That the Clerk [of] Superior Court is hereby authorized and directed to establish an account in this proceeding among the official bookkeeping records of her office to indicate receipts and disbursements of any funds paid by either petitioner or respondent to satisfy any liens upon the real property as divided as set forth in the Order of this Court dated February 15, 1982.

II

Contending, first, that it is necessary for "the executors of the estate to sell the undevised realty to pay the debts of the estate" and, second, that Rebecca Chamberlain, as an heir "to whom none of this realty was devised, does not have a right to come into the court while the estate is still in probate and obtain an order dividing the undevised realty and giving her one-half, and one-half to another heir, Ellen B. Beam," Ellen Beam argues that

> [t]o permit such an arrangement would be to take the responsibility from the executors of the estate as to how and in what manner they should raise the money to pay the debts of the estate . . . and permit an heir who has no official position in the estate itself to decide and obtain court approval on a division of the property before the debts are even ascertained and before it is ascertained how much property has to be sold to pay those debts.

Ellen Beam relies on N. C. Gen. Stat. § 28A-15-1(a) (1976), which directs that all property "of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property," and on N. C. Gen. Stat. § 28A-15-5(a)(1) (1976), which directs that property not disposed of by the will should be the first assets appropriated or abated.

Rebecca Chamberlain, on the other hand, contends that she is entitled, as a matter of right, to hold her interest as a tenant in common with Ellen Beam, and that the trial court properly adjusted the "equities with respect to the property." We agree.

First, our law favors a partition in kind over a sale of land, if one can be accomplished equitably and fairly, since a partition does not compel a person to sell property against his or her will. *Brown v. Boger*, 263 N.C. 248, 256, 139 S.E. 2d 577, 582-83 (1965). Ellen Beam did not offer any evidence showing that actual partition could not be made without injury to some, or all, of the interested parties. This is especially significant since Rebecca Chamberlain, in her Reply, alleged that it was not necessary to sell any of the land and that the land could be divided and held subject to a lien for any amounts of debts or costs that the courts should direct be paid.

Second, the trial court could properly give great weight to Rebecca Chamberlain's position that it would not be in the best interests to sell the real property, considering the depressed real estate market and the probability that the real estate would never bring as much at public auction under adverse economic conditions as could be realized from a gradual sale at a later time, since under principles of equity, the court had authority to make any order necessary to do justice between the parties. On this issue we find *Raymer v. McLelland*, 216 N.C. 443, 5 S.E. 2d 321

(1939) controlling. In *Raymer*, after the payments of debts, legacies, and cost of administration, one-half of the land was to go to the widow and the other one-half to the heirs at law. Our Supreme Court held that the trial court in its equitable jurisdiction had the power to hear and determine the widow's claim that she be permitted to pay one-half the valid debts of the estate and charges of administration and thereupon have the lands allotted to her relieved of any further obligations of the estate.

We do not see how Ellen Beam can be prejudiced by the action of the trial court in the case *sub judice*. After the property is partitioned, the land will still be held subject to liens for whatever amounts the court directs must be paid. The trial court further ordered that neither party was to sell or encumber the share allotted to them until the lien established was fully discharged.

For the foregoing reasons, the order of the trial court is

Affirmed.

Judges WELLS and EAGLES concur.

LINDA S. HOLT v. BILLY SHOFFNER

No. 8218DC836

(Filed 19 July 1983)

Bastards § 1— acknowledgment of paternity—subsequent dismissal of order of paternity error

Under G.S. 110-132(a), the trial judge erred in dismissing an order of paternity which was entered after defendant executed a written acknowledgment of paternity and a written voluntary support agreement and after plaintiff affirmed the fact that she and defendant were the parents of the child. Because the previous proceedings determined the paternity issue, the trial judge had no authority to dismiss a show cause action without prejudice which concerned failure of defendant to provide support.

APPEAL by plaintiff from *Lowe, Judge*. Order entered 12 July 1982 in District Court, GUILFORD County. Heard in the Court of Appeals 9 June 1983.

This is an action by the Guilford County Support Enforcement Office to reinstate child support payments due from the defendant to the Department of Human Resources and to set the amount owed.

On 24 October 1978, the defendant executed under oath an acknowledgment of paternity. He declared that he was the natural father of William Thomasray Holt. On the same day he entered into a voluntary support agreement under which he agreed to pay $15 per week to the Guilford County Clerk of Superior Court.

On 26 October 1978, District Court Judge Gordon Gentry entered an order of paternity in which he approved the defendant's acknowledgment of paternity and an affirmation by the plaintiff that the defendant was the natural father of the child. The order said that it "henceforth shall have the same force and effect as a Judgment of Paternity entered by this court pursuant to N.C.G.S. Chapter 110."

On the same date, Judge Gentry approved the voluntary support agreement entered into by the defendant. The support agreement also was to have the same effect as a court order.

At a show cause hearing on 22 October 1979, the defendant stated that he had not made child support payments as ordered because he was not the child's father. The matter was continued for 60 days to allow the defendant an opportunity to go to court to determine if he is the child's father.

After a hearing on 21 April 1980, District Court Judge Joseph Williams entered a 30 April 1980 order dismissing Guilford County's action without prejudice.

The plaintiff alleges in the present action that the 30 April 1980 order is void because the court did not have authority to dismiss the October 1978 order of paternity. After the trial judge denied a motion to reinstate the defendant's payments under his October 1978 voluntary support agreement and to set the amount in arrears, the plaintiff appealed.

Assistant Guilford County Attorney J. Edwin Pons for the plaintiff-appellant.

No brief filed for the defendant-appellee.

ARNOLD, Judge.

G.S. 110-132(a) decides this action. That statute states:

> In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found shall have the same force and effect as a judgment of that court; and a written agreement to support said child by periodic payments . . . when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such case.

In October 1978, the defendant executed a written acknowledgment of paternity and a written voluntary support agreement. The plaintiff affirmed the fact that she and the defendant were the parents of the child. All of these documents were approved by a district court judge. Thus, the statute was complied with and the 1978 documents were a determination of the paternity question. *See also,* 3 R. Lee, N.C. Family Law § 251 (4th ed. 1981).

Because the 1978 proceedings determined the paternity question, the trial judge in the 1980 order had no authority to dismiss Guilford County's show cause action without prejudice. *See Durham County v. Riggsbee,* 56 N.C. App. 744, 745, 289 S.E. 2d 579, 579 (1982). As a result, the 12 July 1982 order that is the subject of this appeal was erroneously entered. There is no evidence in the record to support the finding of fact that a full hearing on the paternity issue was conducted at the 1980 hearing.

Because the July 1982 order incorrectly relied on the erroneous April 1980 order, we reverse it.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA, DAN MILES, CHILD SUPPORT ENFORCEMENT OFFICER, EX REL. v. OSIE FARMER, JR.

No. 826DC946

(Filed 19 July 1983)

1. **Bastards § 5— questions concerning relationship with other man properly excluded**

In a paternity action, it was not prejudicial error for the trial court to sustain plaintiff's objections to defendant's questions concerning the length of time the mother and another man had been dating, how many times she had had sexual intercourse with the other man, and where the other man lived since relevant information as to the mother's relationship with the other man was adequately elicited by defendant's other questions.

2. **Bastards § 5— questions concerning incubators after birth properly sustained**

The trial court properly sustained plaintiff's objections to defendant's question to the mother in a paternity action concerning whether the twins had been placed in incubators after birth.

3. **Bastards § 5— relevancy of AFDC payments**

Where the amount of AFDC payments made by the Department of Social Services attributable to each twin was irrelevant to any of the four issues submitted to the jury in a paternity action, the trial court properly excluded testimony concerning it.

APPEAL by defendant from *Williford, Judge.* Judgment entered 21 April 1982 in District Court, BERTIE County. Heard in the Court of Appeals 10 June 1983.

Plaintiff filed a complaint for support on 8 May 1979, alleging that defendant was the natural father of twins born to Sharon Yvonne Outlaw on 18 September 1978 and that defendant owed the State of North Carolina for AFDC (Aid to Families with Dependent Children) payments made to Ms. Outlaw for the support of those two children. Defendant answered, denying that he was the father and responsible for support of the two children. At trial, the jury answered issues finding defendant to be the father

of the twins born to Ms. Outlaw on 18 September 1978 and finding that defendant had failed to repay the AFDC funds which Ms. Outlaw had received as support for the twins. From a judgment entered pursuant to the jury verdict, defendant appealed.

Gillam, Gillam & Smith, by Lloyd C. Smith, Jr. and Roswald B. Daly, Jr., for plaintiff-appellee.

Law Firm of Carter W. Jones, by Carter W. Jones, Kevin M. Leahy and Charles A. Moore, for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial court's exclusion of testimony concerning 1) Sharon Outlaw's relationship with Earl Jones, 2) the babies' period of incubation after birth, 3) the separate amount each of Ms. Outlaw's children were receiving in AFDC support, and 4) the reason for an earlier default judgment against defendant having been set aside. If the excluded testimony above had no logical tendency to prove the facts in issue, i.e., that defendant was the natural father of the twins and that Ms. Outlaw had been receiving AFDC payments for their support, then the evidence defendant sought to introduce was inadmissible. *See* 1 *Brandis on North Carolina Evidence* § 77 (2d rev. ed. 1982).

[1] We first reject defendant's contention that he was prejudiced by the exclusion of testimony concerning Ms. Outlaw's relationship with Earl Jones. On this point we note that

> It would not be competent to show that the prosecutrix, years before the birth of the child, had intercourse with someone else. Nor would it have been competent to prove that the prosecutrix at some other time had such intercourse, when it was apparent from the laws of nature that the child could not be the result of such intercourse. This would be incompetent because it did not tend to prove or disprove the affirmative of the issue. To admit such evidence would only be to allow the defendant to attack the character of the prosecutrix in a way not allowed by law.
>
> But it seems to us that when the defendant offered to prove that another man had intercourse with the prosecutrix at the time when by the course of nature the child must have

been begotten, this evidence bears directly upon the issue and is competent.

State v. Warren, 124 N.C. 807, 810, 32 S.E. 552, 553 (1899); see also *Levi v. Justice and Searcy v. Justice*, 27 N.C. App. 511, 219 S.E. 2d 518 (1975).

Defendant was permitted to ask Ms. Outlaw who she had had sexual intercourse with in November 1977, to which she answered "Earl Jones." Defendant was also permitted to ask Ms. Outlaw if she had sexual intercourse with Earl Jones in December 1977, to which she responded in the negative. Defendant was allowed to question her as to the last time she saw Earl Jones, to which she responded "Before Thanksgiving—November, 1977." It was not prejudicial error for the trial court to sustain plaintiff's objections to defendant's questions concerning the length of time Ms. Outlaw and Mr. Jones had been dating, how many times she had had sexual intercourse with Mr. Jones, and where Mr. Jones lived. The relevant information as to Ms. Outlaw's relationship with Mr. Jones was adequately elicited by defendant's other questions. No competent evidence would have been elicited by the questions to which the court sustained objections.

[2] The trial court also sustained plaintiff's objections to defendant's question to Ms. Outlaw concerning whether the twins had been placed in incubators after birth. Assuming *arguendo* that that testimony would have been relevant to the issue of whether defendant was the natural father, we find no merit to defendant's assertion that the court committed prejudicial error when it ruled Ms. Outlaw's response inadmissible. Her answer upon *voir dire* indicated that the children had been incubated at birth, supporting earlier admitted testimony that the twins were a little less than one month premature.

[3] During the testimony of an employee of the Bertie County Department of Social Services, defendant attempted to elicit information as to what portion of the $192.00 monthly AFDC payment received by Ms. Outlaw went to the support of each of her three children. While the jury was asked to determine whether Ms. Outlaw had received any AFDC funds from the State of North Carolina attributable to the support needs of the twins, they were not requested to find the total amount Ms. Outlaw was receiving, nor the AFDC amount attributable to each child. The

amount attributable to each child was irrelevant to any of the four issues submitted to the jury. Since the evidence was irrelevant to the issues raised, that testimony was properly excluded.

Finally, defendant objected to the court's exclusion of testimony explaining why a default judgment entered against defendant had been set aside. The court had allowed the same witness to testify, on direct, that a default judgment had been entered after defendant failed to timely file an answer to plaintiff's complaint. This assignment is without merit. The defendant's case could not have been prejudiced by the exclusion of that testimony.

In the trial below we find

No error.

Judges WHICHARD and JOHNSON concur.

FREDERICK WILLIAM BRAUN v. RICHARD W. GRUNDMAN

No. 8224DC792

(Filed 19 July 1983)

Appeal and Error § 6.2— order setting aside judgment upon surprise and neglect—appeal interlocutory

An appeal from an order setting aside a judgment as having been entered upon surprise and excusable neglect must be dismissed as interlocutory. G.S. 1A-1, Rule 60(b)(1).

APPEAL by plaintiff from *Lyerly, Judge.* Order entered 19 March 1982 in District Court, WATAUGA County. Heard in the Court of Appeals 18 May 1983.

On 3 August 1981 plaintiff instituted an action against defendant for $800.00 allegedly due him on an account. At a hearing before Magistrate Atita G. Norris on 13 August 1981 plaintiff was awarded $710.00 plus interest. Neither party was represented by counsel at the hearing.

Defendant appealed that decision and a *de novo* trial was held in District Court on 2 November 1981. Again, the parties

chose not to be represented by counsel. During the trial the court ruled inadmissible an unsworn written statement which defendant attempted to present into evidence. On the basis of the admissible evidence presented by both parties, the court awarded plaintiff $750.00 plus interest.

On 12 January 1982 defendant filed a motion to set aside the 2 November 1981 judgment on the basis of mistake, inadvertence, surprise and excusable neglect. Defendant's motion asserted that he had not been represented by counsel at the trial *de novo* and that he had been prevented from introducing certain evidence because of his lack of legal knowledge. He also claimed that the magistrate had led defendant "to believe that he would not need an attorney to present this defense" in district court.

After making findings of fact, Judge Lyerly concluded as a matter of law that the judgment of 2 November 1981 should be set aside and that a new trial be scheduled. From this order plaintiff appealed.

Eggers & Eggers, by Stacy C. Eggers, III, for plaintiff-appellant.

James M. Deal, Jr., for defendant-appellee.

EAGLES, Judge.

Plaintiff purports to appeal from an order setting aside a judgment as having been entered upon surprise and excusable neglect. G.S. 1A-1, Rule 60(b)(1). Appeals from such orders must be dismissed as interlocutory. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E. 2d 484 (1980).

Although we need not here address the propriety of the trial court's action in setting aside the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect, we note that a party is not "surprised" merely when he is alarmed by an action taken by the court, nor merely when he has an erroneous view of the law. *Crissman v. Palmer*, 225 N.C. 472, 35 S.E. 2d 422 (1945); *Endsley v. Supply Corp.*, 44 N.C. App. 308, 261 S.E. 2d 36 (1979). Furthermore, a party's voluntary action may estop him from seeking relief from a judgment on the grounds of mistake or

excusable neglect. Wright & Miller, *Federal Practice & Procedure:* Civil § 2858. A party who makes an informed choice as to a particular course of action will not be relieved of the consequences when it subsequently develops that the choice was unfortunate. 7 *Moore's Federal Practice* § 60.22[2].

Appeal dismissed.

Judges WHICHARD and JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 JULY 1983

DEPENDABLE INS. CO. v. MIDDLESEX CONSTR. No. 8210SC806	Wake (80CVS8419)	Affirmed
HIATT v. HIATT No. 8218SC890	Guilford (81CVS2852)	Affirmed
SAMPSON COUNTY v. WESTBROOK No. 824DC755	Sampson (80CVD442)	Reversed

SPECTOR INDUSTRIES, INC. (FORMERLY BENTON-SPRY, INC.) v. SHIRLEY H. MITCHELL

No. 8121SC821

(Filed 2 August 1983)

1. **Cancellation and Rescission of Instruments § 5; Reformation of Instruments § 1.1— *no rescission or reformation of contract***

Defendant could not seek rescission of a contract for the sale of a trucking company and its affiliates where defendant has not tendered return of a sum paid to him pursuant to the contract and is therefore unable to restore the *status quo*. Nor may the contract be reformed on the ground of unilateral mistake where there was insufficient evidence of undue influence or of fraud in the inducement or execution of the contract.

2. **Accountants § 1; Contracts § 27— contract requiring audit—insufficient evidence of conflict of interest**

In an action involving a contract for the sale of a trucking company and its affiliates by defendant to plaintiff at a purchase price which was to be adjusted after an accounting firm's audit of the net worth of the company and its affiliates, the evidence was insufficient to support a rejection of the audit on the ground of a conflict of interest or "double dealing" on the part of defendant's attorney who assisted in the negotiations and prepared the contract, defendant's general manager, or defendant's accountant who conducted the audit.

3. **Accountants § 1; Contracts § 27— contract requiring audit—gross mistake in audit—sufficiency of evidence**

In an action involving a contract for the sale of a trucking company and its affiliates by defendant to plaintiff at a purchase price which was to be adjusted after an accounting firm's audit of the net worth of the company and its affiliates, the evidence was sufficient to be submitted to the jury on the issue of whether the audit should be rejected for gross mistake where there was evidence tending to show that the contract provided that auditing methods would be consistently maintained in order to keep the net worths of the companies consistent with the figures used for negotiation; the auditors wrote down a farm carried on the books at the cost of $655,535.00 to its appraised value of $360,000.00 in violation of the contract requirement that the method of valuation be consistently maintained; the auditors failed to delete a deferred income tax reserve of $128,445.00 which should have been deleted; the method of computation was not consistently maintained for prepaid tire and vacation accounts; company employee accounts were written off as bad debts while the employees still worked for the company; and approximately $100,000.00 was entered as "estimated unentered liabilities" when such an account had not been used previously.

APPEAL by defendant and cross-appeal by plaintiff from *Lewis, Robert D., Judge.* Judgments signed 28 January 1980, 11

February 1980, 29 February 1980, 21 March 1980, 26 March 1980, 24 April 1980, and 25 June 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 June 1983.

This case involves a civil action in which plaintiff sought specific performance of a written Agreement and two Addenda by which defendant agreed to sell plaintiff a package of assets and companies for $9,345,332.00 subject to adjustment after audit by defendant's accounting firm, Ernst & Ernst. Plaintiff prayed that defendant be ordered to deliver the financial statements of companies audited by Ernst & Ernst pursuant to the Agreement so that the adjusted purchase price could be ascertained and final settlement made. Plaintiff also prayed the court to determine the amount of adjustments to promissory notes specified by the Agreement and Addenda.

By his Answer and Counterclaim, defendant contended that the audits, which reduced the purchase price cited in the Agreement by some four and one-half million dollars, were incorrect and that the Agreement should be voided either for fraud or mistake, or, in the alternative, that he was entitled to breach of contract damages at least in the amount of the purchase price set forth in the Agreement, $9,345,332.00, plus punitive damages.

Trifurcating the case for trial, the court elected to try first the issue of the "integrity of the audits." The scope of the jury trial was limited to this single issue to the exclusion of questions concerning whether the contract should be set aside and damages awarded for either fraud or mistake and whether any money was owed Mr. Mitchell.

The trial lasted nearly six weeks. The court submitted the following questions to the jury: (1) whether the audits had been conducted in accordance with generally accepted accounting principles; and (2) whether the audits should be rejected for (a) actual fraud, (b) conflict of interest, (c) undue influence, and (d) misfeasance, malfeasance, or gross mistake to such an extent that the audit was an irresponsible product. On the court's peremptory instructions, the jury answered the first question in plaintiff's favor. While finding no actual fraud or undue influence, the jury found with respect to the second question that the audits should be rejected (and, therefore, not be binding upon Mr. Mitchell) because of (1) the auditors' conflict of interest and (2) gross

mistake amounting to bad faith. The court later set aside the portions of the verdict favorable to defendant and entered judgment N.O.V. for plaintiff, thereby upholding the audits as a matter of law.

The court further entered partial summary judgment in plaintiff's favor regarding certain remaining claims alleged in defendant's counterclaim, including whether the written agreement should be rescinded and damages awarded for mistake or fraud. In addition, the court entered an order providing that prior to any decree of specific performance, it would sit as a "Court of Equity" and determine in an "audit of the audits" the amount of money, if any, due Mr. Mitchell and also whether plaintiff had been unjustly enriched in any respect.

The defendant's appeal from the judgments cites as error the court's (1) refusal to submit certain issues to the jury, (2) peremptory instructions on the first issue, (3) setting aside of the portions of the verdicts that favored defendant, (4) entering judgment for plaintiff on those issues returned in favor of the plaintiff, (5) entering summary judgment in favor of the plaintiff on issues the court had not submitted to the jury and concerning which the court had excluded evidence offered by the defendant at trial, (6) ruling that the court would determine without a jury the amount of money owed the defendant by the plaintiffs, (7) failure to pass upon defendant's motion for a new trial, (8) refusal to grant defendant's motion for injunction, and (9) additional orders or rulings that adversely affected the rights of the defendant.

Plaintiff cross-appealed from (1) the order of the court denying plaintiff's alternative motions for new trials, (2) failure of the court to rule on plaintiff's alternative motions for a new trial should the judgment N.O.V. be vacated or reversed by this Court, (3) that portion of the Order denying plaintiff's motion for partial summary judgment on defendant's claim that the audits were wrong, (4) that portion of the Order ruling that the audits were not binding until after examination of the audits by the Court of Equity, and (5) other orders or rulings that adversely affected the rights of the plaintiff.

Womble, Carlyle, Sandridge & Rice, by H. Grady Barnhill, Jr., and Jimmy H. Barnhill for plaintiff-appellee.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, George L. Little, Jr., and Penni L. Pearson, for defendant-appellant.

HILL, Judge.

Because this controversy has extended well over twelve years and involves numerous individuals, we briefly discuss the parties and some background information to promote an understanding of the issues raised.

Shirley H. Mitchell owned all the stock of Hennis Freight Lines, Inc. (Hennis), a North Carolina corporation principally engaged in freight hauling pursuant to authority granted by the Federal Interstate Commerce Commission, and its subsidiary, Highway Equipment Company. In addition, Mitchell owned all or part of the stock in:

1) Parkway Fuel Service, Inc., a West Virginia corporation.

2) M & M Tank Lines, Inc., a North Carolina corporation, and its subsidiary, M & M Tank Lines of Virginia, Inc., a Virginia corporation.

3) Confederate Vending, Inc., a North Carolina corporation.

4) Dixie Insurance Agency, Inc., a North Carolina corporation.

5) Tar Heel Supply Company, Inc., a North Carolina corporation.

6) Piedmont Motor Sales, Inc., a North Carolina corporation.

7) The Tire Center, Inc., a North Carolina corporation.

8) Hennis Freight Lines of Canada, Ltd., a Canadian corporation.

9) Dixie Rental Service, Inc., a North Carolina corporation.

10) Florida Refrigerated Services, Inc., a Florida corporation and a subsidiary of Hennis Freight Lines of Canada, Ltd.

Jesse Phipps was vice-president and general manager of Hennis Freight Lines. He was second-in-command to Mitchell and remained with the company when it was sold to Benton-Spry.

William M. (Bill) Shelton, a certified public accountant with Ernst & Ernst, had done accounting work for Hennis and Mitchell for years and remained in charge of the Hennis and affiliate audits after the transfer. He was Ernst & Ernst's auditor for Benton-Spry, Inc. after the transfer.

Al Flynn of the law firm York, Boyd and Flynn, was the attorney for Mitchell and Hennis during the negotiations and transfer of Hennis and affiliates.

Kenneth Barlow, the accountant Mitchell consulted after the Ernst & Ernst audit, was Mitchell's expert witness at trial.

Benton-Spry, Inc., known as Spector Industries, Inc. when this appeal was filed, was a Delaware corporation to which Hennis and affiliates were sold.

M. C. Benton, Jr. was chief executive officer and board chairman of Benton-Spry and an accountant with many years of experience regarding trucking lines. He was a senior executive of McLean Trucking Company, a client of the accounting firm Ernst & Ernst which conducted the audits of Hennis and affiliates. Benton was among the principals who negotiated the purchase of Hennis and affiliates.

Dennie Spry, formerly employed by McLean Trucking Company, was a principal in Benton-Spry.

George Doughton of the law firm Spry, Hamrick and Doughton, was attorney for Benton-Spry, Inc.

E. C. Peterson was trustee of the Hennis Chapter X Reorganization and was chief executive officer until the company was released from Chapter X proceedings in April, 1974.

Mitchell built the Hennis company from a small carrier to the tenth largest motor freight line in the United States. In 1969, the financial condition of the company began to decline. Reasons for

the company's financial distress included: unpaid loans made by Hennis to Mitchell affiliates and to Mitchell personally; inability to hire and retain good personnel; inability to pay an IRS tax lien of $4,000,000.00; a labor union strike; and demand by a substantial creditor for payment of approximately $1,800,000.00 in indebtedness. Other creditors applied pressure. The company petitioned for a Chapter X Reorganization under the Bankruptcy Code which was granted. Mitchell and corporate management thereafter concluded that the only practical alternative was to sell the business.

Phipps approached Benton and Spry about their acquiring the Mitchell companies. Initially, Benton and Spry were interested in acquiring only Hennis Freight Lines and its subsidiary, Highway Equipment Company. Because of the volume of intercompany indebtedness, however, Mitchell and Phipps additionally proposed sale of all the affiliates to effect the most advantageous tax consequences.

THE CONTRACT

The contract is composed of three written agreements. The first, dated 20 November 1970, contains the exhaustive terms of the Agreement of Sale. An Addendum dated 20 November 1970 stipulates that sale and purchase is contingent upon a release of the businesses from Chapter X Reorganization proceedings. A second Addendum dated 7 December 1970 deletes from the original Agreement of Sale Hennis Freight Lines of Canada, Ltd., its subsidiary, Florida Refrigerated Services, Inc., and M & M Tank Lines, Inc. with its subsidiary, M & M Tank Lines of Virginia, Inc. This Addendum includes, however, an option to purchase the deleted motor carriers, the base sales price of $1,116,413.00 to be "increased (or decreased) by an amount by which the aggregate net worth of said carriers, *consolidated* with their subsidiaries" is greater or less than the base figure [emphasis ours]. This latter provision apparently amends that portion of the original agreement requiring payment for Hennis of Canada, M & M Tank Lines and their subsidiaries solely on the basis of *aggregate* book value.

Taken together, the documents call for defendant's sale to the plaintiff of (a) the stock of Hennis Freight Lines, Inc., and its subsidiary, Highway Equipment Company, Inc., (b) the stock of certain related companies called "affiliates" and their subsidiaries

and (c) certain other stocks and land. The original agreement provides that the purchase price is subject to adjustment pending the outcome of audits conducted by Ernst & Ernst using "generally accepted accounting procedures." The purchase price includes the following components:

Hennis Freight Lines' intangible operating authority	$6,000,000.00
Hennis Freight Lines' estimated net worth, excluding intangible operating authority	500,000.00
106 acres of land on Interstate 40 at Winston-Salem-Greensboro-High Point Regional Airport, North Carolina, and 92.8 acres of land on Interstate 77, Charlotte, North Carolina	1,124,000.00
Gateway Life Insurance stock	636,364.00
Ten "affiliated" companies at net worth	1,084,968.00
Total	$9,345,332.00[1]

In addition, the contract promises Mitchell $50,000.00 in consulting fees annually for five years, and the conveyance to him of a farm owned by Hennis in Patrick County, Virginia, for $250,000.00 to be credited against the purchase price paid by Benton-Spry.

According to the original Agreement, the purchase price of $9,345,332.00 is subject to adjustment reflecting the outcome of the Ernst & Ernst audit, depending upon:

> (a) The amount by which the consolidated tangible net worth of Hennis and its subsidiary as of November 30, 1970, is greater or less than $500,000.00.

1. The 7 December 1970 Addendum amends the purchase price to $8,228,919.00, allowing for deletion from the original sales agreement of two affiliates and their named subsidiaries worth $1,116,413.00. After ICC approved their sale and Benton-Spry exercised its option to buy, the value of these companies was added to the amended purchase price, effecting a return to the original purchase price of $9,345,332.00.

(b) The amount by which the "aggregate net worth of the Affiliates" as of November 30, 1970, is greater or less than $1,084,968.00.[2] [The contract defines "affiliates" as those corporations owned directly by Mitchell. It does not list as affiliates those corporations (such as Dixie Rental Service, Inc. or Florida Refrigerated Services, Inc.) that are subsidiaries of the corporations owned by Mitchell. This definition and the generally accepted accounting principle that net worths of parents and subsidiaries be consolidated to eliminate duplication of values, form the basis for plaintiff's contention that the original agreement requires consolidation of the net worths of the parents and subsidiaries.]

(c) The amount by which any encumbrances on the Gateway Life Insurance stock and the land are greater or less than stated figures.

The Agreement also provides for the execution of a note by Mitchell to Benton-Spry for $3,502,000.00 or any other amount the audit determines he owes for personal loans from the companies. The Agreement further allows for offsets of principal and interest due under this note and others under the contract.

Benton-Spry assumed operational control of Hennis and its affiliates in early January 1971. The principal closing occurred on 8 February 1971. Benton-Spry received the stock of Hennis and all its affiliates except M & M Tank Lines and Hennis of Canada and their subsidiaries. At the closing, Mitchell received $1,000,000.00 which was put in escrow for the trustee in Reorganization and a note for $7,228,919.00. On 13 January 1972, the closing for M & M Tank Lines, Hennis of Canada and their subsidiaries was held, and a note for $1,116,413.00 was delivered to Mitchell. Both notes contain a provision for adjustments in accordance with the requirements of the contract. In 1981 Mitchell was delivered the deed to the farm in Virginia.

Based upon audits conducted by Ernst & Ernst from 1969 through August of 1970, Benton-Spry has concluded Mitchell has been fully compensated and refuses to make further payments

2. This figure is amended by the 7 December 1970 Addendum to "the sum of a deficit net worth of $31,345.00."

under the contract. Among the unpaid sums purportedly due are Mitchell's consulting fees.

Benton-Spry filed suit against Mitchell on 31 January 1975. The case proceeded to trial on the issue of the integrity of the audits in which (1) upon the court's peremptory instructions, the jury found the audits conformed to generally accepted accounting principles; and (2) while rejecting defendant's fraud and undue influence claims, the jury found the audits should be rejected based on (a) the auditors' conflict of interest and (b) gross mistake, a finding the court set aside by entering judgment N.O.V. for the plaintiff. Both parties appealed.

The issues on appeal are voluminous and variously stated by the parties. Nevertheless, we recognize two broad questions that encompass the issues raised: (1) May the defendant avoid the contract? and (2) May the defendant avoid the valuations determined by the Ernst & Ernst audits?

[1] Regarding the first question, we hold Judge Lewis correctly found as a matter of law that the Agreement and Addenda constitute the entire contract, and that the contract may not be rescinded or modified. Mitchell cannot seek rescission because he has not tendered return of Benton-Spry's $1,000,000.00 and is therefore unable to restore the *status quo*. Nor is reformation on grounds of mistake available. Repudiating any suggestion of mutual mistake, plaintiff contends the contract embodies the parties' intent; and a unilateral mistake is no basis for reformation in the absence of fraud, undue influence or the like. *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926); *Matthews v. Van Lines*, 264 N.C. 722, 142 S.E. 2d 665 (1965). We further find that evidence of fraud in the inducement or execution or of undue influence perpetrated on Mitchell by his advisors is lacking. The court correctly ruled on these issues. Therefore, we conclude the defendant cannot avoid his contract, and in so doing, we uphold the court's entry of summary judgment on questions concerning the composition and interpretation of the contract.

Regarding the second question, we focus on the propriety of the court's entry of judgment N.O.V. for plaintiff. We hold that while the court correctly entered judgment N.O.V. on grounds that there was insufficient evidence of conflict of interest, the

court improperly entered judgment N.O.V. on the issue of gross mistake.

The standard for judgment N.O.V. is fixed by G.S. 1A-1, Rule 50(b)(1) which states in pertinent part:

> [T]he motion shall be granted if it appears that the motion for directed verdict could properly have been granted.

Thus, the question presented upon review of the grant of judgment N.O.V. or directed verdict, *see Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E. 2d 222 (1971), is whether the evidence, when considered in the light most favorable to the non-movant and allowing the non-movant every reasonable inference that may legitimately be drawn therefrom, is sufficient for submission to the jury. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). The jury decides any issue of fact from which more than one conclusion can reasonably be drawn, *see Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971), and resolves any discrepancies or contradictions in the evidence, *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976).

I.

The Conflict of Interest Claims

[2] In support of his argument that the trial court erred in setting aside the jury verdict, defendant Mitchell contends his attorney, Flynn, his accountant, Shelton, and the general manager of Hennis, Phipps, engaged in "double dealing." We find defendant's arguments are meritless.

Professional persons who work for potentially antagonistic parties walk a tight wire. Nevertheless, their task is not impossible. Various professions are governed by their own codes of ethics that provide guidelines for professional conduct. That a professional represents different parties in different capacities within a single transaction, as in the case before us, is not uncommon. Assuming all parties are aware of the duality of the relationship and the professional does not compromise a duty to either party, such an arrangement is often most advantageous. *See e.g.*, 3 C.J.S., Agency, Sec. 279.

Concerning potential conflicts of interest that may arise in this context, certain principles must be noted. When parties entrust a disputed matter to a third party for resolution, the third party's determinations are binding in the absence of some disqualifying conduct. *See Elec-Trol, Inc. v. Contractors, Inc.*, 54 N.C. App. 626, 284 S.E. 2d 119 (1981), *disc. rev. denied*, 305 N.C. 298, 290 S.E. 2d 701 (1982). As the party challenging the results of the determination made by the third party, the defendant has the burden of establishing the disqualifying conduct. In the absence of such evidence, directed verdict is proper. A simple challenge that the audit is the subject of disqualifying conduct is insufficient. Such disqualifying conduct must be proven as a fact to the jury. *Young v. Insurance Co.*, 207 N.C. 188, 176 S.E. 271 (1934). Nor may one object regarding matters he could reasonably have anticipated would form the basis for objection based on the facts known to him. *Garfield & Co. v. Wiest*, 432 F. 2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *see Construction Co. v. Management Co.*, 37 N.C. App. 549, 246 S.E. 2d 564, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 864 (1978). In addition, one party who attempts to "stack the deck" in his favor is estopped to complain if it develops that the third party is biased in the other party's favor, particularly if the potential for bias was the same in each instance. *Firemen's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F. 2d 533 (4th Cir.), *cert. denied*, 295 U.S. 748 (1935).

In support of his argument to reinstate the jury's finding of a conflict of interest, defendant contends the evidence is sufficient to set aside the audits for bias or partiality. *See Brooke v. Milling Co.*, 84 S.C. 299, 66 S.E. 294 (1909). Defendant argues that his accountant's ties to plaintiff, which were initially unknown to him, precluded the "independent" audit required by the parties' contract and the ethical standards of the accounting profession. He faults his attorney and general manager with having pecuniary interests in plaintiff that compromised their duties to him.

A.

Regarding his attorney, Al Flynn, who assisted in the negotiations and prepared the contract, Mitchell contends a conflict of interest arose when Flynn: (1) accepted employment by Benton-Spry to secure the transfer of operating rights, (2) continued to represent Hennis on old legal matters after the stock

transfer to Benton-Spry, (3) as a creditor of Hennis and affiliates, filed a claim in the Hennis bankruptcy proceeding for several thousand dollars, (4) after the transfer, accepted stock in Benton-Spry in exchange for the debts owed him by Hennis and, in addition, bought stock in Benton-Spry from one of his law partners, and (5) advised Mitchell to sign the 7 December 1970 Addendum in which the valuation of the four affiliates was on an aggregated rather than a consolidated basis, reducing the purchase price by some $640,000.00.

Each of these instances is satisfactorily explained and none indicates Flynn was double-dealing. Flynn did assist Benton-Spry by filing required applications for transfer of operating rights, but he did so with Mitchell's approval, believing he was jointly representing the parties in this particular endeavor. His continuing legal representation of Hennis was in defense of claims that had arisen before the Reorganization; he was paid by Peterson, the Hennis trustee. In any event, there is no evidence that his continued representation compromised his professional judgment regarding the sale. The claim Flynn filed in the bankruptcy was for services rendered to Hennis before the Reorganization. Flynn's subsequent acceptance of Benton-Spry stock in satisfaction of the claim and his acquisition of Benton-Spry stock *after* Mitchell discharged him is simply not evidence of any wrongdoing.

Finally, defendant cites as evidence of disloyalty and conflict of interest Flynn's recommendation that Mitchell sign the second Addendum that Benton-Spry prepared on the advice of Shelton, Ernst & Ernst's lead auditor. Shelton had advised attorneys for Benton-Spry that valuation of two named motor carriers and their subsidiaries (i.e., M & M Tank Lines and its subsidiary, M & M Tank Lines of Virginia; Hennis Freight Lines of Canada and its subsidiary, Florida Refrigerated Services) should be determined on a consolidated rather than on an aggregated basis, as originally provided, to avoid duplication of values. Flynn, who had an accounting degree and had in fact passed part of the CPA exam before deciding to pursue a legal career, reviewed the proposed change and understood its significance. Elimination of the discrepancy in valuation brought the contract within generally accepted accounting principles, and Flynn appropriately advised Mitchell to sign.

B.

Jesse Phipps had worked for Hennis for some ten years before the sale and was general manager at the time of the transfer. He was principally responsible for persuading Benton and Spry to purchase the Mitchell companies.

As evidence of a conflict of interest, Mitchell charges that Phipps: (1) knew Benton because Benton was an officer of McLean Trucking Company for which Phipps had once done audit work and that he was acquainted with Shelton as well, (2) as a subscriber to shares of Benton-Spry stock, was an agent of Benton-Spry during the negotiations, (3) continued as general manager of Hennis under the direction of Benton-Spry, and (4) owed debts to Hennis and various affiliates which later were written off the books, resulting in a substantial reduction in the purchase price.

Taking Mitchell's contentions singly, we find no evidence that Phipps's professional acquaintance with Benton and Shelton created any conflicts. The existence of these relationships, of themselves, is insufficient evidence for jury consideration on the conflict of interest issue. One in top management customarily knows others in the trade and becomes acquainted with company auditors. Regarding his shareholder status in Benton-Spry, Phipps purchased the stock after the transfer while still employed by the Hennis trustee. His acquisition of stock after the contracts were negotiated and signed is hardly evidence of an agency relationship between Phipps and the Benton-Spry principals during negotiations. While Phipps remained general manager of Hennis after the transfer, he was employed by Peterson, the Hennis trustee—not Benton-Spry; defendant's allegation of a conflict of interest based on this fact is therefore without merit.

Mitchell contends that when lead auditor Shelton in negotiations proposed an addendum to consolidate values of certain parent and subsidiary corporations, Mitchell asked for an explanation, to which Phipps replied: "Don't worry about that. It's just a bunch of highly technical accounting matters. Let's not worry about that now." Mitchell argues that Phipps's response is evidence from which a jury could conclude Phipps had become an agent of Benton-Spry. We disagree. The contract required that the audited net worths of the companies be based on generally ac-

cepted accounting principles. Use of the initially proposed aggregated method of valuing net worths would have resulted in duplication of values in contravention of generally accepted accounting principles. While it does indicate that Phipps preferred to postpone discussion of the proposed change, his alleged failure to explain does not provide sufficient evidence of conflict of interest for submission to the jury. In any event, the Addendum which substituted the consolidated for the aggregated method of valuation was apparently understood by attorney Flynn, who had studied accounting, was familiar with generally accepted accounting procedures and advised Mitchell to sign.

We are concerned, however, about the manner in which Phipps's accounts were written off. We will discuss the issue later in this opinion.

C.

Mitchell contends that Shelton, who supervised the audits of Hennis and the affiliated companies, and his employer, Ernst & Ernst, committed acts of wrongful conduct from which a jury could find a conflict of interest existed. We disagree.

As provided by the contract, the accounting firm of Ernst & Ernst was to be "independent." Defining the functions of independent public accountants, Mitchell's expert witness, Mr. Barlow, testified:

> . . . our primary responsibility is to the users of financial statements upon which we report. We are hopefully independent, which involves—we are objective in our evaluation of those financial statements which, [sic] hopefully we make decisions with unbiased judgment.
>
> * * * * * * * * * * *
>
> Yes, I think there is a difference [in the responsibility of the auditor performing an audit which will be used by the parties with regard to the purchase and sale of the company as opposed to a regular audit which would be published for the company shareholders] . . . I think there are different effects involved.

Shelton testified he was familiar with the rules of the accounting profession regarding independence:

> [I]t's a mental attitude more than anything else . . . . Independence is one of the generally accepted auditing standards.

Before negotiation and execution of the sales contract, Mitchell and the Benton-Spry principals knew that they and their employees had and would continue to have contacts with Ernst & Ernst. These parties were familiar with auditing procedures, and they agreed Ernst & Ernst should perform the audit.

Shelton supervised past audits of the companies. He also attended negotiations as counsel to Mitchell on tax matters, but only after determining his presence would not conflict with Ernst & Ernst's policy to avoid participation in their clients' negotiations. That he apprised the parties of problems in the valuation methods is not evidence of bias or conflict of interest; it is evidence of an effort to correct an error in the contract. Shelton's delay in consulting Mitchell about the proposed audit adjustments is immaterial, particularly since Shelton knew the audit was to be performed under the direction of the trustee, Peterson. Shelton acknowledged he could have discussed the adjustments with Mitchell "piecemeal," but decided to review the entire audit with Mitchell and his attorney when the audit was completed. None of these actions evidences a lack of independence sufficient for jury consideration on the conflict of interest question.

Ernst & Ernst's responsibility for the audit was described in the contract:

> There will be furnished to the Buyer after the Closing, the audited balance sheets of Hennis and each of the Affiliates as of November 30, 1970, certified by Ernst & Ernst, independent certified public accountants and auditors.
>
> *The audited financial statements as of November 30, 1970, certified by Ernst & Ernst, certified public accountants, will be correct and complete and will be prepared in accordance with generally accepted accounting practices consistently maintained. Such balance sheets will present a correct and complete statement of the financial condition and assets and liabilities (whether accrued, absolute, contingent or otherwise) of Hennis and each of the Affiliates as of November 30, 1970.* . . . The costs of having prepared the aforesaid audit

> and financial statements with respect to the Affiliates and their subsidiaries shall be paid by the Seller. Seller shall pay any additional costs associated with the audit of Hennis and its subsidiary over and above the cost that would normally be charged to Hennis and its subsidiary for its annual audit of December 31, 1970. [Emphasis added.]

In short, Ernst & Ernst was to produce a correct and complete statement of the financial condition, assets and liabilities (whether accrued, absolute, contingent, or otherwise) of Hennis and its affiliates as of November 30, 1970, the date of transfer of ownership. Ernst & Ernst was not to be an umpire or arbiter. Although its employees talked with many people, including Peterson, Benton, Spry, and Flynn, there is no evidence of any individual doing more than supplying the information solicited. Nor do we find evidence of wrongdoing by Ernst & Ernst and Flynn in allocating costs between the parties to the contract based on services rendered. That Ernst & Ernst may have wanted Benton-Spry's business in the future is not evidence of wrongdoing as contended by Mitchell.

Finally, we find no basis in the record for defendant's assertion that Benton-Spry "stacked the deck" by controlling the information reviewed by Ernst & Ernst. Ernst & Ernst already had background information resulting from their prior audits of Hennis. Indeed, the diversity of location of the affiliates and Benton-Spry's unfamiliarity with Hennis records would make any effort to control the auditors' information nearly impossible. Although Benton and Spry were on the premises as of early January 1971, the trustee was legally in charge of Hennis operations. They conversed with the auditors, but information pertinent to the period before 30 November 1970 was provided the auditors by appropriate employees of Hennis. Thus, evidence of contacts between Benton-Spry principals and the auditors is insufficient to raise the conflict of interest issue.

Having examined the record, we conclude the evidence is insufficient to create a conflict of interest issue sufficient for jury consideration. We therefore uphold the trial court's entry of judgment N.O.V. in this regard.

II.

The Gross Mistake Claim

[3] While upholding the judgment N.O.V. on the issue of conflict of interest, we conclude the trial court erred in entering judgment N.O.V. on the jury's rejection of the audit based on gross mistake.

As a background to the discussion of this issue, an understanding of an audit is helpful. The term "generally accepted accounting practices" (GAAP) includes the rules by which an audit is conducted. The rules have been codified by the American Institute of Certified Public Accountants and are followed generally by all auditors. Yet the rules themselves allow for variations in result. For example, there are several methods by which depreciation charged off as a current expense can be ascertained under GAAP (e.g., straight line, sum of the digits, declining balance methods); each method produces different sums to be charged off as a current expense. When the current expense is charged to reserve, the book value of the asset varies, depending on the method of depreciation used. Yet, all methods are correct and conform to GAAP.

GAAP allows for the exercise of individual judgment. When the audits involve extensive bookkeeping entries, it is not customary to check each item. Instead, certain tests are applied to the accounts in accordance with auditing standards and procedures. Obviously, this area requires exercise of the auditor's judgment. Based upon the test results, the auditor makes adjustments to reflect the accounts shown on the books. The auditor also exercises judgment in making other adjustments, such as setting up reserves for doubtful accounts and, in some instances, writing off accounts as bad debts. Here again, education, experience and knowledge of the particular industry are used by the auditor in making any entries the auditor determines to be within the scope of generally accepted accounting procedures.

To keep the net worths of the companies consistent with the figures used for negotiation, the parties herein provided by contract that auditing methods would be consistently maintained. This simply required the auditor to ascertain the method used the previous year and apply the same method. Spry allegedly told Ernst & Ernst he did not want an audit report like the one that

had arisen from the 1969 Hennis audit in which Ernst & Ernst offered "no opinion" of the company's audited financial statements. Spry's concern was legitimate. A "no opinion" audit would be worthless in Benton-Spry's effort to secure financing.

The very existence of the 1969 "no opinion" audit reveals something about the condition of the books. Many records were not kept current. One of the Ernst & Ernst auditors testified the records were "much less than we would have normally expected for the company in missing documentation and other things of that nature."

We do not propose to examine every adjustment made by Ernst & Ernst in connection with the audits of the various companies. Nevertheless, an examination of several adjustments supports our conclusion that the evidence sufficiently indicates the auditors committed gross error to such an extent that the audit is an irresponsible product. We hold that the trial court erred in setting aside the jury verdict rejecting the audit for this reason.

We confine our examination to whether there is sufficient evidence of gross error in the audit to submit the question to the jury. We find instructive the case of *McDonald v. MacArthur Bros. Company*, 154 N.C. 122, 69 S.E. 832 (1910), in which the Court upheld the following jury instruction:

> If you believe from the evidence that the estimate referred to contained such error of judgment as amounted to a mistake so gross as to necessarily imply bad faith and to amount to a fraud upon the rights of the plaintiff, you should answer the . . . issue "Yes," and this would be so though there is no evidence of an intention to commit a fraud or to act in bad faith.

Id. at 126-127, 69 S.E. at 834.

The Supreme Court also approved the following instruction:

> The contention of the plaintiff is that this paper writing, called "final estimate," was grossly erroneous and the plaintiff insists that the amount which you will find due was so far from being insignificant and was such a considerable sum in comparison with the aggregate of the whole work done, that any court and any jury ought to say (the plaintiff insists) that

> it was not only erroneous, but that it was gross error and such as would amount to a legal fraud.

Id. at 127, 69 S.E. at 834.

Hence, the question whether the audit should be set aside on the foregoing grounds is one for the jury. *McDonald v. MacArthur Bros. Company, supra.*

Evidence from which the jury could find gross mistake includes the following:

1. The trading date was 30 November 1970. Prior to that date, the farm was carried on the books as an asset at $655,535.00. The auditors wrote down the sum to $360,000.00, the farm's appraised value. Benton-Spry had contracted to sell the farm to Mitchell at the bargain price of $250,000.00. The write-down resulted in a removal of some $295,000.00 of Mitchell's contracted-for bargain. The $655,535.00 figure represented the cost of the farm to Hennis. Use of the appraised value method of valuation was not a "consistently maintained" procedure and was thus in violation of the contract requirement.

2. The balance sheet showed a reserve of $128,445.00 for deferred income taxes. The company was operating at a loss with operating loss carryovers and investment credits of $6,640,000.00 and $960,000.00, respectively. If the company operates at a profit in the future these sums could be used as offsets against income and income taxes. Mitchell's CPA, Barlow, said the $128,445.00 reserve should have been deleted, which would have increased the value of the assets by that amount. We conclude the jury properly considered this item in determining whether the audit should be set aside for gross mistake.

3. In several other areas, *e.g.*, a prepaid tire account and vacation accounts, the method of computation does not appear to have been consistently maintained.

4. Principal company employee accounts were written off as bad debts when they were still employed: a) B.C. Brandon appears to have owed $2,605.00 to Hennis and over $11,000.00 to the Tire Center. These sums were written off even though he was employed at an annual salary of $20,000.00; b) W.R. Moore Company owed Hennis and the affiliates in excess of $300,000.00

which was written down. Yet under its Reorganization plan, every other creditor of W.R. Moore was paid; c) Phipps owed some $4,000.00 each to Hennis and the Tire Center which he contended were actually advances for travel expenses. These accounts were apparently reserved or written off without requiring vouchers for travel expenses; d) Shelton, Ernst & Ernst's lead auditor, wrote off $100.00 on an account receivable owed by himself.

5. Approximately $100,000.00 was entered as "estimated unentered liabilities," an account that was not entered in 1969, violating the requirement of accounting procedures "consistently maintained."

In all, approximately $4,400,000.00 worth of write-downs were entered on the books. Benton-Spry contends that when the conveyance of the farm, the down payment of $1,000,000.00, the note due from Mitchell, and the write-downs are added, it owes Mitchell nothing further.

The jury heard the testimony concerning the audit adjustments. There were sufficient questions of fact for the trial court to submit the issue of gross mistake. The jury decided the audit was grossly in error. Whether there is *any* evidence of an issue is a question for the judge. Whether there is sufficient evidence for a positive finding on the issue is a question for the jury. *Wittkowsky v. Wasson*, 71 N.C. 451 (1874). The trial judge improperly granted judgment N.O.V. on this issue.

CONCLUSION

A substantial portion of the sales agreement has been closed. The stocks have been transferred and notes with guidelines for adjustments have been delivered. A deed to the farm has been delivered and accepted. The question of Mitchell's fees as a consultant is not resolved.

Having found no support for the trial court's entry of an order appointing itself as a court of equity to determine whether and how much money is due Mitchell, we strike the court's order. We affirm the trial court's entry of judgment N.O.V. on the conflict of interest claim. We reverse the trial court's entry of judgment N.O.V. on the jury's rejection of the audit for misfeasance, malfeasance or gross mistake and reinstate the jury verdict on

this issue. We remand the case to the trial court for a new jury trial which will include the following issues:

1. What amount, if any, is the defendant entitled to recover under the note for $1,116,413.00 dated 13 January 1972 and given in payment for the two affiliates and their subsidiaries deleted from the original Agreement?

2. What amount, if any, is the defendant entitled to recover under the note for $7,228,919.00 dated 8 February 1971 for the balance of the companies minus the $1,000,000.00 down payment?

3. What amount, if any, is the defendant entitled to recover for consulting fees under the contract?

4. What amount, if any, does Mitchell owe Benton-Spry under the contract?

Both parties raise other issues that we do not address. They are moot or immaterial in light of our decision.

Affirmed in part.

Reversed in part and remanded.

Chief Judge VAUGHN and Judge BECTON concur.

STATE OF NORTH CAROLINA v. WESLEY IRVEN JONES, JR.

8225SC1124

(Filed 2 August 1983)

1. Searches and Seizures § 9— search of briefcase in bus following accident—denial of motion to suppress evidence of contents proper

In a prosecution for manslaughter, driving under the influence of intoxicating liquor, and other traffic violations, the trial court did not err in failing to suppress evidence of bottles containing alcohol which were found in a briefcase next to defendant bus driver's seat. Former G.S. 18A-21 which pertained to searches of vehicles used for illegal transportation of alcohol was inapplicable to the facts of the case, and since the purpose of the search of the briefcase was to determine the owner of the property so that the officer could safeguard its contents, the search was not unreasonable under the Fourth Amendment.

2. Criminal Law § 95.2— testimony concerning speed limit signs—limiting instruction—no prejudicial error

In a prosecution for manslaughter, driving under the influence, and other traffic violations where defendant had been found not guilty of speeding in district court, the trial court did not err in denying defendant's motion to strike testimony concerning speed limit signs posted around the intersection of the accident. The witness made no reference as to whether defendant was speeding; he merely said that there were two speed limit signs on the road, and the trial court instructed the jury not to consider the testimony about the speed limit signs.

3. Automobiles and Other Vehicles § 126; Constitutional Law § 33— driving under the influence—evidence of refusal to take breathalyzer test admissible

The admission into evidence of defendant's refusal to take a breathalyzer test does not violate his Fifth Amendment right against self-incrimination and is not unconstitutional under North Carolina law. G.S. 20-139.1(f).

4. Criminal Law § 166— failure to present argument—failure to offer proof—assignments of error overruled

Two of defendant's assignments of error were overruled where defendant failed to make an offer of proof as to what excluded evidence would have been, and where defendant did not present an argument following his assignment of error as required by Rule 28(b)(5) of the Rules of Appellate Procedure.

5. Automobiles and Other Vehicles § 126.3; Criminal Law § 86.1— testimony concerning blood test—impeachment of defendant

Defendant's argument that the evidence that a blood test was made was inadmissible because of the lapse of time between the accident and test was without merit in that the evidence that defendant knew the test was made was offered to contradict his earlier statement that he did not know whether he had had a blood test at the hospital.

6. Criminal Law § 86.2— testimony of defendant's driving record properly admitted

In a prosecution for manslaughter, driving under the influence and other traffic related crimes, the trial court did not err in allowing testimony of defendant's driving record over the past 20 years. Once defendant chose to testify, cross-examination about prior convictions was admissible for impeachment purposes, and was relevant to show defendant's lack of credibility.

7. Automobiles and Other Vehicles § 114— manslaughter—instructions proper

In a prosecution for manslaughter, driving under the influence and other related traffic offenses, the trial court clearly instructed the jury that if they found either that defendant failed to keep a proper lookout, failed to stop at the stop sign, or drove under the influence, then the next thing they would have to find beyond a reasonable doubt is that defendant's violation was culpable negligence. Defendant's contention that the judge instructed the jury that defendant would be guilty of manslaughter if he merely failed to keep a proper lookout was without merit.

8. Criminal Law § 100— private prosecutor

Defendant was not denied an impartial prosecution when a private prosecutor appeared with the district attorney. Although the assistant district attorney did not question every witness, he conducted eight direct or cross-examinations and presented a closing argument, and there was no evidence that he did not remain in charge of the prosecution as required by G.S. 7A-61. Further, defendant failed to produce any evidence that he was denied the opportunity to plea bargain.

APPEAL by defendant from *Lupton, Judge.* Judgments entered 29 May 1982 in Superior Court, BURKE County. Heard in the Court of Appeals 13 April 1983.

Defendant, a Trailways bus driver, was charged with driving under the influence of intoxicating liquor in violation of G.S. 20-138; transporting an open container of liquor in violation of G.S. 18A-26 [repealed by Session Laws 1981, c. 412, s. 1, effective 1 January 1982, and replaced by G.S. 18B-401(a)]; failure to stop at a stop sign in violation of G.S. 20-158(b); and driving at a speed greater than reasonable and prudent under existing conditions in violation of G.S. 20-141(a). Defendant was also indicted for manslaughter. At trial for the misdemeanor offenses in District Court, defendant was found guilty of driving under the influence, failing to stop at a stop sign, and transporting an open container of liquor. Prior to trial in Superior Court, the prosecutor dismissed the charge of transporting an open container of liquor. The remaining charges were consolidated for trial.

At trial, defendant's attorney made the following statement:

> If the Court please, on behalf of the defendant we would like to stipulate that on December 3, 1981, the occasion in question, that the defendant was driving a Trailways bus in a northly [sic] direction on Bethel Road, or Rural Paved 1704, and that at the intersection with the Drexel Road, Rural Paved 1712, which runs east and west, that the front of the bus struck the right side of the Chevrolet car within that intersection, and as the car was proceeding in an easterly direction, and that as the proximate result of that collision the infant Jodie Page Jordan was killed.

The State's evidence tended to show the following. Highway Patrolman Rector, who investigated the accident, said there was a stop sign on Bethel Road at the intersection with Drexel Road.

South of the stop sign was a "stop ahead" sign. There were also two speed limit signs south of the intersection. Rector said defendant told him the accident was his fault and he had run the stop sign. Rector took defendant aside, concluded that he smelled strongly of alcohol, read him his Miranda rights, informed him that he was under arrest for driving under the influence, and asked him to take a breathalyzer test. According to Rector, defendant's eyes were glassy and red, his face was red, and he appeared to be unsure of his steps.

At the Highway Patrol Station, Officer Dickey advised defendant of his rights pertaining to the breathalyzer test. Although defendant originally agreed to take the test, he changed his mind after he made a telephone call to the Trailways office. Rector was of the opinion that defendant had consumed sufficient alcohol to appreciably impair both his mental and physical faculties. Rector said defendant told him several times that he was afraid to take the breathalyzer test because he had several drinks that morning between 8:00 and 9:00 a.m.

Highway Patrolman Dickey testified that he observed defendant for about thirty minutes at the Highway Patrol Station. He said defendant had a strong odor of alcohol coming from his mouth, his face was flushed, his eyes were glassy, and, in his opinion, defendant had consumed enough alcohol to substantially impair his physical or mental faculties.

Highway Patrolman Jones testified that while at the scene of the accident assisting Trooper Rector, he smelled alcohol on defendant's breath. A man from the Trailways terminal told Jones not to let anyone take luggage from the bus without providing proper identification. After releasing a duffle bag to a passenger, Jones saw a brown briefcase by the driver's seat. It had no identification on the outside. He opened it and found three liquor bottles, a thermos, papers from Trailways bearing defendant's name, a ticket puncher, and charts. He said the bottles were two fifths and one pint. One of the fifths was half full. the other fifth and the pint were three-fourths full. After he found the bottles, he radioed Rector and told him what he had found. Later, when Jones gave defendant back his bag, minus the liquor, defendant said only one of the bottles belonged to him. He said he

had taken the other two from passengers to hold until they got off the bus.

Rector was recalled to the witness stand and testified that he put three vodka bottles in the evidence locker at the Highway Patrol Station, but one of the bottles was inadvertently destroyed when the locker was cleaned out.

Defendant's evidence tended to show the following. Ron Harris, an insurance adjuster, arrived at the scene of the accident at about 5:00 p.m. on 3 December 1981. He was accompanied by his associate, Russell Kerfoot. When they arrived at the scene, Trooper Jones told them what had happened. Kerfoot called Harris' attention to a vodka bottle on the steps of the bus. The bottle was in a bag. Harris took a picture of the bottle and the ticket. Kerfoot told Trooper Jones about the bottle.

Defendant testified that when he was at the Morganton bus station he saw two passengers drinking liquor. He confiscated their bottles and put them in his bag. The Morganton bus station was new, and defendant had to ask a taxi driver for directions to Interstate 40. He followed the directions, looking for a sign to Interstate 40. He said he saw neither the "stop ahead" sign nor the stop sign at the intersection of Bethel Road and Drexel Road. He did not see the Chevrolet until the collision. He said that at first he told Rector he would take the breathalyzer test. Defendant said his face was red because of his high blood pressure and because he was tense and nervous due to the accident. He had gout in his left foot which affected the way he walked. At the Highway Patrol Station, Trooper Dickey read defendant his rights. Rector asked defendant if he would make a statement. Defendant said he would first have to call Mr. Polk, the Trailways dispatcher. Defendant said Polk told him not to say anything or do anything. Defendant refused to make a statement or take the breathalyzer test. He denied drinking any liquor that day, but said the night before he drank about half a pint. His last drink was between 8:00 and 9:00 p.m. He went to the hospital with a Trailways supervisor, but he did not know if he had a blood test to determine his blood alcohol level. He admitted he was guilty of running the stop sign and killing the child. Defendant said he had driven over two million miles, and was convicted of fourteen traffic violations since 1956.

Stan Polk, the Trailways dispatcher, said he told defendant not to answer any questions or take any tests when defendant called him from the Highway Patrol Station.

Defendant's doctor testified that he treated defendant for tendonitis and gout. He said defendant's blood pressure was in the normal range but could have been elevated due to a stressful situation such as the accident. The sudden elevation in blood pressure could cause his complexion to first pale, and then redden.

Pamela Jo Williams, a passenger on the bus, sat directly behind defendant. She said he drove in a normal manner and did not smell of alcohol. She was looking for a sign to Interstate 40 and did not see the stop sign until they were almost at the intersection. She said that in her opinion defendant was not under the influence of alcohol.

On rebuttal, the State presented the following evidence. Donna Pearson, a registered nurse at Grace Hospital in Morganton, said she was on duty on 3 December 1981 when Mr. Williams, a Trailways transportation supervisor, in the presence of defendant, asked her to withdraw blood from defendant to test the blood alcohol level. Pearson said defendant agreed to have the blood alcohol drawn.

The jury found defendant guilty of failing to stop for a stop sign, driving under the influence, and involuntary manslaughter. He received a three-year sentence, the presumptive term, for the manslaughter conviction. As to the misdemeanors, he received a six-month sentence for driving under the influence, and sixty days for failing to stop for a stop sign, both of which were to run concurrently with the manslaughter sentence.

Attorney General Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Myers, Ray and Myers, by Charles T. Myers and John F. Ray, for defendant appellant.

VAUGHN, Chief Judge.

At the outset, we note that defendant's brief does not contain a non-argumentative summary of the material facts as required

by Rule 28(b)(3), Rules of Appellate Procedure. Failure to comply with this rule slows our work by requiring us to read through the entire lengthy transcript to determine the facts of the case. We have, however, elected to consider the case on its merits.

[1] Defendant's first assignment of error is that the trial court erred in denying his motion to suppress the evidence of the bottles found in his briefcase. Defendant bases his argument on appeal solely on the following sentence from G.S. 18A-21(c) [repealed by Session Laws 1981, c. 412, s. 1, effective 1 January 1982]:

> Provided, that nothing in this section shall be construed to authorize any officer to search any vehicle or other conveyance or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor . . . in the vehicle or baggage.

This sentence in G.S. 18A-21, however, pertains only to searches of vehicles used for illegal transportation of alcohol. Obviously, defendant's reliance on G.S. 18A-21 is mistaken because at trial, in Superior Court, he was charged with manslaughter, failure to stop at a stop sign, and driving under the influence, not illegal transportation of alcohol. Under these circumstances, G.S. 18A-21 is inapplicable.

Although defendant's present argument concerning his motion to suppress is based solely on G.S. 18A-21, at trial he argued that the search of his briefcase was unconstitutional. The trial court properly rejected this argument. Officer Jones testified that he had been told by a Trailways employee not to allow anyone to remove baggage without providing identification. After identifying and releasing one bag, Jones picked up an untagged and unmarked briefcase lying beside defendant's seat and opened it. In the briefcase he found three liquor bottles and defendant's identification. The State argues that the warrantless search was not unconstitutional because it qualified as an inventory search, permitted under *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed. 2d 1000, 96 S.Ct. 3092 (1976). *Opperman*, however, does not support the State's argument. *Opperman* applies only to the situation where a vehicle is impounded by the police, and the police routinely inventory and secure the contents of the vehicle. This is done for the protection of the owner's property, to protect the

police from claims or disputes over stolen property, and to protect the police from danger. An inventory, pursuant to standard police procedures, is not unreasonable under the Fourth Amendment.

The situation in the instant case is different from *Opperman* because the vehicle was not impounded and its contents were not inventoried. It is, however, analogous to the situation in *State v. Francum*, 39 N.C. App. 429, 250 S.E. 2d 705 (1979). In *Francum*, defendant had wrecked his car, and after he was taken to the hospital, a State trooper noticed a paper bag lying beside the upturned car. The officer opened the bag and examined the contents, later determined to be hashish, barbiturates, and LSD. The Court held that although the officer's inspection of the bag's contents did not fall within the inventory search exception set forth in *Opperman*, the same considerations justifying an inventorying of property in an automobile that has properly been taken into police custody are applicable. The primary justification for the search is to safeguard the individual's property from loss or theft. The Court held that it was reasonable for the officer to look inside the paper bag to determine whether there was anything valuable belonging to the owner that should be held for safekeeping. The paper bag may have been worthless garbage which someone threw from a passing car, or it may have belonged to the owner of the wrecked car. It was impossible to tell from merely looking at the outside of the bag, so, under those circumstances the search was found to be reasonable. The search was not based upon probable cause, it was to identify the owner of the property so that it could be protected from theft. Had it been a briefcase or suitcase it would have been clear that it was valuable, had fallen out of the car, and belonged to the owner of the car, and a warrantless search would have been unjustifiable at that time. In the instant case, the wrecked vehicle was a bus with many passengers, not a private car. In *Francum*, the question the officer faced was whether the bag belonged to the owner of the car. In the instant case the question was which passenger owned the briefcase. Although defendant contends that the briefcase was beside his seat and obviously belonged to the driver, it is quite likely the officer reasoned that in the confusion of the accident a passenger's briefcase could have ended up beside the driver's seat. The purpose of the officer's search was analogous to the pur-

pose in *Francum*: to determine the owner of the property so the officer could safeguard its contents. Under these circumstances, the search was not unreasonable under the Fourth Amendment.

[2] Defendant's second assignment of error is that the trial court erred in allowing evidence of speed limit signs because defendant had been found not guilty of speeding in district court. We do not agree. When Trooper Rector was describing the intersection where the accident occurred, he said "There are two speed limit signs on this particular road. After you turn off on [Route] 18 there is the first sign which is approximately a hundred feet onto Bethel Road. After the first sign there is another thirty-five miles an hour speed sign, and it is approximately five tenths of a mile from N.C. 18." Defendant's subsequent motion to strike was overruled, but the court instructed the jury not to consider the testimony about the speed limit signs. Since the judge gave the jury a limiting instruction, defendant was not prejudiced by the denial of his motion to strike. In general, the jury is presumed to have heeded a limiting instruction, whether the instruction has removed the prejudice depends on the nature of the evidence and the circumstances of the case. *State v. Gregory*, 37 N.C. App. 693, 247 S.E. 2d 19 (1978). Here, Rector made no reference as to whether defendant was speeding; he merely said there were two speed limit signs on the road. There was no error prejudicial to defendant.

[3] Defendant's third assignment of error is that the trial court erred in admitting evidence of his refusal to take the breathalyzer test. Evidence of refusal to take the breathalyzer test is admissible as provided in G.S. 20-139.1(f):

> If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of alcoholic beverages.

The admission into evidence of defendant's refusal to take a breathalyzer test does not violate his Fifth Amendment right against self-incrimination, *South Dakota v. Neville*, 459 U.S. ---, 74 L.Ed. 2d 748, 103 S.Ct. 916 (1983), and is not unconstitutional under North Carolina law. *State v. Paschal*, 253 N.C. 795, 117 S.E.

2d 749 (1961); *State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976). "The established rule in this jurisdiction is that '[t]he scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, *i.e.*, the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person.'" *State v. Paschal*, 253 N.C. at 797, 117 S.E. 2d at 750-751, *quoting State v. Rogers*, 233 N.C. 390, 399, 64 S.E. 2d 572, 578-579 (1951).

[4] Defendant's fourth assignment of error is that the trial court erred in refusing to permit Trooper Rector to testify as to whether defendant's walk could have been due to his bruised hip. This assignment of error is overruled because defendant failed to make an offer of proof as to what the excluded evidence would have been. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). Moreover, it is unlikely that Rector was more qualified than the jury to reach that conclusion.

Defendant's fifth assignment of error is that the trial court erred in failing to grant a motion for mistrial or to strike the testimony about the missing liquor bottle. This assignment of error is overruled because defendant did not present an argument following his assignment of error as required by Rule 28(b)(5), Rules of Appellate Procedure, instead he merely listed two pages of quotes from various cases. Moreover, the testimony that the Highway Patrol lost the bottle probably hurt the State more than defendant, since it may have undermined the credibility of the State's witnesses.

[5] Defendant's sixth assignment of error is that the trial court erred in allowing testimony about blood taken from defendant six to seven hours after the accident. The uncontradicted evidence was that the accident occurred at three o'clock, and defendant's blood sample was taken at about seven thirty, only four and a half hours later. The results of the test were not introduced into evidence. Nevertheless, defendant argues that the evidence that the test was made was inadmissible because of the lapse of time between the accident and the test. This argument is without merit. Perhaps the results of the test would have minimal probative value since the test was made several hours after the accident. However, the evidence that defendant knew the test was

made was offered to contradict his earlier statement that he did not know whether he had a blood test at the hospital. Such evidence was, therefore, admissible to impeach the defendant. *See* 1 Brandis on North Carolina Evidence § 47 (1982).

[6] Defendant's seventh assignment of error is that the trial court erred in allowing testimony of defendant's driving record over the past twenty years. When a defendant chooses to testify he may be cross-examined about any prior convictions, subject to the discretion of the trial judge. *State v. Atkinson*, 39 N.C. App. 575, 251 S.E. 2d 677 (1979). The trial judge did not abuse his discretion in allowing the cross-examination about defendant's driving record. The evidence of defendant's traffic violations tended to show that he pled guilty or was convicted of fourteen traffic offenses since 1956. Eleven of the violations occurred after defendant began working as a bus driver, although he testified that two or three were received when he was driving his personal car. This evidence, of course, is admissible for impeachment, and is relevant to show defendant's lack of credibility. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death penalty vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976); 1 Brandis on North Carolina Evidence § 112 (1982).

Defendant's eighth assignment of error is that the trial court erred in denying his motion to dismiss. A motion to dismiss requires the evidence to be considered in the light most favorable to the State, and, if there is substantial evidence, whether direct or circumstantial, to support a finding that the offense charged has been committed by defendant, the motion should be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Defendant does not argue that the evidence did not support a finding that he was driving under the influence; instead, he contends that the State's evidence is not incompatible with his defense. The record is replete with evidence which, when viewed in the light most favorable to the State, supports the driving under the influence charge, and, as mentioned above, defendant admitted he ran the stop sign, and that the victim's death was proximately caused by the collision. Clearly the trial judge did not err in denying defendant's motion to dismiss.

[7] Defendant's ninth assignment of error is that the trial court erred in charging the jury on manslaughter. Although given an

opportunity to object out of the presence of the jury, defendant failed to object and cannot assign error to any portion of the jury charge. Rule 10(b)(2), Rules of Appellate Procedure. Moreover, defendant's argument, that the court instructed the jury that defendant could be found guilty of manslaughter if they found that he failed to keep a reasonable lookout, ignores the court's full set of instructions. The court clearly instructed the jury that if they found either that defendant failed to keep a proper lookout, failed to stop at the stop sign, or drove while under the influence, then the next thing they would have to find beyond a reasonable doubt is that defendant's violation was culpable negligence. The trial judge twice instructed the jury as follows:

> Now, members of the jury, this next thing that you must find is that the defendant's violation, if you find that he did violate one or more of those 3 motor vehicle laws, that is, the rule that he is required to keep a reasonable lookout and the rule that he is required to stop for the stop sign and the rule and law that he shall not drive on the highway while under the influence of intoxicating liquor, if you should find that he did violate one of those laws or more, your next thing to determine and the next thing which you must find beyond a reasonable doubt is that the violation by the defendant constituted culpable negligence.
>
> As I told you before, you must find more than just a violation to constitute culpable negligence; and in determining whether a violation of a motor vehicle law constitutes culpable negligence the violation must be considered by you along with all the facts and circumstances existing at that time relating to such violation.
>
> Now, a violation of a safety—a motor vehicle safety law—and I want you to carefully listen to what I have to say—a violation of a motor vehicle safety law which results in injury or death will constitute culpable negligence if the violation is wilful, wanton or intentional; but where there is an unintentional or inadvertent violation of the motor vehicle law such violation, standing alone, does not constitute culpable negligence. I have told you that several times.
>
> The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable conse-

quences of a dangerous nature when tested by the rule of reasonable foresight amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others in order to constitute culpable negligence.

Defendant's contention that the judge instructed the jury that defendant would be guilty of manslaughter if he merely failed to keep a proper lookout is without merit.

[8] Defendant's tenth assignment of error is that the trial court erred in denying his motion for appropriate relief because he was denied an impartial prosecution and an unfettered right to plea bargain. He first contends that the private prosecutors exercised complete control over the case. The record, however, does not support this contention. It has long been the rule that the trial judge has discretion to permit private prosecutors to appear with the District Attorney. *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). Although the Assistant District Attorney did not question every witness, he conducted eight direct or cross-examinations and presented a closing argument. There is no evidence that he did not remain in charge of the prosecution as required by G.S. 7A-61. In *State v. Page*, 22 N.C. App. 435, 206 S.E. 2d 771, *cert. denied*, 285 N.C. 763, 209 S.E. 2d 287 (1974), the private prosecutor conducted every examination of the State's witnesses, every cross-examination of defendant's witnesses, and made the only closing argument. The Court found no error, holding that absent a showing to the contrary the Court must assume that the solicitor (*i.e.*, the District Attorney) remained in charge throughout the trial. *See also State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978) (the record disclosed no participation by the solicitor in the trial, although he participated in the sentencing hearing; the Court found no error).

As for defendant's contention that he was denied an opportunity to plea bargain, the only evidence in the record on this point is a letter from Mr. Byrd, one of the private prosecutors, to defendant's counsel in which he said he could not accept the plea bargain but he would discuss the matter with the Assistant District Attorney. This letter does not tend to show that defendant was denied an opportunity to plea bargain, it merely shows that the private prosecutor could not accept the plea. There is no evidence of any direct communication between defendant and the

Assistant District Attorney nor any evidence that such communication was frustrated by the private prosecutors. Defendant has simply failed to produce any evidence that he was denied the opportunity to plea bargain.

We have carefully reviewed defendant's assignments of error and find

No error.

Judges HEDRICK and ARNOLD concur.

NORTHERN NATIONAL LIFE INSURANCE COMPANY v. LACY J. MILLER MACHINE COMPANY, INC.

No. 8222SC919

(Filed 2 August 1983)

Insurance § 19.1— life insurance—misrepresentations in application by insurance broker—estoppel of insurer

Plaintiff insurer was estopped to assert that a life insurance policy was void because of false statements in the application that the insured was an active and full-time employee of the corporate beneficiary at the time the policy became effective where the evidence supported the jury's findings that the false statements were inserted in the application by an insurance broker without the actual or implied knowledge of defendant or the insured and that the broker "solicited" the insurance application and was thus an agent of plaintiff insurer pursuant to G.S. 58-197.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 19 March 1982 in DAVIDSON County Superior Court. Heard in the Court of Appeals 9 June 1983.

Plaintiff, Northern National Life Insurance Company, brought this action seeking to cancel a $100,000.00 policy of life insurance issued by it on the life of Lacy J. Miller wherein defendant, Lacy J. Miller Machine Company, Inc., was to pay the premiums and was the named beneficiary. Plaintiff asserted as grounds for the requested relief that the application for the policy contained false statements of facts material to the status of Lacy

J. Miller, the insured, and that had the true facts requested on the application been disclosed, the policy would not have been issued.

Defendant filed its answer and a counterclaim seeking enforcement of the policy. Defendant alleged that Roger C. Brooks, the plaintiff's agent who sold the policy, was aware of the true facts pertinent to the application for insurance, that plaintiff knew or should have known the true facts regarding the status of the insured and that plaintiff is estopped to assert that the false statements in the application are sufficiently material as to entitle plaintiff to rescind the contract.

Plaintiff filed a reply, denying defendant's essential allegations. After the pleadings were joined, plaintiff's motion for summary judgment was denied.

The case was tried before a jury and the evidence tended to show, in pertinent part, the following sequence of events.

In March of 1979, James T. Donley and Joseph T. Buie, minority shareholders, directors and officers in defendant corporation, informed Roger C. Brooks, an insurance broker affiliated with the Equitable Life Insurance Association and who had prior dealings with defendant corporation, that defendant was interested in obtaining insurance on the life of its corporate president, Miller.

In September of 1979, Brooks interviewed Miller and learned, *inter alia*, that he had heart trouble. Brooks obtained from Miller an application to Equitable for a $100,000.00 life insurance policy. Equitable declined to issue the requested policy. In September, Brooks succeeded in placing a group insurance policy for defendant company with Equitable. Brooks continued to look for additional insurance on the life of Miller.

In December of 1979 or early January of 1980, Brooks discovered that plaintiff had begun marketing a new multiple acceptance group plan wherein an employer could obtain insurance on the lives of ten of its important employees without the need for a physical examination of the insured. Brooks contacted either Buie or Donley, or both of them, and informed them about the plan. They told Brooks to find out more about the plan.

In December of 1979 or early January of 1980, Brooks learned that plaintiff's eligibility requirements included that the

insured not be known to be terminally ill and that the insured be actively engaged in the full-time pursuit of the duties of his employment.

Brooks knew that Miller was not at defendant's corporate headquarters on a full-time basis. He learned from a general agent of plaintiff that plaintiff would issue a policy as long as the insured was currently active in a decision-making capacity. Donley expressed concern to Brooks that Miller's health may cause plaintiff to refuse to insure him. Brooks responded that he would turn in the application and find out if plaintiff would accept the risk.

In late January or early February of 1980, Brooks obtained application forms from plaintiff and delivered them to an attorney for defendant. The application for Miller was returned to Brooks bearing the signature of Lacy J. Miller, but otherwise blank. Brooks filled out the Miller application. He supplied the requested information based on his knowledge from "prior dealings" with the company and his "personal knowledge, the best as [he, Brooks] knew." Brooks testified that in supplying the information requested on the application he relied upon (1) the information he had received from Miller in September when he interviewed Miller regarding the application to Equitable, (2) his conversations with Buie and Donley prior to mid-January and (3) information from corporate records or elsewhere.

The Miller application was dated 5 February 1980 and it was countersigned by Brooks as "licensed resident agent." The application, as filled in, stated that Miller was the corporate president, that he had suffered a heart attack in 1977, that he had public relations and office duties and that he was currently active and working full time. Brooks forwarded the application, along with a binder payment to plaintiff and plaintiff accepted the risk, issuing a policy effective 5 February 1980. Miller died on 13 May 1980.

As of the date of application, the information contained in the application regarding Miller's occupation, duties and active, full-time status was incorrect. On 22 January, a temporary restraining order was issued by the superior court, enjoining Miller from taking any action relating to the Lacy J. Miller Machine Company because of, *inter alia*, alleged neglect of his corporate duties. The

petition for the T.R.O. was filed by Joseph T. Buie, Jr., James T. Donley and Lacy J. Miller Machine Company as plaintiffs against Lacy J. Miller as defendant. The materials filed for the T.R.O. included sworn statements of Buie and Donley that Miller had been inactive and in neglect of his corporate duties and responsibilities since 1975. On 28 January 1980, Miller was removed as corporate president by the board of directors.

At the close of all the evidence, motions for directed verdict made by both plaintiff and defendant were denied. The jury returned the following special verdict:

1. Was Roger C. Brooks the agent of Lacy J. Miller Machine Co., Inc., in obtaining the insurance policy on the life of Lacy J. Miller?

ANSWER: No

2. Was there a false statement of a material fact in the application for insurance on the life of Lacy J. Miller?

ANSWER: Yes

3. Was Roger C. Brooks the agent of Northern National Life Insurance Company in obtaining the insurance policy on the life of Lacy J. Miller?

ANSWER: Yes

4. As such, did Roger C. Brooks know or have reason to know of a false statement of a material fact in the application for the insurance on the life of Lacy J. Miller?

ANSWER: Yes

5. Was a false statement of material fact inserted in the application by Roger C. Brooks without the actual or implied knowledge of the Lacy J. Miller Machine Co.?

ANSWER: Yes

Plaintiff moved for judgment N.O.V., which motion was denied. From judgment entered on the verdict, awarding defendant the full amount of coverage on the policy, plaintiff appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and John Dusenbury, Jr.; and John T. Manning for plaintiff.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker; and House, Blanco & Osborn, P.A., by Lawrence U. McGee and John S. Harrison, for defendant.

WELLS, Judge.

At the outset, we address plaintiff's contention raised at oral argument of this case that our decision in this case must be dictated by the decision of this Court in *Manhattan Life Insurance Company v. Lacy J. Miller Machine Company, Inc.*, 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983). In *Manhattan*, a case similar to the present case, this Court affirmed the trial court's grant of plaintiff's motion for summary judgment. While we recognize that this case and *Manhattan* involve similar issues, we note that one important factual difference is apparent. In *Manhattan*, the application was signed both by Buie in his capacities as vice-president, secretary and treasurer of the corporate defendant, and by Miller. Moreover, *Manhattan* was a summary judgment case, and the scope of appellate review and questions presented on appeal were necessarily different than in the present case. In *Manhattan*, the Court did not address the issue of agency, as that issue relates to which of the parties in that case furnished the false information contained in the application. We do not believe that the decision in *Manhattan* is controlling on the issue presented in the present appeal.

It is proper to direct a verdict for the party with the burden of proof only if the evidence so clearly establishes the facts in issue that no reasonable inference to the contrary may be drawn. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). It is generally held that a directed verdict for the party with the burden of proof is proper only if the credibility of the movant's evidence is "manifest as a matter of law." *Id.* Situations where the movant's evidence is sufficiently credible include:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

Id. (Cites omitted.)

Plaintiff contends that the insurance policy on the life of Miller was void *ab initio*. "It is well established that an insurance company cannot avoid liability on a life insurance policy on the basis of facts known to it at the time the policy went into effect." *Willetts v. Insurance Corp.*, 45 N.C. App. 424, 263 S.E. 2d 300, *disc. rev. denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980), *citing Cox v. Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936). Of course, the knowledge of or notice to an agent of an insurer is imputed to the insurer itself, absent collusion between the agent and the insured. *Cox v. Assurance Society, supra; Insurance Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923); *Buchanan v. Nationwide Life Insurance Co.*, 54 N.C. App. 263, 283 S.E. 2d 421 (1981). Moreover, an insurance company is deemed by law to have notice of facts that an inquiry pursued with ordinary diligence and understanding would have disclosed. *Gouldin v. Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846 (1958); *Willetts v. Insurance Corp., supra.*

A corollary to the above rules, applicable to the present case, is that when the agent of the insurance company answers questions for the applicant on an application for insurance, without the applicant having reason to know what answers the agent is supplying, the insurance company will be equitably estopped to rely on the falsity or inaccuracy supplied by its own agent in any effort to defeat liability on the policy. *See Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429 (1942); *Cato v. Hospital Care Association*, 220 N.C. 479, 17 S.E. 2d 671 (1941); *cf. Sauls v. Charlotte Liberty Mutual Insurance Co.*, 62 N.C. App. 533, 303 S.E. 2d 358 (1983).

It is well established that when the evidence raises a question of whether a misrepresentation in an application for insurance is attributable to the insured or the agent of the insurer

alone, the question must be resolved by the finder of fact. *See Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574 (1960); *Heilig v. Insurance Co., supra; Cox v. Assurance Society, supra; Buchanan v. Nationwide Insurance Co., supra.*

Applying these principles to the evidence in the present case, it becomes clear that a threshold issue in this case is whether there was sufficient evidence to submit to the jury the question of whether Brooks was an agent of plaintiff insurance company. Plaintiff, in its brief, concedes that the dispositive question presented in this appeal relates to who must bear responsibility for the false answers in Miller's application. It was for the jury to decide whether Brooks was an agent of plaintiff or defendant and whether defendant had either actual or implied knowledge of the false statements in the application, and we affirm the judgment of the trial court.

G.S. 58-197 provides that

> A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured.

The statute thus establishes a conclusive presumption of an agency relationship between the agent and the insurance company once "solicitation" on the part of the agent is found.

The word "solicit" is not defined in the definition section of Chapter 58 of the General Statutes; nor does the term appear to have been authoritatively construed in the reported decisions of the appellate courts of this state. Its meaning must be discerned, therefore, by application of fundamental principles of statutory construction.

Two well-settled principles of statutory construction in this state are that the words in a statute are to be construed so as to further the intent of the legislature, *Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977), and that absent a special or technical definition or other clear indication to the contrary, words in a statute must be given their ordinary meaning. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980). Generally the best indicia of legislative

intent are: the spirit, language and objectives of the act. *Savings & Loan League v. Credit Union Commission*, 302 N.C. 458, 276 S.E. 2d 404 (1981).

Clearly, G.S. 58-197 was enacted by the General Assembly as a protective measure for consumers of insurance services. Its import is obviously to expand the class of persons capable of binding insurers to enforceable insurance obligations, and to prevent insurers who obtain consideration from persons solicited on their behalf, from relying on the purportedly ultra vires actions of their agents to deny liability to beneficiaries.

Webster's Third New International Dictionary of the English Language, Unabridged 2169 (1976), in pertinent part, defines "solicit" as ". . . to approach with a request or plea (as in selling or begging) . . . to seek eagerly or actively . . . ."

The evidence in the present case tended to show that Brooks was in the business of selling insurance; that he frequented the corporate headquarters of defendant for the purpose of selling insurance; that, pursuant to a request, he found out about plaintiff's plan and suggested to defendant that the plan may meet its needs; that he delivered to defendant application forms and, eventually, issued insurance policies for plaintiff; that he forwarded the applications and binder payments from defendant to plaintiff; and that he was paid a commission by plaintiff on the policies he sold to defendant. This evidence was sufficient to permit the jury to find that Brooks solicited the application of the insured and was, therefore, an agent of plaintiff and not of defendant.

We note that there was abundant evidence which would have permitted, but did not require, the jury to find that defendant knew or should have known that Brooks supplied false information to plaintiff. The jury's verdict, in light of the jury instructions given, clearly indicates that the jury rejected this evidence favoring plaintiff and found that the misrepresentations were those of Brooks, acting as agent of plaintiff. Upon the verdict of the jury, plaintiff is estopped to assert the fraud of Brooks in its effort to defeat defendant's recovery under the insurance policy.

No error.

Judge PHILLIPS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

While I do not necessarily agree with all that was said or unsaid in *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983), I feel we are bound by the results in that case especially since our Supreme Court denied the petition to review this court's decision in that case.

WILKES COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.* SHIRLEY WHITAKER NATIONS AND BETTY WHITAKER, PLAINTIFF v. JUNIOR GENTRY, DEFENDANT

No. 8223DC508

(Filed 2 August 1983)

Bastards § 1— failure to support illegitimate child—prior criminal action establishing paternity and ordering lump sum settlement

Summary judgment was improperly entered for defendant and should have been entered for the plaintiff in an action to establish the paternity of a minor child, to recover for past public assistance paid for the child's support, and to order the defendant to pay continuing child support. A 1974 guilty plea by the defendant to a criminal charge of nonsupport of an illegitimate child, and an order to pay a lump sum plus medical expenses to the child's mother for the child's benefit, did not bar the subsequent civil action by a county social services department for child support. G.S. 49-7; G.S. 49-2; G.S. 110-135; G.S. 110-129(3); G.S. 110-137; G.S. 49-15; and G.S. 50-13.4(b) and (c).

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Osborne, Judge.* Judgment entered 15 March 1982 in District Court, WILKES County. Heard in the Court of Appeals 17 March 1983.

This case is an attempt to establish the paternity of a minor child, to recover for past public assistance paid for the child's support, and to order the defendant to pay continuing child support.

The minor child was born on 27 September 1973 to Shirley Darlene Whitaker [now Nations]. Although the defendant denies

paternity, the record contains a certified copy of a guilty plea by him to nonsupport of an illegitmate child on 27 June 1974. That 1974 criminal action, which was initiated by the child's mother, resulted in an order that prayer for judgment be continued on the condition that the defendant pay a lump sum settlement of $2,500 to the mother and the hospital and doctor expenses incident to the child's birth.

An affidavit of the Child Support Enforcement Officer of Wilkes County indicates that the Wilkes County Department of Social Services is paying $127 per month for the support of the minor child and had paid a total of $1,352.50 by 26 February 1982.

The defendant's answer denied paternity and pled the statute of limitations as a bar. Although the defendant offered no evidence, the trial judge granted his motion for summary judgment and denied a similar motion by the plaintiff. From this ruling, the plaintiff appealed.

Paul W. Freeman, Jr. for plaintiff-appellant.

Franklin Smith for defendant-appellee.

ARNOLD, Judge.

The issue here is if a 1974 guilty plea by the defendant to a criminal charge of nonsupport of an illegitmate child, and an order to pay a lump sum plus medical expenses to the child's mother for the child's benefit, is a bar to a subsequent civil action by a county social services department for child support.

Because we find that the trial judge entered summary judgment for the wrong party, we reverse the judgment below. To understand our decision, 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. . . ." 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). "[I]ts purpose is to eliminate formal trials where only questions of law are involved. . . . Where there is no genuine issue as to the facts, the presence of important or

difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. Mortgage Co.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). *See also*, W. Shuford, N.C. Civil Practice and Procedure § 56-7 (2d ed. 1981).

I. *Paternity Question*

The plaintiff argues that the criminal action established that the defendant is the child's father and should estop further litigation on that question. At the same time, it argues that it can still seek support, even though the criminal action required the defendant to pay a lump sum award.

The defendant contends, however, that the plaintiff is estopped from recovering in this civil action on the same issues against him because of the lump sum payment resulting from the criminal judgment.

We first note that the 1974 criminal action determined implicitly that the defendant was the parent of the minor child. The order of judgment specifically states that the lump sum payment was being ordered pursuant to G.S. 49-7. That statute states in relevant part:

> The court before which the matter may be brought *shall* determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order . . . a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings.

(Emphasis added.) An affirmative answer to the paternity question is an indispensable prerequisite to the defendant's conviction under this statute. *Tidwell v. Booker*, 290 N.C. 98, 110, 225 S.E. 2d 816, 823 (1976).

G.S. 49-7 is a part of Article I of Chapter 49. Another portion of that article, G.S. 49-2, states: "Any *parent* who willfully neglects or who refuses to provide adequate support and maintain

his or her illegitimate child shall be guilty of a misdemeanor. . . ." (Emphasis added.) G.S. 49-2 is a criminal statute. *State v. Beasley*, 57 N.C. App. 208, 290 S.E. 2d 730, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 225 (1982).

Thus, the outcome of the case *sub judice* depends on whether the implicit determination of paternity in a prosecution by the State under Article 1 of G.S. 49 when the defendant pled guilty should estop a county social services department from seeking a subsequent determination of paternity and an order to pay child support.

Although it could be argued that the criminal judgment might be entitled to *res judicata* effect in this action because the parties to the two suits were the same, *i.e.*, the State prosecuted the defendant in the criminal action and the State, through its subdivision Wilkes County, brought this action, it is unnecessary for us to make such a holding. Instead, we give collateral estoppel effect to the implicit determination of paternity in the criminal action.

Collateral estoppel should be applied to an issue that was involved, litigated, and judicially determined in the prior action and when the prior judgment was dependent upon determination of the issue. *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E. 2d 799, 806 (1973).

As stated above, the criminal judgment here was dependent on a determination of paternity, although it was not explicitly stated. The collateral estoppel effect of the paternity issue is not affected by the fact that the conviction was based on a guilty plea. *See* 1B Moore's Federal Practice ¶ 0.418[1] (2d ed. 1982); 18 C. Wright, Federal Practice and Procedure § 4474 (1981).

The defendant relies on *Tidwell* and *Smith v. Burden*, 31 N.C. App. 145, 228 S.E. 2d 662 (1976), for the proposition that he can relitigate the paternity issue here. But those cases are distinguishable in two important ways.

First, the defendants there pled not guilty, unlike here, where the defendant pled guilty. Second, the plaintiffs in the civil suits in *Tidwell* and *Smith* were the mothers, not a county, which is a subdivision of the State. These factual differences make *Tidwell* and *Smith* inapplicable in the case *sub judice*.

II. *Past support paid by the plaintiff*

After concluding that the prior determination of paternity should be given collateral estoppel effect, we now must decide if the defendant is liable to the plaintiff for past support.

G.S. 110-135 states in relevant part:

> Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. . . . [A]ny county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section. . . .

The defendant here is a "responsible parent" under G.S. 110-129(3).

By accepting the public assistance, the recipient is deemed to have assigned to the county who gave the assistance the right to any child support owed up to the amount of public assistance. The county is subrogated to the right of the person having custody to recover any payments ordered by the courts of this State. G.S. 110-137. *See Cox v. Cox*, 44 N.C. App. 339, 341, 260 S.E. 2d 812, 813 (1979).

Because the debt for assistance paid by Wilkes County did not arise until after the 1974 criminal judgment, the County is not estopped from seeking repayment of the child support that it paid to the mother. As a result, the defendant father should reimburse the plaintiff Wilkes County for the public assistance that it has rendered up until this point. The plaintiff is subrogated to the mother's right to recover this amount under G.S. 110-137.

III. *Future Child Support*

Finally, the plaintiff in this action seeks an order that would require the defendant to pay future child support. The defendant argues that the prior criminal proceeding bars such a recovery. We disagree.

The criminal proceeding only disposed of the defendant's willful nonsupport of the minor child until the judgment rendered in that 1974 action. He was ordered to pay certain sums of money

as a condition of a prayer for judgment continued. But that judgment and any sums paid pursuant to it did not satisfy his continuing support obligation.

The plaintiff's complaint sought to have the defendant declared to be the minor child's father and a support order under Article 3 of G.S. 49. G.S. 49-15, which is a part of Article 3, states:

> Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the *same*, and may be deteremined and enforced in the *same manner*, as if the child were the *legitimate* child of such father and mother. (Emphasis added.)

An action separate from the one brought under Article 3 of G.S. 49 is not required. As *Tidwell* stated, "Clearly, this statute contemplates that such rights may be determined and enforced in the action brought pursuant to G.S. 49-14. . . ." 290 N.C. at 115, 225 S.E. 2d at 826.

G.S. 50-13.4(b) places the primary liability for the support of a legitimate minor child on both parents. Other circumstances may be considered, including the relative ability of the parties to pay. G.S. 50-13.4(c). These sections should be considered here in determining the defendant's liability for the support of the minor child. G.S. 49-15. *See* R. Lee, N.C. Family Law § 251 (4th ed. 1981).

Because no findings were made below about the child's reasonable needs and the father's ability to pay them, we remand for such findings.

IV. *Summary judgment for the plaintiff*

We note that G.S. 1A-1, Rule 56 provides for summary judgment in favor of the plaintiff in appropriate cases even when the motion was oral, as in this case.

In addition, G.S. 1A-1, Rule 56(d) allows for a partial summary judgment when there is no genuine issue as to a material fact on part of the issues. When this case is returned for a determination of the amount of the child's reasonable needs and the defendant's ability to pay them, the other issues on which we

have entered summary judgment for the plaintiff are deemed established. *See* W. Shuford, *supra*, at § 56-10.

In summary, we hold that summary judgment was improperly entered for the defendant and should have been entered for the plaintiff. But we remand for a finding on the reasonable needs of the minor child and the ability of the defendant to pay them.

Reversed and remanded.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the majority has misapplied the collateral estoppel doctrine; not by ruling that the defendant is estopped to deny that he is the child's father, as the 1974 proceeding established, but by failing to also give effect to the other adjudication made in that proceeding. The same judgment, it seems to me, that estops the defendant on the paternity issue because it recites his plea of guilty to bastardy also estops the State, the mother, and the plaintiff subrogee on the obligation to pay issue, because it recites that the plea was part of a negotiated lump sum settlement made with the State and the child's mother, and approved by the court pursuant to G.S. 49-7. Furthermore, the judgment relied upon by the plaintiff to establish its case also establishes that another court has continuing control over defendant's obligation to the child and has had ever since the judgment was rendered; and that therefore any relief that the plaintiffs are entitled to must be obtained through that court, in that proceeding, if at all.

Though some judges and lawyers take the view that bastardy cases cannot be settled because of the child's right to support during minority, I am of the opinion that any criminal case can be settled through plea bargaining and that the lump sum payment proviso included in G.S. 49-7 was put there by the Legislature for the purpose of facilitating the settlement of disputed bastardy cases. Explicit in the judgment rendered is that extracting nearly $3,000 from the defendant in exchange for

his chance to escape scot-free was in the best interest of the State, the mother and the child; and I see nothing in the judgment to support the belief that the lump sum agreed to and ordered merely discharged defendant's obligations up to that time. On the contrary, it seems to me, the judgment was a final disposition of the defendant's obligation to contribute to the support of the child, *subject only to the power of the court in that case, as the statute expressly permits, to require additional payments of him if and when the circumstances warrant.* Since the Superior Court of Wilkes County, which determined what amount defendant should pay for the support of the child, still has control of the matter, plaintiffs' action in another and subordinate court cannot lie; which is another reason why the judgment below dismissing this case was correct.

JAMES C. HOGAN, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC647

(Filed 2 August 1983)

Master and Servant §§ 68, 77— claim for byssinosis—statute of limitations—res judicata

Plaintiff's claim to recover workers' compensation benefits for byssinosis was barred by the two-year statute of limitations of G.S. 97-58(c) where plaintiff alleged he became disabled on 1 February 1976 and the claim was filed on 13 August 1980. Furthermore, plaintiff's 1980 claim was also barred by *res judicata* where a claim filed by plaintiff on 21 September 1976 was dismissed on the ground that plaintiff's last exposure to cotton dust occurred in 1959 and byssinosis was not considered an occupational disease at that time, and plaintiff failed to appeal the order of dismissal.

Judge EAGLES dissenting.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and Award entered 1 April 1982. Heard in the Court of Appeals 9 May 1983.

Plaintiff filed a "notice of accident to employer" form, as required by G.S. 97-22, on 12 August 1976, claiming he was entitled to workers' compensation benefits because he was disabled by byssinosis. He alleged that his disability began June 1976. He filed a B-1 application for workers' compensation benefits on 21

September 1976. In the application, he stated that his last exposure to cotton dust was in 1959.

On 8 December 1976, Deputy Commissioner Conely informed plaintiff's counsel, by letter, that if plaintiff's last exposure to cotton dust was prior to 1 July 1963 then plaintiff would not be entitled to compensation. On 13 December 1976, defendants filed a motion to dismiss on the ground that plaintiff's alleged disability occurred prior to 1959, and at that time byssinosis was not considered an occupational disease. Plaintiff's counsel authorized Deputy Commissioner Conely to dismiss the claim. Deputy Commissioner Conely granted defendants' motion and dismissed the claim on 4 January 1977.

In July 1980, a Mrs. Marjorie Jones of the Occupational Disease Section of the North Carolina Industrial Commission wrote plaintiff and informed him he could refile his claim. Plaintiff filed a new claim on 13 August 1980. Defendants filed a motion to dismiss on the ground that plaintiff's claim had previously been adjudicated. At the hearing, they moved to dismiss on the grounds that plaintiff did not file his claim within two years after his disability arose. The motions were denied. Deputy Commissioner Rich filed an opinion and award on 12 May 1981 and made the following pertinent findings of fact and conclusions of law:

> 5. In 1976 plaintiff was hospitalized at Duke Medical Center. He came under the care of Dr. Herbert O. Sieker, who diagnosed his condition at that time as chronic obstructive lung disease as a result of byssinosis. In August of 1976 plaintiff filed a claim for Workers' Compensation, alleging byssinosis. On January 4, 1977, by Order of Deputy Commissioner Conely, plaintiff's claim was dismissed on the ground that plaintiff's last injurious exposure to the hazards of byssinosis was prior to 1963, and therefore, under the Workers' Compensation Act, plaintiff had no remedy at law.
>
> 6. In 1980, following enactment by the North Carolina General Assembly of legislation establishing a cause of action for persons whose last injurious exposure to the hazards of byssinosis was prior to 1963, plaintiff filed a second claim under the Workers' Compensation Act alleging the occupational disease byssinosis.
>
> 7. On October 8, 1980, plaintiff was again examined by Herbert O. Sieker, M.D. Dr. Sieker again diagnosed plaintiff's condition as byssinosis. Dr. Sieker further opined that plain-

tiff is permanently disabled for all but the most sedentary type of employment.

8. Plaintiff has the occupational disease byssinosis as a result of exposure to cotton dust in his employment with defendant. As a result of byssinosis, plaintiff is permanently disabled from all but the most sedentary occupations. In view of plaintiff's inability to perform the non-strenuous work at J. P. Stevens, as well as plaintiff's age, level of education and limited work experience, he is totally and permanently disabled from gainful employment.

9. From February 1, 1976, plaintiff was permanently totally disabled as a result of byssinosis.

The above findings of fact and conclusions of law engender the following

CONCLUSIONS OF LAW

1. Plaintiff has contracted the disease byssinosis as a result of exposure to cotton dust. His last injurious exposure was with defendant employer. This disease is compensable under G.S. 97-53(13). *Booker v. Duke Medical Center*, 297 N.C. 458 (1979).

2. Plaintiff is entitled to compensation from defendants for total and permanent disability at the rate of $82.00 per week beginning February 1, 1976, and continuing for life. G.S. 97-29.

3. Plaintiff is entitled to all reasonable and necessary medical treatment for life. G.S. 97-29.

On 1 April 1982, the full Commission affirmed the Deputy Commissioner's opinion and award, amending it by striking out finding of fact No. 6 and conclusion of law No. 2. The Commission inserted a new conclusion of law No. 2: "Plaintiff became disabled on February 1, 1976. The applicable law to determine the compensability of the plaintiff's disability is G.S. 97-53 as revised in 1971. *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980)." In a special concurrence, Commission Chairman Stephenson said he seriously questioned the Industrial Commission's jurisdiction to, in effect, set aside the previous order of Deputy Commissioner

Conely. He concurred in the result "[p]urely on the basis of equity."

Boone, Higgins, Chastain and Cone, by Peter Chastain, for plaintiff appellee.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant appellants.

VAUGHN, Chief Judge.

The sole issue we need address is whether the Industrial Commission had jurisdiction to hear plaintiff's August 1980 claim. The finding of jurisdiction by the Industrial Commission is not conclusive on appeal, and the reviewing court may make its own finding of jurisdictional facts based on the evidence. *See Lucas v. L'il General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976) (the jurisdictional question was whether there was an employer-employee relationship). For the following two reasons, we find that the Industrial Commission did not have jurisdiction to hear the claim.

First, plaintiff's August 1980 claim is barred by the Statute of Limitations. G.S. 97-58(c) bars claims which are not filed "within two years after death, disability, or disablement." Plaintiff alleged he became disabled 1 February 1976, and he filed his claim on 13 August 1980, which is more than two years after his disability.

Our additional reason for determining that the Industrial Commission lacked jurisdiction is that plaintiff's August 1980 claim was barred by *res judicata* because his first claim was dismissed. The essential elements of *res judicata* are: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Nash County Board of Education v. Biltmore*, 640 F. 2d 484, 486 (4th Cir.), *cert. denied*, 102 S.Ct. 359, 70 L.Ed. 2d 188, 454 U.S. 878, *rehearing denied*, 102 S.Ct. 692, 70 L.Ed. 2d 654, 454 U.S. 1117 (1981). *See also King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Teague v. Alexander*, 38 N.C. App. 332, 247 S.E. 2d 775, *review denied*, 296 N.C. 414, 251 S.E. 2d 473 (1978); *Taylor v. Tricounty Electric Membership Corp.*, 17 N.C. App. 143, 193 S.E. 2d 402 (1972).

In general, any dismissal other than a dismissal for lack of jurisdiction, for improper venue, or failure to join a necessary party, operates as an adjudication on the merits. A claim that has been dismissed, and the dismissal unappealed, is barred from being refiled by the doctrine of *res judicata*. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed. 2d 103, 101 S.Ct. 2424 (1981). This principle has been applied in workers' compensation cases in this State. For example, in *West v. J. P. Stevens Co.*, 12 N.C. App. 456, 183 S.E. 2d 876 (1971), plaintiff broke her right leg at home, and claimed she injured her left leg at work. She had phlebitis in both legs. Two hearings were held, and the Commissioner concluded that plaintiff sustained a compensable injury which resulted in phlebitis, and she was temporarily totally disabled. Plaintiff did not appeal, but she later applied for review alleging her condition had changed. The Deputy Commissioner found that her injuries to her right leg did not arise from an industrial accident, but she had permanent partial disability of her left leg, and she was awarded additional compensation. The award was affirmed by the full Commission and by this Court. Plaintiff subsequently applied again for additional compensation on the ground that her condition had changed. She offered testimony that the disability in her right leg had increased, but her left leg was unchanged. The Deputy Commissioner awarded her additional compensation for the left leg. On appeal this Court held that the plaintiff was barred from claiming benefits with respect to her right leg because she had not appealed the previous order which determined she had no compensable injury to her right leg.

In *Smith v. Carolina Footwear, Inc.*, 50 N.C. App. 460, 274 S.E. 2d 386 (1981), the plaintiff, who was struck on her right leg by a shoe rack, filed a claim contending she could not work because of leg and back pain. Plaintiff's claim was denied, and she did not appeal. Three years later, plaintiff moved for a new hearing. A hearing was allowed for the purpose of determining whether plaintiff had experienced a change of condition. The Commission found that plaintiff's disability was not due to a work-related injury and denied the claim. On appeal, this Court noted that plaintiff was not entitled to a hearing *de novo* because she did not appeal the first denial of her claim. Consequently, the only review available was based on a change of condition pursuant to G.S. 97-47.

Plaintiff brings forth several arguments as to why the dismissal of his first claim did not bar the subsequent claim. He first contends that the dismissal was not an adjudication on the merits because it was a dismissal without prejudice. We do not agree. The order, entered 4 January 1977, dismissing the claim did not indicate in any way that it was without prejudice. The order was as follows:

> By letter dated January 28, 1976, counsel for plaintiff advised the Commission that plaintiff's last injurious exposure to the hazards of byssinosis was prior to 1963 and that there appears to be no valid response to the motion propounded by the defendants. Counsel further advised the Commission by telephone on January 3, 1977, that plaintiff does not intend to pursue this claim further and does not object to the Commission's entering an order dismissing this claim.
>
> Only from and after July 1, 1963, did the Workmen's Compensation Act, G.S. 97-53(13), provide compensation for byssinosis and chronic obstructive lung disease caused by exposure to cotton dust. However, even then, the Act provided compensation only in the event that the last exposure to the hazards of byssinosis or chronic obstructive lung disease occurred on or after July 1, 1963. Since plaintiff's last exposure to cotton dust appears to have occurred prior to July 1, 1963, the disease he suffers is not compensable under the Workmen's Compensation Act.
>
> IT IS, THEREFORE, ORDERED that defendants' motion is hereby granted and this matter is DISMISSED.

Plaintiff's argument that the dismissal was without prejudice is based on a letter his attorney wrote the Deputy Commissioner on 6 January 1977, two days after the claim was dismissed, which contained the following sentence: "Mr. Hogan asked me to reemphasize to you that he is willing to allow the dismissal of this case so long as it does not prejudice his rights to initiate a new action should he so desire." Obviously, the dismissal, which was based on defendants' motion to dismiss, could not be interpreted as a voluntary dismissal merely because of a subsequent letter from plaintiff's attorney to the Deputy Commissioner. Moreover, even if the dismissal was without prejudice, the two-year Statute

of Limitations in G.S. 97-58(c) would still bar the subsequent claim.

Plaintiff's next argument is that if Deputy Commissioner Conely's order was a final order he should be granted relief from the order pursuant to G.S. 1A-1, Rule 60(b)(6). Plaintiff contends that Rule 60(b) is applicable to workers' compensation cases because in *Grupen v. Thomasville Furniture Industries*, 28 N.C. App. 119, 220 S.E. 2d 201 (1975), *review denied*, 289 N.C. 297, 222 S.E. 2d 696 (1976), this Court held that a motion for rehearing based on newly discovered evidence pursuant to Rule 60(b)(2) was properly denied when plaintiff failed to move for the rehearing within the one-year limitation provided in Rule 60(b). *Grupen*, however, is not analogous to the instant case. Plaintiff, unlike Grupen, never filed a Rule 60(b) motion. Also, plaintiff is attempting to use Rule 60(b)(6) as a substitute for appellate review, which is improper. *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974).

Plaintiff's next argument is that had Deputy Commissioner Conely not written him a letter advising him that his claim was not compensable he would not have agreed to the dismissal. Although this may be true, as mentioned above, to prevent his claim from being precluded by *res judicata* plaintiff must appeal the dismissal. Deputy Commissioner Conely's reason for advising plaintiff that his claim was not compensable was because his last injurious exposure to the cotton dust was in 1959, and at that time byssinosis was not considered an occupational disease. Three years later, however, in *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979), the Supreme Court held that the law in effect at the time of the claimant's disablement, not necessarily the time of the last injurious exposure, must be applied. Wood filed her claim for compensation on 5 December 1975, claiming her disability began on 12 November 1975, although she contracted byssinosis before 1 July 1958. Wood's claim was denied because byssinosis was not a compensable occupational disease in 1958. In February 1977, the full Commission affirmed, and the Court of Appeals affirmed the full Commission, with one judge dissenting. The Supreme Court reversed the Court of Appeals which had held that a claimant's case originates when the employee "contracts" the disease (i.e. when the employee was last exposed to the hazard), and held that the 1958 version of G.S. 97-53(13) did

not govern the case. The Court reasoned that an injury resulting from an occupational disease is only compensable when it leads to disablement, until that time the employee has no cause of action, and the employer has no liability. The Court held that the current version of G.S. 97-53(13) applies to all claims for disablement where the disability occurs after the effective date of the statute, 1 July 1971.

In the instant case, plaintiff filed his claim in September 1976, almost a year after Wood filed her claim, alleging he became disabled in June 1976. If plaintiff had appealed Deputy Commissioner Conely's order and pursued his claim, he undoubtedly would have had a good chance of prevailing because the principle set forth in *Wood* would have been applied to his case when he reached the Court of Appeals or the Supreme Court. Plaintiff, however, by failing to appeal his original claim, was barred from bringing a new action, and the Industrial Commission did not have jurisdiction to hear the claim.

For the reasons stated above, the order and award of the Industrial Commission is reversed.

Reversed.

Judge HEDRICK concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

To hold, as the majority does, that the August 1980 claim is barred by the statute of limitations is to ignore the intent of the General Assembly in its amendment of G.S. 97-53(13) to create a new cause of action for victims whose last injurious exposure was before 1963. The August 1980 claim was filed well within two years of the effective date of the legislation creating the remedy for victims whose last injurious exposure was pre-1963.

To hold that the claim here is barred by the doctrine of res judicata is to misapply the law. As quoted in the majority opinion, one of the requisites for the application of the doctrine of res judicata is "an identity of the cause of action in both the earlier and later suit." *Nash County Board of Education v. Bilt-*

more Co., 640 F. 2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878, 70 L.Ed. 2d 188, 102 S.Ct. 359, *reh. denied*, 454 U.S. 1117, 70 L.Ed. 2d 654, 102 S.Ct. 692 (1981); *Teague v. Alexander*, 38 N.C. App. 332, 247 S.E. 2d 775 (1978).

Here, there is no identity of cause of action. When the first filing was made, there was no cause of action for injuries sustained by victims whose last injurious exposure was before 1963. Only after legislative action in 1979 was there created a cause of action for such injuries.

Further, to hold that consideration of this cause of action is barred by claimant's failure to appeal from the earlier dismissal is to foster a policy of encouraging feckless appeals. In a time of expanding litigation in the appellate division, there is no justification for a policy that encourages unmeritorious appeals.

RUBY ELIZABETH McCANN v. JAMES WHARTON TRAVIS

No. 829SC877

(Filed 2 August 1983)

Adverse Possession § 7— tenants in common—failure to prove possession for 20 years

Where plaintiff, as tenant in common with defendant, could show adverse possession for 10 years plus a few months at most, the evidence failed to contain facts justifying an award of title to plaintiff by adverse possession since, even under color of title, adverse possession will not ripen against a tenant in common short of 20 years.

APPEAL by defendant from *Jolly, Judge.* Judgment entered 30 January 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 7 June 1983.

Plaintiff Ruby Elizabeth McCann instituted this action to quiet title to 4.16 acres conveyed to her by the heirs of Sabat T. Smith. Defendant James Wharton Travis claims title to the land pursuant to a deed from his father, J. B. Travis. Defendant's grandfather, W. G. Travis, and Sabat Smith were brother and sister. From a judgment finding that plaintiff adversely possessed the disputed land under color of title of 7 years, and that plaintiff was the fee simple owner, defendant appeals.

From stipulations before the referee and from deeds in exhibits, the following facts appear uncontested:

On 16 September 1885, 56.7 acres were conveyed to Benjamin Travis and his son, M. P. Travis. Later, M. P. Travis inherited Benjamin's part and became the common ancestor who owned the whole of the tract of land now in dispute. In 1900 M. P. died and was survived by his wife, Mary Anne Travis, and their five children, Polly Travis, Bennie Travis, W. G. Travis, Sabat Smith and Bettie Williams. By deed dated 18 August 1900, W. G. Travis conveyed his undivided one-fifth interest in his father's land to his mother, Mary Anne Travis. A plat, dated August 1900, and entitled "The Division of the Travis Land," shows 10-5/8 acres allotted to Sabat Smith, and 11 acres each allotted to Bettie Williams, Polly Travis, Bennie Travis and Mary Anne Travis. Bennie and Polly died prior to 1914 without being survived by lineal descendants or spouses. On 7 November 1914, Bettie Williams conveyed her undivided one-third interest in her father's land to her brother, W. G. Travis. W. G. conveyed 5 acres of land to his sister Sabat on 7 April 1917. In the same year Mary Anne Travis died and was survived by her children, W. G. Travis, Bettie Williams and Sabat Smith. On 14 May 1956 W. G. Travis conveyed two-thirds of his interest in his father's property, less the 5 acres previously conveyed to Sabat Smith, to his son, J. B. Travis. Included in the deed's description of this property was the following:

> "W. G. Travis was the son of M. P. Travis and at the death of Mary Anne Travis, the wife of M. P. Travis about 1917, the fifty-five acre tract of land, more or less, formerly owned by M. P. Travis, was inherited by Mrs. Sabat Smith, Mrs. Bettie T. Williams, and W. G. Travis, who employed Thomas Taylor to divide the fifty-five acre tract into three parts. Mrs. Sabat Smith drew the western share, W. G. Travis drew the center share and Bettie Williams the eastern share. W. G. Travis purchased from Bettie Williams her share and later conveyed 5 1/10 acres of his share to Mrs. Sabat Smith. It is the intention of this deed to transfer all right, title and interest now owned by W. G. Travis in the M. P. Travis land located in Dabney Township to the grantees named herein whether or not land is fully described above."

On 17 March 1967 the heirs of Sabat Smith conveyed 26.86 acres to plaintiff, Ruby Elizabeth McCann. The land described in this deed contained the 4.16 acres in dispute. The description also included a note indicating that Sabat Smith adversely possessed the land for more than 25 years prior to her death in 1948. The note referred to the deed and plat regarding 5.10 acres conveyed to Sabat Smith by W. G. Travis. In July 1976 a plat was made and labeled "Division of Travis Land." This plat contained the disputed tract of land labeled as the "James" tract. On 14 September 1976 J. B. Travis conveyed the disputed land to his son James Wharton Travis, the defendant herein.

The referee's report contains the following pertinent findings of fact and conclusions of law:

"12. That the Plaintiff has produced evidence tending to show use and occupation by herself and her predecessors in title during a period beginning not later than 1917, though not necessarily continuously since that time.

13. That the Plaintiff's evidence does not establish by the greater weight of the evidence that the occupation and use of the said disputed tract of land by herself and her predecessors in title has been exclusive and continuous for a period of at least twenty years.

14. That the Plaintiff has held the disputed tract of land under color of title for a period of at least seven years after March 17, 1967.

15. That the Plaintiff has shown, by the greater weight of the evidence, that during the period of seven years or longer during which she has held the disputed tract of land under color of title, her possession has been actual, open, notorious, exclusive, continuous and hostile.

16. That the Plaintiff has established by the greater weight of evidence, that her possession of the disputed tract as characterized above, has extended to a portion, but not all, of the tract in dispute.

17. That the Defendant has not shown use or possession by himself of the disputed property or any part thereof.

WHEREFORE, the undersigned referee has reached the following conclusions of law:

1. That, when claiming title by adverse possession under color of title, a showing that the claimant has adversely held a portion of the disputed premises is sufficient to establish adverse possession as to the whole.

2. That the Plaintiff has established fee simple title to the disputed tract of land through adverse possession under color of title for a period of seven years or more.

3. That any claim of title to the disputed tract of land the Defendant may have or may have had has been extinguished by the adverse possession of the Plaintiff."

Defendant excepted to Findings of Fact #14 through #17 and all the Conclusions of Law, and demanded a jury trial on the following issue: "Has the Plaintiff held the disputed tract of land for a period of time sufficient to grant her title to same under the doctrine of adverse possession?" However, prior to trial, both parties waived their right to a jury trial. After considering the referee's report, the transcript of the hearing before the referee and the exhibits, the trial court adopted the report as its own and adjudged plaintiff to be sole owner in fee simple of the disputed land. Defendant appeals.

Bobby W. Rogers for plaintiff appellee.

Hight, Faulkner, Hight & Fleming by Henry W. Hight, Jr., for defendant appellant.

BRASWELL, Judge.

The case turns upon two basic issues: (1) were the plaintiff and defendant tenants in common in the disputed property, and, if so, (2) did the plaintiff prove adverse possession for 20 years (and not 7 years under color of title)? We hold that the evidence requires an affirmative finding that the parties were tenants in common. We also hold under the evidence that the plaintiff has failed to prove adverse possession for 20 years. The application here of the doctrine of adverse possession for 7 years under color of title to a claim against tenants in common was erroneous. The judgment of the trial court for the plaintiff is reversed.

The uncontroverted evidence shows that plaintiff and defendant owned the disputed tract of land as tenants in common by virtue of each party claiming ownership through a sibling of M. P. Travis. No deed in evidence ever succeeded in destroying the unity of possession by which any tenant in common was in possession for all. A discernible mathematical share of the land always remained as an undivided interest in each chain of title.

Plaintiff obtained her portion of this land from the heirs of Sabat Smith. Sabat was a sibling of M. P. Travis. Defendant obtained his portion of this land from his father, J. B. Travis. J. B. Travis was the son of W. G. Travis, who was a sibling of M. P. Travis, and a brother of Sabat Smith.

As between tenants in common, adverse possession is governed by its own set of rules. *See* Annot., Adverse Possession Between Cotenants, 82 A.L.R. 2d 5, 140 (1962). We hold that the following rules apply, as summarized by this Court in *Young v. Young*, 43 N.C. App. 419, 427, 259 S.E. 2d 348, 352 (1979):

> "Because defendants were tenants in common with the plaintiff, their possession for a period of less than twenty years could not be adverse to the plaintiff, absent an actual ouster of the plaintiff. This is so because a tenant in common has the right to possess the property and is presumed to be holding under his true title. *Winstead v. Woolard*, 223 N.C. 814, 28 S.E. 2d 507 (1944). The possession of a tenant in common is not considered adverse to his cotenant unless he ousts his cotenant 'by some clear, positive, and unequivocal act equivalent to an open denial of his [cotenant's] right.' *Dobbins v. Dobbins*, 141 N.C. 210, 214, 53 S.E. 870, 871 (1906). If the tenant in common gives a deed which purports to convey the whole estate, the grantee therein merely steps into his grantor's shoes. As a result, the deed is not color of title as against the grantor's cotenants, and seven years' possession under the deed will not ripen title to the whole estate in the grantee. *Cox v. Wright*, 218 N.C. 342, 11 S.E. 2d 158 (1940). 'In the absence of *actual ouster*, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years . . . .' *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E. 2d 174, 186 (1964)."

Pursuant to these rules, plaintiff could be adjudged the fee simple owner of the land only if she or her predecessors in title actually ousted defendant or his predecessors or adversely possessed the disputed property for at least twenty years. Both the referee and the trial court found "[t]hat the Plaintiff's evidence does not establish by the greater weight of the evidence that the occupation and use of the said disputed tract of land by herself and her predecessors in title has been exclusive and continuous for a period of at least twenty years." Since plaintiff has not excepted to this finding, we need consider only whether there was an actual ouster of defendant or his predecessors.

An actual ouster has been described as an entry or possession of one tenant in common that enables a cotenant to bring ejectment against him. The entry or possession "must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin." *Dobbins v. Dobbins*, 141 N.C. 210, 214, 53 S.E. 870, 871 (1906). Plaintiff would have us find that either her adverse possession of the disputed property under color of title for 7 years, or her possession under the alleged 1917 parol partition of the Travis property would constitute an ouster, and thus entitle plaintiff to fee simple ownership. However, as previously noted, adverse possession even under color of title will not ripen title as against a tenant in common short of twenty years. *See Duckett v. Harrison*, 235 N.C. 145, 69 S.E. 2d 176 (1952), and cases cited therein. Also, under the facts in the record, the alleged parol partition fails to work an ouster. As held by the court in *Duckett*, *id.* at 147, 69 S.E. 2d at 178,

> "In order for tenants in common to perfect title to the respective shares of land allotted to them by parol, it is necessary for them to go into possession of their respective shares in accordance with the agreement and to hold possession thereof under known and visible boundaries, consisting of lines plainly marked on the ground at the time of the partition, and to continue in possession openly, notoriously and adversely for twenty years. (Citations omitted)."

According to the record, the evidence to support the 1917 oral partition is contained in the 1956 deed from W. G. Travis to J. B. Travis. In surplus words following the description, it ap-

pears that the 55-acre tract of M. P. Travis "was inherited by Mrs. Sabat Smith, Mrs. Bettie T. Williams, and W. G. Travis," that a surveyor was employed to divide the land into three parts, and that "Mrs. Sabat Smith drew the western share, W. G. Travis drew the center share and Bettie Williams the eastern share. . . . It is the intention of this deed to transfer all right, title and interest now owned by W. G. Travis in the M. P. Travis land . . . to the grantees named herein whether or not land is fully described above." While this deed succeeded in conveying to J. B. Travis all the interest in the land then owned by W. G. Travis, the deed fails to constitute an ouster. There is no showing of known and visible boundaries of each of the three shares with lines plainly marked on the ground as of the 1917 partition. Also, the evidence fails to show that in 1917 the three tenants in common went into possession of their respective shares in the division in accordance with the agreement, which agreement was memorialized in 1956 by only one of the three heirs.

In considering the findings of fact made by the referee and adopted by the trial court, this Court must find them conclusive if there is any competent evidence to support them. *Morpul, Inc. v. Knitting Mill,* 265 N.C. 257, 143 S.E. 2d 707 (1965). We find the evidence considered by the referee competent to support a finding that plaintiff adversely possessed the disputed property under color of title for 7 years only. Her evidence shows that she purchased the property at issue on 17 March 1967. The property was surveyed and deed recorded on 4 October 1967. Plaintiff's brother testified that he had planted crops on the disputed tract since 1968. There was further evidence that plaintiff enjoyed uninterrupted possession of the land from 1967 until 1976; that she collected rent from her brother and that it was generally known in the community that Sabat Smith had owned the disputed land. At most, plaintiff can show adverse possession for ten years, plus a few months. Thus, the evidence fails to contain facts justifying an award of title to the plaintiff by adverse possession as between tenants in common.

Judgment for the plaintiff is reversed.

Judges ARNOLD and WEBB concur.

CHARLES E. MASHBURN v. WILLIAM W. HEDRICK, M.D.

No. 8210SC670

(Filed 2 August 1983)

Physicians, Surgeons and Allied Professions § 17.2— medical malpractice—failure to diagnose—sufficient evidence of negligence

Plaintiff's evidence was sufficient for the jury in an action to recover damages for the amputation of plaintiff's left leg because of a circulatory disease which defendant general practitioner allegedly negligently failed to diagnose where it tended to show that defendant violated the standard of care required for the examination of a patient whose symptoms include pain in the lower extremeties upon walking and discoloration between the toes in that he did not check the pulses in plaintiff's lower extremeties, did not compare the temperatures of plaintiff's left and right feet, did not ask plaintiff to return for a reevaluation of his problem or refer him to a specialist, and gave plaintiff no instructions; plaintiff's circulatory disease was not diagnosed until after plaintiff saw another physician some two months after he was first examined by defendant; and the lack of proper treatment by defendant was a proximate cause of plaintiff's later amputation in that, had defendant properly diagnosed plaintiff's circulatory condition or referred him to a vascular surgeon, the possibility of saving plaintiff's leg from amputation would have greatly increased.

APPEAL by plaintiff from *Farmer, Judge*. Order entered 26 January 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1983.

This medical malpractice action alleges that plaintiff Mashburn was forced to undergo an amputation of his left leg below the knee as a result of negligent medical treatment by the defendant Dr. Hedrick, a general practitioner who had been Mashburn's family doctor for many years. At trial Mashburn presented evidence that on 25 March 1977 he went to Dr. Hedrick's office for an examination of his left foot because, three or four days prior, two of his toes on his left foot had turned purple and he was experiencing pain when he walked. He was first examined by a physician's assistant who mashed his foot and pushed back his toes. Plaintiff told the assistant that these maneuvers were not painful but that his left leg and the bottom of his left foot hurt when he walked. The physician's assistant told plaintiff that he had a spur. Dr. Hedrick then examined the plaintiff by pushing his toes back to see if it caused pain. Plaintiff told him that this manipulation did not hurt but that it did hurt him in his leg and foot when he walked. Dr. Hedrick also felt that

the plaintiff had a "spur" and instructed him to have his foot x-rayed. Plaintiff's left foot was x-rayed that day and it was reported as being normal. Plaintiff was not given any medication, treatment, or instructions during the 25 March 1977 examination. He was not instructed by Dr. Hedrick to return for a follow-up examination nor was he referred to another physician. Plaintiff testified that his toes remained a blue color and he continued to experience pain in his left leg and foot upon walking for four or five days after he saw Dr. Hedrick. Plaintiff's wife testified that these symptoms continued as long as six days after the 25 March 1977 examination.

The pain and discoloration reappeared in May of 1977. Plaintiff made his own appointment with an orthopedic surgeon and was examined on 18 May 1977. This doctor found no orthopedic problems but felt that plaintiff might have a circulatory disease after he felt the pulse in plaintiff's left leg, felt the leg for coolness and compared the left leg with the right leg. He referred the plaintiff back to Dr. Hedrick for the suspected circulatory problems. On 20 May 1977 plaintiff was again examined by Dr. Hedrick who had been told about the circulatory problems. Dr. Hedrick then listened to the pulse in plaintiff's leg and advised the plaintiff to see Dr. Stocks, a vascular surgeon, as soon as possible.

Plaintiff was examined by Dr. Stocks that same day. He diagnosed plaintiff's condition as peripheral vascular disease with a clot or obstruction in the thigh and popliteal area of his left leg. Plaintiff was immediately placed in the hospital where it was determined that one of the three blood vessels in plaintiff's lower left leg was obstructed. He was discharged from the hospital in four or five days and continued to see Dr. Stocks on a regular basis. Although the plaintiff was on medication to thin his blood, the pain continued in his foot and leg upon walking and he was unable to return to work. Because the plaintiff did not improve with the conservative non-surgical treatment, Dr. Stocks readmitted him to the hospital in August of 1977. An arteriogram was performed on 11 August 1977 and it showed that a second artery had clotted off, leaving only one main artery to supply blood through plaintiff's lower leg. Dr. Stocks decided that surgery was necessary and performed a vein bypass operation in an attempt to save plaintiff's leg. Several days later the bypass

vein clotted and continued to clot despite subsequent surgery. Dr. Stocks then replaced the vein graft with a synthetic material but this also clotted and gangrenous changes occurred. On 16 August 1977 Dr. Stocks amputated plaintiff's left leg below the knee. Because of the amputation plaintiff has been unable to work and has experienced severe physical pain and psychological discomfort.

At the conclusion of plaintiff's evidence the trial judge granted defendant's motion for a directed verdict. Plaintiff appeals.

Donald Soloman and Brenton D. Adams, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James G. Billings, for defendant-appellee.

EAGLES, Judge.

Plaintiff first assigns error to the trial judge's entry of the directed verdict in favor of the defendant. In determining the correctness of a directed verdict, we must consider the plaintiff's evidence to be true and resolve all contradictions in his favor, giving him the benefit of every inference which can be drawn from the evidence. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968). The application of the standard of a reasonable, prudent person in a negligence action is generally considered to be better served by the decision of a jury. For this reason, the removal from the jury of this type of action by a directed verdict is to be carefully scrutinized. *Smithers v. Collins*, 52 N.C. App. 255, 278 S.E. 2d 286, *rev. denied*, 303 N.C. 546, 281 S.E. 2d 394 (1981).

The trial judge was correct in granting the defendant's motion for directed verdict if the plaintiff's evidence failed to establish any of the requisite elements of his negligence action: (1) the standard of care required of the defendant as the treating physician, (2) defendant's breach of that standard of care, (3) defendant's breach as being the proximate causation of plaintiff's injury, and (4) the damage caused by the defendant's alleged negligent treatment. *See Lowery v. Newton*, 52 N.C. App. 234, 278 S.E. 2d 566, *rev. denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981).

We find that plaintiff did present sufficient evidence of the standard of care required for the examination of a patient whose symptoms included pain upon walking in the lower extremeties along with discoloration between the toes. Plaintiff presented medical testimony that in addition to visual observation and manual manipulation of the affected area, the examining physician should check for pulses going to the feet and also compare the temperature of the left and right feet for discrepancies. The patient's symptoms should be reevaluated in a few days to note any changes. The detection of abnormalities would indicate that consultation with or referral to a vascular surgeon would be appropriate to ascertain the necessity for further tests to determine the existence of circulatory problems.

As defendant concedes on appeal, the evidence, when viewed in the light most favorable to the plaintiff, was sufficient to establish that Dr. Hedrick breached the standard of care. In his examination of the plaintiff on 25 March 1977, Dr. Hedrick did not check the pulses in plaintiff's lower extremeties and did not compare the temperatures of his left and right feet. He did not ask the plaintiff to return for a reevaluation of his problem nor did he refer him to a specialist for treatment. Plaintiff was given no instructions by Dr. Hedrick.

There can be no question that evidence of the loss of the plaintiff's leg, with its attendant disruption in his lifestyle, was sufficient evidence of damages to go to the jury.

The remaining question to be determined is whether plaintiff presented sufficient evidence of causation, *i.e.*, that the lack of proper treatment by Dr. Hedrick on 25 March 1977 was a proximate cause of the plaintiff's later amputation. Defendant contends that there is no evidence that a different result would have occurred even if he had correctly diagnosed peripheral vascular disease or referred plaintiff to a vascular surgeon on 25 March 1977. Defendant argues that since the standard of care for a patient in plaintiff's condition would entail a reevaluation of symptoms a few days after the initial visit, and since plaintiff became asymptomatic shortly after he was seen on 25 March 1977, no treatment would have ensued regardless of defendant's inaction. We do not agree.

Viewing plaintiff's evidence in the light most favorable to him reveals the following: (1) Vascular disease is a progressive disease. The plaintiff had a vascular or circulatory disease on 25 March 1977. (2) On 25 March 1977 plaintiff had certain symptoms of a vascular disease which were pain in his leg and foot upon walking and discoloration of his toes. These symptoms continued for as long as six days after the plaintiff was initially examined by Dr. Hedrick, (3) If defendant had referred the plaintiff to Dr. Stocks on 25 March 1977, Dr. Stocks would not have prescribed any drug therapy on that day but would have asked the plaintiff to return in a few days to see if plaintiff's pain and discoloration were still present. If these symptoms were visible at the time of reevaluation, more evaluative tests would have been ordered to determine if there was vascular occlusion or obstruction. (4) Plaintiff's vascular disease was not diagnosed until 20 May 1977. During the delay in diagnosis from March to May, plaintiff's disease was progressing and was not being monitored. The importance of an earlier diagnosis of a vascular condition is that earlier diagnosis would allow an earlier commencement of the selected mode of treatment and an earlier evaluation of its effectiveness. On 20 May 1977 Dr. Stocks chose to follow a conservative non-surgical treatment of plaintiff's leg until August of 1977. If Dr. Stocks had learned that plaintiff had a vascular disease in March rather than in May, he would have had more time to determine whether plaintiff was likely to develop adequate collateral flow and therefore could have recommended an operation earlier. (5) Dr. Stocks' opinion was that the success rate of an operation on plaintiff's leg was about 50% in May but only about 25% in August. The opinion of another expert, Dr. Conley, was that, based upon the arteriograms, the operation success rate was 75% to 80% on 23 May 1977 and it had declined to 8% to 10% by 11 August 1977.

We believe that the above evidence was sufficient for a jury to have found that if Dr. Hedrick had properly diagnosed the plaintiff's circulatory condition or had referred him to a vascular surgeon, plaintiff's symptoms would have still been present upon a reevaluation within five to six days later. The presence of plaintiff's symptoms upon reevaluation could have led to further tests and earlier treatment, thus increasing the possibility of saving plaintiff's leg from amputation. For purposes of the directed

verdict issue, plaintiff had adequately established the necessary elements of his negligence action. We hold that the trial judge erred in entering a directed verdict.

We are not persuaded that the failure of the saphenous vein graft effectively insulated any prior breach of care on Dr. Hedrick's part. Dr. Stocks' testimony was that one of the possible reasons for the clotting in his first vein graft, resulting in its subsequent failure, might have been a defective valve in the vein itself. This testimony in no way removes defendant's negligence as at least one proximate cause of plaintiff's injury. A defendant's negligence need not be the sole proximate cause of injury or the last act of negligence in order to impose liability. *Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, *rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979).

Because we find error in the entry of the directed verdict in favor of the defendant, we do not reach plaintiff's remaining assignments of error.

Reversed.

Judges WELLS and BECTON concur.

DRIFTWOOD MANOR INVESTORS v. CITY FEDERAL SAVINGS AND LOAN ASSOCIATION AND JAMES M. KIMZEY, SUBSTITUTE TRUSTEE

No. 8210SC942

(Filed 2 August 1983)

1. **Mortgages and Deeds of Trust § 15— limiting assumption to written approval—sale of property subject to deed of trust different**

Where a deed of trust stated that it may only be assumed if defendant gives prior written approval, and if the property is transferred without such written approval, defendant may declare the balance due and payable, defendant was not entitled to accelerate the indebtedness when the property was sold subject to the deed of trust.

2. **Mortgages and Deeds of Trust § 19.6; Waiver § 1— waiver of right to insist on punctual payment**

Where a holder of a note has repeatedly accepted monthly installment payments after their respective due date, the note holder will be held to have

waived the right to insist on punctual payment unless prior to the late payment the noteholder notified the payor that prompt payment is again required.

APPEAL by defendant City Federal Savings and Loan from *Battle, Judge.* Judgment entered 17 May 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1983.

This action is a consolidation of a foreclosure proceeding instituted by defendant pursuant to a deed of trust held by it which encumbers property owned by plaintiff, and a civil action brought by plaintiff seeking to enjoin the foreclosure proceeding and requesting a declaration that defendant is not entitled to foreclosure. On 4 March 1971, James F. Kirkpatrick, the owner of a residential apartment complex now known as "Driftwood Manor Apartments" (hereinafter the Apartments), executed a deed of trust on the real property comprising the apartment complex to Charles L. Fulton, Trustee for defendant. This deed of trust secured a promissory note executed by Mr. Kirkpatrick in an amount over three million dollars.

Relevant provisions of the deed of trust state as follows:

"[P]rincipal and interest shall be payable in monthly installments as follows:

TWENTY-EIGHT THOUSAND TWO HUNDRED FOUR AND 16/100 ($28,204.16) DOLLARS on the first day of April 1973, and a like amount on the first day of each month thereafter . . . .

. . . .

If the said party of the first part shall fail or neglect to pay the interest on said Note, or any part of same, as and when the same may hereafter become due, or the whole or any part of the principal when the same shall be or become due and collectible, according to the terms and provisions of said Note and the covenants and conditions of this Deed of Trust, or shall fail to perform any of the covenants and conditions herein set and agreed to be performed by the party of the first part . . . and in any and all such cases, the entire amount of said Note, principal and interest, and all other amounts that may be secured by this Deed of Trust, shall at the option of the party of the third part immediately mature and become due and collectible, anything herein or in said

> Note to the contrary notwithstanding, and on application to the party of the third part, it shall be lawful for and the duty of the party of the second part . . . (foreclosure provisions here follow).
>
> . . . .
>
> [Paragraph Fourteen:] This deed of trust may be assumed only if the party of the third part (City Federal) gives its prior written approval to the substitute mortgagor and if this property is transferred without such prior written approval the party of the third part (City Federal) may at its option, without notice, declare the entire remaining balance and all other sums secured hereby at once due and payable, anything herein contained to the contrary notwithstanding."

In February 1975, James F. Kirkpatrick conveyed the Apartments subject to the deed of trust to Driftwood Apartment Associates, a North Carolina limited partnership. In April 1979, Driftwood Apartment Associates conveyed the Apartments, subject to the deed of trust, to Syntek of Florida, Inc., who immediately upon acquiring title conveyed the Apartments subject to the deed of trust to plaintiff, Driftwood Manor Investors, which is a North Carolina joint venture. The prior written approval of defendant was never requested or given for any of these transfers.

From the time plaintiff acquired title to the Apartments in April 1979 until March 1980, plaintiff paid each monthly installment due on the note and deed of trust. Defendant, by and through its servicing agent, accepted all such monthly payments without objection or protest, even though all the payments were made after the first day of the month. The earliest date on which a payment was received was on the eighth of the month. Other payments were received at various dates later during the month for which they were due. The latest payment was on the twenty-ninth day of the month.

By a letter dated 5 March 1980, defendant notified plaintiff that the remaining payments under the note and deed of trust had been accelerated because of the transfers of the Apartments without defendant's prior approval, that the entire balance of the indebtedness was immediately due, and that the March 1980 in-

stallment payment would be returned, if received. The March 1980 payment was mailed to defendant's servicing agent no later than 5 March 1980, was received by it during the week of 14 March 1980, and was subsequently returned to plaintiff.

On 27 March 1980, defendant by and through the substitute trustee for the deed of trust, instituted a foreclosure proceeding. In the Notice of Hearing filed in this proceeding, defendant claimed the default under the note and deed of trust to be as follows:

> "The default is (1) the transfer of the property secured by the Deed of Trust, as aforedescribed without first obtaining the prior written approval of the Owner and Holder of the Note and Deed of Trust in violation of covenant and agreement 'Fourteenth' contained in the original deed of trust recorded in Book 1960, Page 369, Wake County Registry; and, (2) failure to pay timely by 1 March 1980 the installment of principal and interest due on that date."

In April 1980, an Assistant Clerk of Superior Court made findings and authorized the trustee to proceed with foreclosure. Plaintiff duly appealed from the findings to the Superior Court. In May 1980, plaintiff brought an action in the Superior Court against defendant seeking to enjoin the foreclosure proceeding and requesting a declaration that there exists no default or no right to accelerate payment of the indebtedness under the note and deed of trust. Subsequently, both parties consented to a preliminary injunction with respect to the foreclosure action and to an order consolidating plaintiff's civil action with the foreclosure proceeding. In May 1982, the consolidated action was heard in Superior Court. At the close of all the evidence, the court granted plaintiff's motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). The court denied defendant's motion for same made at the close of plaintiff's evidence and at the close of all the evidence.

From the judgment enjoining defendant from foreclosing the deed of trust, defendant appealed.

Smith, Moore, Smith, Schell and Hunter, by Larry B. Sitton and E. Garrett Walker; and Joslin, Culbertson, Sedberry and Houck, by John K. Culbertson, for plaintiff appellee.

Manning, Fulton and Skinner, by Charles B. Morris, Jr. and Robert S. Shields, Jr., for defendant appellant.

Kimzey, Smith and McMillan, by James M. Kimzey, for James M. Kimzey, trustee.

WEBB, Judge.

The issue in this case is whether a default has occurred under the deed of trust entitling defendant to accelerate the indebtedness and foreclose the property. Defendant argues that two separate defaults have occurred—(1) failure to obtain written approval prior to transfer of the security property (hereinafter the transfer default), and (2) failure to timely pay the March 1980 installment (hereinafter the payment default)—either of which alone is sufficient to entitle defendant to exercise the acceleration clause in the deed of trust. For the reasons that follow, we hold the trial court was correct in finding there is no default under the deed of trust and in directing a verdict for plaintiff.

The Alleged Transfer Default

[1] The determination of whether a transfer default occurred in this case depends upon the interpretation given paragraph fourteen of the deed of trust. We read this paragraph to say the deed of trust may only be assumed if City Federal gives prior written approval, and if the property is transferred without such written approval, City Federal may declare the balance due and payable. The property was sold subject to the deed of trust. We believe the difference between a sale of real property with an assumption of the indebtedness and a sale subject to an indebtedness is well enough known in this state so that we should not hold that City Federal is entitled to accelerate the indebtedness when the property is sold subject to the deed of trust.

The defendant argues that the second clause of Paragraph Fourteen is separate and divisible from the first clause so that regardless of the first clause, it prohibits a sale of the property without the prior written approval of City Federal. We do not so

read this paragraph. We believe the use of the word "such" refers the prior written approval to the clause dealing with an assumption. It is only in case of an assumption that prior written approval is required.

Both the note and deed of trust provide that in the event of default, City Federal will look solely to the property covered by the deed of trust for satisfaction of the indebtedness and will not hold the maker of the note personally liable. The defendant argues that since it cannot look to the maker of the note in the event of default it has greater need to approve the owner of the property before a transfer is made. It says this is so because only by approving the property owner can it be assured that the property will be properly maintained. Whatever the needs of City Federal, we do not believe we can change the words of the agreement.

The Alleged Late Payment Default

[2] The issue presented by the facts of this case is whether the holder of a note who has repeatedly accepted monthly installment payments after their respective due dates will be allowed to accelerate the entire indebtedness because of a subsequent late payment. This is a case of first impression in North Carolina but the question has been addressed in numerous other jurisdictions. *See Northside Bank of Miami v. Melle*, 380 So. 2d 1322 (Fla. App. 1980); *Verner v. McLarty*, 213 Ga. 472, 99 S.E. 2d 890 (1957); *Federal Nat. Mortgage Ass'n v. Walter*, 363 P. 2d 293 (Okl. 1961); Annot. 97 A.L.R. 2d 997 (1964). We believe the majority of jurisdictions hold that a noteholder in this situation will be held to have waived the right to insist on punctual payment unless prior to the late payment the noteholder notified the payor that prompt payment is again required. We believe this is the better reasoned rule. We hold that on the facts of this case, City Federal waived the prompt payment of the March 1980 payment. This is without prejudice for City Federal to require payment by the first of each month in the future.

For the reasons stated in this opinion, we affirm the judgment of the Superior Court.

Affirmed.

Judges ARNOLD and BRASWELL concur.

EDWARD D. WRIGHT AND UNIGARD MUTUAL INSURANCE COMPANY v. COMMERCIAL UNION INSURANCE COMPANY, ET AL.

No. 8226SC569

(Filed 2 August 1983)

1. **Rules of Civil Procedure § 15.1 — denial of motion to amend complaint — discretionary**

There was no abuse of discretion in the trial court's denial of plaintiffs' motion to amend their complaint fourteen months after the complaint was filed, a year after defendant's answer was filed, and a month after defendant's motion for summary judgment was made.

2. **Champerty and Maintenance § 1 — summary judgment properly entered**

The trial court properly entered summary judgment against plaintiffs on their claims of champerty and maintenance where defendant insurance company had a real interest in settling claims against its insured by a third party and where it made an agreement with the third party to settle the claim, which settlement included an agreement that the third party would attempt to collect a part of the damages from parties defendant insurance company reasonably believed were joint tort-feasors.

APPEAL by plaintiffs from *Grist, Judge.* Judgment entered 29 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 April 1983.

Harrell and Leake, by Larry Leake, for plaintiff appellants.

Smith, Moore, Smith, Schell and Hunter, by Robert A. Wicker, for defendant appellee.

WEBB, Judge.

Plaintiffs brought this action against defendant Commercial Union Insurance Company (Commercial) seeking damages resulting from Commercial's alleged champerty and maintenance. From summary judgment in favor of Commercial, plaintiffs appealed raising the questions of whether the trial court properly denied plaintiffs' motion to amend their complaint and whether the trial

court properly granted summary judgment for Commercial. For the reasons set forth below, we affirm.

I

The undisputed factual situation is as follows:

In August 1971, Grady Paul Ridge and Nina Ridge were injured in an automobile accident which occurred when an International tractor owned by Wilson Transfer Company (Wilson Transfer) and driven by Fritz James Todd pulled out of its lane of traffic, crossed the median, and ran head-on into the Ridges' automobile. Todd's action in driving the truck across the median was apparently an effort to evade traffic which had backed up in his lane due to plaintiff Edward Wright's driving Roger Revels' automobile partially into the passing lane of the highway. At the time of the accident, American Employers Insurance Company, a member of Commercial, insured Wilson Transfer, and plaintiff Unigard Mutual Insurance Company (Unigard) insured Wright.

Nina Ridge sustained serious injuries in the collision, and Grady Paul Ridge received less serious injuries and some property damage. The Ridges retained the Lexington law firm of Wilson and Biesecker to represent their interests in the matter, and J. Lee Wilson of the firm notified Wright requesting that he inform his insurance carrier and that he get a representative from the carrier to contact him. The Ridges, through attorney Wilson also made claims against Commercial.

Commercial was willing to negotiate a settlement and sought Unigard's participation in settlement as joint tort-feasors. Unigard's response, by letter of Claim Supervisor Frank Court, was that its investigation showed that the proximate cause of the accident was the action of Todd in operating the truck insured by Commercial. Voluntary payment by Unigard did not appear in order but Frank Court did open up the possibility of paying "some nominal amount in order to defray the cost of litigation."

Commercial settled with Nina Ridge for $64,101.80 and with Paul Ridge for $13,050.00. In return for its payments, Commercial obtained covenants not to sue from both Ridges. On the same day that the Ridges signed the covenants not to sue, they also entered into an agreement with American Employers Insurance

Company (i.e. Commercial) which contained the following provisions:

1. The Ridges were to institute proceedings against Wright and Revels for recovery of damages in an amount not less than $107,611.73. They were to be represented by the law firm of Wilson and Biesecker and by Commercial's attorneys, Cockman, Alvis & Aldridge of Raleigh.

2. Commercial was to pay the firm of Cockman, Alvis & Aldridge. It was also to pay the expenses for depositions properly taxable to the Ridges and for costs assessed against the Ridges at either the trial or appellate level.

3. No settlement of the claims for the sum of $30,459.93 or less could be made by the Ridges without Commercial's consent unless the Ridges paid Commercial $23,345.94. If the settlement offers totalling as much as $15,000 were made to the Ridges and they failed to accept such offers, Commercial would not have had to pay any amount to the Ridges under the terms of the agreement.

4. Commercial agreed to pay the Ridges $15,000 if both cases were lost on the issue of negligence.

5. No sum was to be paid by Commercial to the Ridges under the agreement if the cases were settled, if judgment were obtained and the Ridges received any sum in satisfaction, or if the verdict was equal to or below the prior payment received by plaintiffs from the alleged joint tort-feasors.

6. If Commercial had to make any payment to the Ridges under the agreement, it had "the right to pursue and exercise the rights accruing under the judgment or judgments to the extent of such payment by [Commercial] to Ridges . . . and [it had] . . . the right to the first procedure recovery up to the extent of . . . [Commercial's] payment as specified . . . ." Amounts collected thereafter were to be the property of the Ridges up to the sum of $30,459.93, and amounts thereafter up to the sum of $23,345.94 were to belong to Commercial. All additional sums would have gone to the Ridges.

The Ridges did in fact sue Wright and Revels who joined Commercial's insureds Wilson Transfer and Fritz James Todd as

third-party defendants. Eventually, the third-party complaint was dismissed with prejudice by defendants and third-party plaintiffs who settled with the Ridges for $20,000. None of the settlement money was received by Commercial.

At some point during the lawsuit against its insureds, Unigard learned of the agreement between the Ridges and Commercial. In November 1980, plaintiffs initiated this lawsuit by filing a complaint alleging, among other things, that Commercial had no proper financial interest in the legal action of the Ridges against Wright and Revels and that Commercial's providing of legal counsel for the prosecution of the lawsuit was tortious and constituted an improper maintenance of a legal action. Plaintiff Revels took a voluntary dismissal without prejudice in October 1981. Commercial filed a motion for summary judgment two months later, and in January 1982, the two remaining plaintiffs filed a motion to amend their complaint to add the counts of abuse of process and fraud. The trial court allowed defendant's motion for summary judgment and denied plaintiff's motion to amend their complaint.

II

[1] Plaintiffs bring forward two assignments of error. First, they assign error to the trial court's denial of their motion to amend their complaint. G.S. 1A-1, Rule 15(a) states:

> "A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . ."

It is clear from the facts of the present case that an amendment to plaintiffs' complaint was possible only by leave of court. In such cases, the trial court has broad discretion in its rulings on motions to amend, and those rulings are subject to reversal only when there has been abuse of that discretion. *Hudspeth v. Bunzey,* 35 N.C. App. 231, 241 S.E. 2d 119, *disc. rev. denied and appeal dismissed,* 294 N.C. 736, 244 S.E. 2d 154 (1978).

In the present case, the plaintiffs sought to amend their complaint fourteen months after the complaint was filed, a year after defendant's answer was filed, and a month after defendant's motion for summary judgment was made. Plaintiffs have failed to argue that justice requires such amendment at this point, and we can, therefore, find no abuse in the trial court's discretion in denying the motion.

[2] The second argument brought forward by the plaintiffs is that the trial court erred in allowing defendant's motion for summary judgment. The basis of plaintiffs' argument is that there were genuine issues of fact concerning the claims of champerty and maintenance. We disagree.

The term "maintenance" has been defined by our courts as "an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908). "Champerty" is a form of maintenance whereby a stranger makes a "bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." *Id.* The Supreme Court in the *Smith* case noted that many exceptions to the principles of champerty and maintenance have been recognized and that it has come to be generally accepted that an agreement will not be held to be within the condemnation of the principles "unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.'" *Id.*, *quoting* 5 Lawson on Rights and Remedies, § 2400.

In this case we do not believe there was any officious intermeddling by Commercial. Commercial had a real interest in settling the claims against its insureds by the Ridges. We see nothing wrong with its agreement with the Ridges to settle the claim, which settlement included an agreement that the Ridges would attempt to collect a part of the damages from parties Commercial reasonably believed were joint tort-feasors. We hold that all the evidence shows there was no champerty or maintenance.

We do not believe the agreement between the defendant and the Ridges is a "Mary Carter" agreement as argued by the plaintiffs. *See Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. App.

1967). A Mary Carter agreement is one in which a co-defendant secretly settles a case and continues as an ostensible co-defendant. The allowance of a sham defendant who may have an interest in seeing a verdict rendered against its ostensible co-defendant has been condemned by courts in other jurisdictions. In this case Commercial's insureds were not parties to the action filed by the Ridges against Wright and Revels. The jury would not have been misled by having a sham defendant in the case.

Affirmed.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. NORMAN E. CUNNINGHAM, III

No. 825SC925

(Filed 2 August 1983)

1. **Criminal Law § 143.8— suspended sentence—good behavior condition—necessity for breach of criminal law**

Behavior that will warrant a finding that a defendant has violated the "good behavior" condition of a suspended sentence must be conduct which constitutes a violation of some criminal law of the State. Therefore, although defendant's conduct in playing loud music through a speaker located twenty-five feet from his neighbors' back door may have constituted a nuisance, it did not violate a criminal law so as to constitute a violation of the "good behavior" condition of his suspended sentence.

2. **Criminal Law § 143.1— revocation of suspended sentence—notice of alleged violations**

Where defendant was served with notice which alleged that he had violated the "good behavior" condition of his suspended sentence by repeatedly playing loud music which greatly disturbed his neighbors and by taking their personal property without permission, defendant's suspended sentence could not be revoked on the ground that he violated the "good behavior" condition by trespassing upon and damaging real and personal property belonging to his neighbors.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 21 May 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 March 1983.

On 15 February 1982, defendant, Norman E. Cunningham, was given a sentence of twenty-nine days in the District Court of New Hanover County for the offense of disorderly conduct. The sentence was suspended on the conditions that the defendant (1) pay the costs of court and (2) be of good behavior for two years.

On 5 April 1982, the State filed a motion seeking revocation of defendant's suspended sentence. The motion included a statement of the violations alleged, that the defendant has violated the condition of his suspended sentence in that (1) he has consistently played loud music from a sound system's speakers after 11:00 p.m. that is greatly disturbing to the peace and quiet of Mr. and Mrs. E. H. Southerland, and (2) he has removed private property signs posted by Mr. and Mrs. E. H. Southerland without their permission.

On 10 April 1982, defendant was duly served with an order to show cause together with a copy of the State's motion for revocation. A revocation hearing was held on 14 April 1982 in New Hanover District Court. Judge John M. Walker found that defendant had violated the condition of his suspended sentence requiring him to "remain of good behavior for two years" by embarking upon a course of conduct which was greatly disturbing to the peace and quiet of Mr. and Mrs. E. H. Southerland in that:

> (1) [O]n March 17, 1982 the defendant played very loud music from speakers located in a metal shed a foot from the home of Mr. and Mrs. E. H. Southerland. Said shed contains a hot tub. The music played from the shed began during the daylight hours and continued until after midnight;
>
> (2) [O]n March 18, 19, 20, 21, and 22, 1982 the defendant played music loudly from speakers in the metal shed all day and past 11:00 o'clock P.M.;
>
> (3) [O]n March 25, 1982 the defendant played music from the speakers in the shed loudly until 2:00 o'clock A.M. and in addition area lights on the Cunningham property were left on and beaming into the Southerland's bedroom;
>
> (4) [O]n April 1, 1982 loud music was again played by the defendant until late in the night.

Judge Walker revoked defendant's suspended sentence and activated the sentence of twenty-nine days. Defendant appealed to the Superior Court.

On 21 May 1982, a *de novo* hearing was held to determine if defendant had violated the condition of his 15 February 1982 suspended sentence and, if so, whether his suspended sentence should be revoked and the sentence activated. Evidence at the hearing tended to show the following: defendant resided in and managed the Driftwood Trailer Park which was located on property adjacent to the property of Mr. and Mrs. E. H. Southerland. Subsequent to 15 February 1982 defendant has continually played loud music throughout the day and as late as 2:00 a.m. to 3:00 a.m. The music was played through a speaker located on the outside of defendant's trailer about twenty-five feet from the Southerland's back door. The playing of the music has prevented the Southerlands from sleeping. At 11:30 p.m. on 22 April 1982, Mrs. Southerland observed defendant behind an oak tree on her property. She checked the tree the morning of 23 April 1982, but observed nothing unusual. On 25 April 1982, she noticed that some of the ivy and azalea plants around the oak tree were drooping. Several days later she discovered a hole bored in the trunk of the oak tree and in six other trees. The trees were thereafter diagnosed as dying from a herbicide placed within the bored holes. Further, that on 30 March and 1 April 1982, someone removed four "no trespassing" signs from the fence along the Southerland's property line and spray painted one of the signs.

Defendant testified in his own behalf. He denied playing music and denied going on the Southerland's property or removing or damaging any of their property.

At the conclusion of the hearing, the court entered an order making the following findings of fact and conclusions of law:

1. That on February 15, 1982 the Defendant was found guilty of disorderly conduct by the Honorable John M. Walker in New Hanover County District Court and given a sentence of 29 days, suspended upon payment of cost and good behavior for two years.

2. That on the 22nd of April, 1982 the Defendant was trespassing on the E. H. Southerland, Jr. property after being forbidden to do so.

3. That on the 22nd of April, 1982, the Defendant was seen to be bending over in front of a live oak tree located on the property of E. H. Southerland, Jr.

4. That after the 22nd of April, 1982 said live oak tree began to die and was found to have a man-made hole bored into its base in which herbicide had been deposited.

5. That in addition to the above mentioned tree, some six to seven other trees located on the E. H. Southerland, Jr. property have been damaged by man-made bore holes and herbicide poisoning since the 22nd day of April, 1982.

6. That subsequent to the 15th of February, 1982, the Defendant has continually played loud music throughout the day and as late as 2:00 A.M. to 3:00 A.M. at night from a speaker located outside of his trailer and aimed at the Southerland property.

7. That said noise disrupted the peace and comfort of the E. H. Southerland, Jr. family.

8. That the Defendant maliciously spray painted a "No Trespassing" sign located on the E. H. Southerland, Jr. property.

Based upon the above findings of fact and the evidence presented, the Court finds [concludes as a matter of law] as follows:

1. That the Defendant committed the criminal offense of malicious damage to personal property.

2. That the Defendant committed the criminal offense of malicious damage to real property.

3. That the defendant committed the criminal offense of trespassing.

The trial court then concluded that defendant had willfully violated the "good behavior" condition of his suspended sentence by the foregoing conduct and therefore revoked his suspended sentence and activated the twenty-nine day sentence. From entry of the order revoking his suspended sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Lanier and Hall, by Fredric C. Hall, for defendant appellant.

JOHNSON, Judge.

Defendant excepts to and assigns as error the trial court's Findings of Fact Nos. 2, 3, 6, 8 and Conclusions of Law Nos. 1, 2 and 3. Defendant contends that these findings and conclusions are not supported by competent evidence and that the trial court's order revoking his suspended sentence was based on insufficient evidence.

The trial judge may not exercise his discretionary authority to activate a suspended sentence unless the breach of a condition of probation is established by "substantial evidence of sufficient probative force to generate in the minds of reasonable men the conclusion that defendant has in fact breached the condition in question." *State v. Millner*, 240 N.C. 602, 605, 83 S.E. 2d 546, 548 (1954).

[1] The alleged violation that defendant consistently played loud music that disrupted the peace and quiet of the Southerlands and the trial court's Findings of Fact Nos. 6 and 7 are supported by the testimony of Mrs. Southerland. She testified that since 15 February 1982 defendant has continually played loud music throughout the day and as late as 2 to 3 a.m., and that the music has prevented her and her husband from sleeping. However, this conduct does not violate the suspensory condition of good behavior. In North Carolina, "good behavior" means "law-abiding" in the context of suspension of a sentence upon conviction of a crime. *State v. Seagraves*, 266 N.C. 112, 145 S.E. 2d 327 (1965). Behavior that will warrant a finding that a defendant has violated the "good behavior" condition must be conduct which constitutes a violation of some criminal law of the State. *State v. Millner, supra; State v. Seagraves, supra.* In the case *sub judice*, we are constrained to hold that although the conduct of the defendant in playing music through a speaker located twenty-five feet from the Southerland's back door, which is undoubtedly disturbing to the Southerlands, may constitute a nuisance, it does not amount to conduct which constitutes violation of a criminal law of this State.

Therefore, the trial court erroneously found this conduct to violate the suspensory condition of good behavior.

We next consider defendant's assignment of error regarding the trial court's Findings of Fact Nos. 2, 3, and 8 and Conclusions of Law Nos. 1, 2, and 3. We agree with defendant that the trial court erroneously based the revocation of defendant's suspended sentence upon those findings and conclusions.

[2] Defendant was properly served with a statement of the alleged violations of his suspended sentence. G.S. 15A-1345(d); *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). The State alleged that the condition of good behavior was violated by defendant's repeated playing of loud music, which greatly disturbed the Southerlands and by defendant's taking of their personal property without permission. However, the State sought to prove additional conduct in violation not contained in the notice served upon defendant—that defendant trespassed upon and damaged real and personal property belonging to the Southerlands. The record does not show that defendant received notice or a statement of an alleged violation consisting of trespass or damage to property. Therefore, entry of an order revoking defendant's suspended sentence upon Findings of Fact Nos. 2, 3, and 8 and Conclusions of Law Nos. 1, 2, and 3 was error.

In addition, a careful examination of the evidence of record clearly shows that evidence presented by the State that defendant trespassed upon and damaged real and personal property belonging to the Southerlands was irrelevant and improperly admitted because this evidence had no logical tendency to prove either of the two facts which were properly in issue. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976).

For the reasons stated herein, we hold that the evidence was insufficient to support the trial court's order revoking defendant's suspended sentence. The trial court's order is, therefore,

Reversed.

Judges WELLS and HILL concur.

Moore v. Frazier

EDWARD L. MOORE AND EDWARD L. MOORE, III PARTNERS D/B UNDER THE FIRM NAME AND STYLE OF MOORE'S SEAFOOD CO. v. DEWEY RAY FRAZIER

No. 823SC772

(Filed 2 August 1983)

Accord and Satisfaction § 1— insufficient evidence of accord—summary judgment for defendant improper

A draft from an insurance company with the words "for all claims" failed to establish an unequivocable intent by either of the parties to settle plaintiffs' claim against the defendant for the amount of the draft, and summary judgment was improperly entered for defendant on his claim of accord and satisfaction.

APPEAL by plaintiffs from *Peel, Judge.* Judgment entered 4 March 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 17 May 1983.

While traveling down U. S. Highway 17, plaintiffs' large 18-wheel tractor trailer rig, loaded with fish on the way to market, was hit by defendant's pickup truck as it backed into the highway. Plaintiffs' tractor trailer was damaged in the amount of $18,000, and the cargo of fish in the amount of $7,792.26; the defendant also sustained considerable property damage and plaintiffs' driver, not a party to this case, was seriously injured.

Plaintiffs' own insurance carrier, New Hampshire Insurance Company, paid their collision loss, except for the $1,000 deductible, but the cargo loss was uninsured. Because of its large subrogation interest and the circumstances of the accident indicated the defendant was liable, New Hampshire had the adjuster who handled the claim for it, James Dwight Gay, with General Adjustment Bureau, an independent adjusting concern, contact defendant's liability carrier, Fireman's Fund Insurance Company, about the loss. During the several telephone conversations that Gay had with the adjuster for Fireman's Fund, John Hall, Gay told Hall, among other things, that plaintiffs' damages exceeded $25,000, defendant was clearly liable, New Hampshire's subrogation interest amounted to $17,000, and Hall told Gay that defendant's property damage limits were $10,000. In his last telephone conversation with Hall July 5, 1979, Gay told Hall that the plaintiffs and New Hampshire would like to receive Fireman's Fund's $10,000 as soon as possible because of plaintiffs' uninsured

cargo loss, and that they would negotiate with the defendant personally about the excess later. During none of the conversations was the possibility of settling with the defendant for the policy limits mentioned by either of them.

Gay wrote Hall a letter July 16, 1979, in which he referred to their last telephone conversation and reiterated several of the matters discussed, sent copies of the bills and receipts substantiating the $18,000 collision loss and the $7,792.26 cargo loss, asked for written confirmation that the defendant's policy limits were $10,000, and requested that in paying the $10,000 two drafts be written, one for $7,792.26 to the plaintiffs and the other to New Hampshire for $2,207.74. A few days thereafter, with no accompanying letter or other papers, Fireman's Fund sent Gay a draft for $10,000 payable jointly to Ed Moore Seafood and New Hampshire Insurance Group. On the face of the draft the printed word "For" is followed by the typed words, "all claims"; below these words is a vacant space large enough to accommodate a dozen or more typed words. Defendant's name appears on the draft but once, in a space no more obtrusive than any other labelled "insured," while more than a dozen similar spaces on the face of the draft contain information of different kinds about Fireman's Fund, the draft, the policy, the agent who wrote it, the claim, and the claimant. On the back of the draft is printed language instructing all payees to endorse their names exactly as drawn, that endorsement by payee constitutes a receipt and release for the items mentioned on the face of the draft, and, in bold print, that if payable to a corporation an authorized officer must sign.

As an independent claims adjuster, Gay had processed and settled claims for and with many different insurance companies, including Fireman's Fund, many times. In all of his previous dealings with Fireman's Fund, a compromise settlement of all claims against an insured always entailed the execution of a formal, comprehensive, notarized release and settlement form. Since such a form did not accompnay the draft and nothing had been said about settling with the defendant for his policy limits, and since he had ascertained from the agent who wrote the policy that the limits were $10,000, Gay advised the plaintiffs that Fireman's Fund was just paying its limits and an endorsement of the draft would not affect the rest of the claim against defendant. The

draft was then endorsed and after it cleared, New Hampshire sent the plaintiffs a check for their $7,792.26.

Some months later, failing to reach a satisfactory agreement with the defendant as to the rest of their damages, plaintiffs sued for $25,792.26, acknowledged a $10,000 payment upon defendant's behalf and asked that defendant be given credit therefor. Initially, in addition to denying liability and counterclaiming for his property damage, the defendant denied paying the $10,000 or authorizing anyone to pay it for him, and moved that the allegation of payment be stricken. Several months later, defendant amended his answer to allege an accord and satisfaction based on plaintiffs' acceptance of the $10,000 draft.

At the close of plaintiffs' evidence, which tended to show all the above, the trial court granted defendant's motion for a directed verdict on the express ground that plaintiffs' own evidence established defendant's affirmative defense of accord and satisfaction as a matter of law.

Ward and Smith, by Kenneth R. Wooten, for plaintiff appellants.

Dunn & Dunn, by Raymond E. Dunn, Jr., for defendant appellee.

PHILLIPS, Judge.

The legal principles that govern this appeal are few and explicit. In considering a defendant's motion for a directed verdict at the close of plaintiff's evidence, the evidence admitted at trial, whether competent or not, must be accepted as true and viewed in the light most favorable to the plaintiff. *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). Simply put, an accord is an agreement to settle a disputed claim for less or something other than what one party claims is due from the other; a satisfaction is the execution or performance of the agreement so made. 1 C.J.S. *Accord and Satisfaction* § 1 (1936); *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43 (1921). Establishing an accord and satisfaction affirmative defense as a matter of law requires evidence that permits no reasonable inference to the contrary and that shows the "unequivocal" intent of one party to make and the other party to accept a lesser payment in satisfaction and dis-

charge of a larger claim. *Allgood v. The Wilmington Savings & Trust Co.*, 242 N.C. 506, 515, 88 S.E. 2d 825, 831 (1955).

Applying these principles to the record below, it is manifest that the evidence fails to establish an unequivocal intent by either of the parties, much less both, to settle plaintiffs' $25,000 plus claim against the defendant for Fireman's Fund's $10,000 draft.

First of all, the draft itself, the primary basis in the record for determining the state of mind of either the defendant or Fireman's Fund when it was tendered, is incomplete and ambiguous on its face. The meaning of the words "For all claims" cannot be ascertained from the instrument itself, which contains no explanatory or qualifying information with respect thereto. Obviously, the words could mean all of plaintiffs' and New Hampshire's claims against Fireman's Fund generally, all their claims against Fireman's Fund under the policy referred to, or all their claims against the insured defendant, Dewey Ray Frazier. And, to say the least, this uncertainty as to what the words meant to the parties at the time is not diminished by the fact that several months went by after the suit was filed before defendant apparently decided that the words meant all of plaintiffs' claims against defendant and amended his answer to plead accord and satisfaction. On the other hand, the evidence abundantly and clearly shows that plaintiffs had no intention whatever of compromising their claim against the defendant for Fireman's Fund's $10,000 draft, and, for that matter, had not even considered doing so, since compromising plaintiffs' claim for any lesser amount had been neither proposed nor discussed. Their contention that the draft only settled Fireman's Fund's policy limits obligation was a question of fact for the jury, rather than one of law for the court.

What complexion the evidence will have when Fireman's Fund's version of the events that occurred is added remains to be seen. But since the writing is ambiguous and the intent of the parties cannot be ascertained from its contents, relevant parol evidence will be both appropriate and necessary. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). During the first trial some such evidence was properly admitted, but other such evidence, equally relevant, was not, including proof that in settling the personal injury claim of plaintiffs' driver against the

defendant because of the same accident, Fireman's Fund required him to sign a comprehensive, notarized form releasing all and sundry persons and organizations for all claims, injuries and damages, past, present, and prospective.

New trial.

Judges HEDRICK and WELLS concur.

ARTHUR M. HOCH v. HERBERT C. YOUNG

No. 8210SC937

(Filed 2 August 1983)

1. **Trover and Conversion § 3— action for conversion of stock—statute of limitations**

The jury could properly find that defendant converted plaintiff's stock certificate when he refused to return the certificate to plaintiff in September 1980 rather than when he received the certificate in late 1976 or early 1977 and plaintiff learned that defendant had possession of his certificate where there was evidence that defendant lawfully came into possession of the certificate. Therefore, plaintiff's action for conversion of the certificate instituted on 9 October 1980 was not barred by the three-year statute of limitations of G.S. 1-52(4).

2. **Trover and Conversion § 4— conversion of stock—sufficient evidence of damages**

In an action to recover damages for conversion of stock in a closely-held corporation, plaintiff offered sufficient evidence of the value of the stock to overcome defendant's motion to dismiss, although there was no direct testimony as to the fair market value of the shares themselves, where there was substantial evidence as to the many factors affecting valuation, such as the fair market value of the corporation's assets, its income, expenses, dividends, and the value of plaintiff's interest.

APPEAL by defendant from *Lee* and *Battle, Judges.* Judgment entered 8 April 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1983.

This is a civil action wherein plaintiff, Arthur M. Hoch, seeks to recover from defendant Herbert C. Young the fair market value of ten (10) shares of stock in a closely-held corporation, known as Triangle Swim Club, Inc. which stock defendant allegedly converted.

The Triangle Swim Club, Inc. (hereinafter the Swim Club), shortly after its incorporation on 17 March 1970, issued thirty (30) shares of its capital stock as follows: ten (10) shares to plaintiff, ten (10) shares to defendant and defendant's wife, and ten (10) shares to Miriam Hudson. At the first trial of this action, plaintiff acknowledged that he resigned his position as officer of the Swim Club in a letter dated 13 June 1974, but testified he did not surrender possession of the stock certificate representing his ten shares of the stock in the corporation at that time.

At a later date in 1974, plaintiff gave his stock certificate endorsed in blank to Sam Hudson, who was a mutual friend of the parties and the bookkeeper for the Swim Club. Mr. Hudson acknowledged receipt of plaintiff's certificate with a letter dated 2 October 1974 in which he said:

> "This will acknowledge receipt of your stock certificate of Triangle Swim Club which I agree to hold in trust for you until such time as your dispute with Herb Young on how the pool will operate has been settled. Your signature will remain as it is and I await your instructions as to how it is to be eventually endorsed."

Plaintiff's certificate remained in Mr. Hudson's possession until the spring of 1977 when Mr. Hudson was imprisoned for embezzlement from his employer, First Citizens Bank and Trust Company. At some point in either late 1976 or early 1977, defendant informed plaintiff that he now had possession of plaintiff's certificate.

In September 1980, plaintiff demanded the return of his stock certificate from defendant. It became apparent defendant did not intend to comply with the demand, thus plaintiff instituted this suit on 9 October 1980. The matter first came on for trial on 11 January 1982 before Judge Thomas H. Lee. Defendant made a motion for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. Both motions were denied. Three issues were submitted to the jury which were answered as follows:

1. Did the defendant convert the stock certificate of the plaintiff representing 10 shares of capital stock in Triangle Swim Club, Inc.?

ANSWER: Yes

2. Did the plaintiff commence this action before the expiration of the three-year statute of limitations?

ANSWER: Yes

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

ANSWER: (No answer)

Upon receipt of the foregoing verdict, the court declared a mistrial as to the damage issue, denied defendant's alternative motions for judgment notwithstanding the verdict or a new trial on the first two issues, entered judgment for plaintiff on the first two issues, and ordered a new trial as to the damage issue. Upon retrial of the damage issue, the jury found plaintiff is entitled to recover $13,000.00 from defendant. From the final judgment entered 8 April 1982, defendant appealed.

Harrell and Titus, by Bernard A. Harrell and Richard C. Titus, for plaintiff appellee.

Poyner, Geraghty, Hartsfield and Townsend, by David W. Long and Cecil W. Harrison, Jr., for defendant appellant.

WEBB, Judge.

The question presented for review on this appeal is whether the trial court, at the first trial of this matter, erred in failing to grant defendant's motions for a directed verdict and judgment notwithstanding the verdict.

Defendant offers the following two grounds in support of his contention that the court erred in denying his motions: (1) plaintiff's own evidence established that his cause of action for conversion was barred by the three-year statute of limitations set out in G.S. 1-52(4), and (2) plaintiff failed to offer evidence as to the fair market value of the converted stock as of the date of the conversion. We do not agree and find no error in the court's denial of defendant's motions.

[1] Defendant argues the statute of limitations began to run when plaintiff learned in either late 1976 or early 1977 that defendant had possession of plaintiff's stock certificate endorsed in

blank. If the statute of limitations had been triggered at that point, then plaintiff's action would be barred because it was not filed until over three years later on 9 October 1980. Plaintiff maintains the limitation period did not begin until September 1980, the date he made demand for the return of his stock certificate. We agree with plaintiff that there was sufficient evidence for the jury to find that the statute of limitations did not begin to run until September 1980.

There is no evidence that when defendant informed plaintiff that he had possession of the certificate, that he indicated any intention to retain the same against plaintiff's rights or to convert it to his own use. Rather, the conversation between the parties served only to notify plaintiff of the location of his certificate subsequent to the imprisonment of Mr. Hudson. Defendant testified that he "received Mr. Hoch's stock certificate in the mail. There was nothing with the certificate and I do not know who mailed it . . . ." Since it appears defendant came into possession of the certificate lawfully, the following applies:

> "Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort. When demand is made, and absolute, unqualified refusal to surrender, which puts the plaintiff to the necessity of force or a lawsuit to recover his own property, is of course a conversion."

Prosser, *The Law of Torts* 4th, § 15 at pp. 89-90 (1971).

Similarly, Dr. Robert E. Lee in his book *North Carolina Law of Personal Property* (1968), stated as follows at page 60:

> "The mere receipt of the possession of a chattel from a third person with an intent to acquire a proprietary interest therein constitutes a conversion without a demand for its return by the owner. The fact that the person in possession is without knowledge that the third person had no power to transfer a proprietary interest is immaterial. A subsequent refusal to surrender the chattel on demand may constitute a separate act of conversion. The owner may elect to treat the defendant as a converter either from the receipt of the chattel or from his refusal to deliver it on demand . . . ."

We hold that the jury could find that the defendant converted the stock on the date of the refusal to return the certificate.

[2] With respect to defendant's contention that plaintiff failed to offer evidence at the first trial as to the fair market value of the converted stock at the time of conversion, we note that although there was no direct testimony as to the fair market value of the shares themselves, there was substantial evidence as to the many factors affecting valuation, such as the fair market value of the corporation's assets, its income, expenses, dividends, and the value of plaintiff's interest. Plaintiff introduced into evidence the balance sheets of the corporation, its income tax returns for the years 1970 through 1979, and its complete ledger book, which contained information about all the income, salaries, dividends, expenses, loans, and obligations of the Swim Club as well as all other matters relating to its financial status.

Plaintiff testified as to the cost of construction of the Swim Club, loans made to it, the size of its initial membership, and its financial success. Plaintiff and his expert witness both gave their opinions as to the fair market value of the corporation's assets prior to construction of a second pool in 1975. Defendant admitted at trial that in an earlier statement he had estimated the assets of the Swim Club to be at least $120,000.00. He further testified that prior to plaintiff's resignation in June 1974, plaintiff's interest was worth $35,000.00.

In our opinion, there was sufficient evidence of the value of the stock to overcome the motion to dismiss.

No error.

Judges ARNOLD and BRASWELL concur.

CONSOLIDATED SYSTEMS, INC. v. GRANVILLE STEEL CORPORATION, SUCCESSOR BY NAME CHANGE TO COLEMAN-DEESE INDUSTRIES, INC. v. JOHN S. CLARK COMPANY, INC.

No. 8217SC679

(Filed 2 August 1983)

1. **Laborers' and Materialmen's Liens § 3— subrogation of second tier contractor—bound by agreement between first tier contractor and general contractor**

Since plaintiff's claims, as second tier subcontractor, were for subrogation to the rights of defendant, a first tier subcontractor, a compromise contract between defendant and third party defendant, contractor, that purported to reduce the amount owed the subrogor, diminished the amounts owed plaintiff, the subrogee, and the trial court's determination that the compromise contract was valid and binding was supported by the evidence.

2. **Trial § 57— trial by court—rules prohibiting expressions of opinion by trial judge—no application**

Statements by a trial judge in which he stated that "I have already reached a conclusion" were not prejudicial to plaintiff because (1) the trial court clearly stated its willingness to hear additional relevant evidence, and (2) the rules prohibiting expressions of opinion by trial courts have no application in proceedings before a judge sitting without a jury.

APPEAL by plaintiff from *Jolly, Judge.* Judgment entered 22 January 1982 in Superior Court, SURRY County. Heard in the Court of Appeals 10 May 1983.

Daniel J. Park, for plaintiff appellant.

Bell & White, by W. Thomas White, for third-party defendant appellees.

BECTON, Judge.

I

This is an action by plaintiff (Consolidated) against defendant (Coleman-Deese, now Granville) on a delinquent account for materials, services and supplies provided Granville at three construction sites—Elkin, Lexington, and North Wilkesboro, North Carolina. Consolidated, a second-tier subcontractor, supplied steel to Granville, a first-tier subcontractor, who was hired to complete a portion of a project under the supervision of the general contractor and third party defendant, John S. Clark Company.

Because of Granville's failure to pay Consolidated for materials furnished, Consolidated, on 2 June 1980, filed this action to recover $19,577.38 plus interest from Granville. In its Answer filed 22 August 1980, Granville denied the material allegations of Consolidated's Complaint and averred that Consolidated failed to provide the materials required by their contract. Granville averred alternatively that Consolidated was late in providing needed materials, and that such delay resulted in Granville suffering financial loss. Granville also filed a Third Party Complaint against the general contractor, John S. Clark Company, alleging that Clark had failed to pay Granville for steel delivered to Clark's construction sites and praying for $24,912.75 in damages.

Consolidated moved for summary judgment against Granville on 1 October 1980; later, that motion was granted and judgment entered for Consolidated for $19,577.38. Six days later, Consolidated filed a claim against third party defendant Clark, by which it sought to be subrogated to the rights of Granville to any recovery Granville received from Clark, and prayed for judgment against Clark up to and including amounts awarded Consolidated from Granville.

Clark, in its Answer to Granville's Third Party Complaint, moved for dismissal pursuant to Rules 12(b)(2), (5) and (6) of the North Carolina Rules of Civil Procedure, and averred that because of (i) change orders agreed to, (ii) delay expenses caused by, and (iii) payments made by Clark to Granville, Clark had discharged all but $522.46 of debts it owed to Granville. Clark also answered Consolidated's claim; it denied the material allegations of that Complaint and moved to dismiss it pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Both Granville and Consolidated then moved for summary judgment against Clark, and Clark moved for summary judgment against both Granville and Consolidated. All motions were denied.

The matter was heard by Judge John Jolly, sitting without a jury, during the 28 September 1981 civil session of Surry County Superior Court. At the conclusion of the evidence, the trial court made factual findings, among them that Consolidated was subrogated to Granville's rights against Clark, and that Clark was entitled to deduct $18,715.47 from the amounts it owed Granville as compensation for delay expenses and back charges, pursuant to

the agreement between Clark and Granville. The court then made legal conclusions, and ordered that Consolidated was entitled to recover the following sums from Clark: $1,604.93 with interest at 8% from 28 April 1980 until paid; $4,545.13 with interest at 12% to accrue from 28 April 1980 to 22 January 1982, then 8% until paid; and costs of the action. Consolidated appealed.

II

Consolidated raises sixteen (16) assignments of error and makes eleven (11) arguments in its brief. Consolidated, however, abandoned its eighth and ninth contentions during its oral argument.

[1] The crux of this case is Consolidated's contention that it should not be bound by an agreement between Granville and Clark, which resulted in a total credit of $13,500 to Clark as delay charges. Since Consolidated's claims are for subrogation to the rights of Granville, a compromise contract, such as the one here, that purports to reduce the amount owed the subrogor, diminishes amounts owed Consolidated, the subrogee. Because the trial court determined that the compromise contract was valid and binding on Consolidated, Consolidated first challenges the evidentiary rulings concerning the proof of that contract.

The trial was conducted without a jury, and the trial court's findings concerning that contract are presumed correct so long as they are supported by competent evidence. *Williams v. Pilot Life Ins.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). Even when incompetent evidence is admitted, if competent evidence of the same import is also considered, the court is presumed to have considered only that evidence which is competent. *Construction Co. v. Housing Authority*, 1 N.C. App. 181, 160 S.E. 2d 542 (1968). Our review of the record reveals plenary *competent* evidence to support the findings of the trial court to which Consolidated excepted, and we expressly hold that these findings support the trial court's conclusions. Thus, Consolidated's evidentiary arguments are without merit.

[2] Consolidated's remaining argument concerns the trial court's denial of its motion for mistrial, based on the following statements by the trial court:

COURT: I have already reached a conclusion, unless you can show some evidence on this agreement about the delay, that's in accord and satisfaction I find that from all the evidence. I don't see any way you can get around that. And any evidence you have got about further delays, I'm not going to deduct the account any more than $13,500.00, but I don't see any way you can get around that. Mr. Shillington had apparent authority as president of the company. There is complete testimony that they reached accord and satisfaction as to the delays, and as I told you yesterday you have a problem in that Mr. Shillington is not here to disprove that and nobody else in the company was there, other than Mr. Rohde if I remember correctly. I just, I am bound. It's almost a matter of summary judgment as to that particular delay. So all this stuff about other delays, unless Mr. White wants me to—in fact, if I conclude that that was an accord and satisfaction then we have got an argument as to whether or not the delays were greater or lesser, and I think you have got some arguments as to being lesser and he has got arguments as to the continuing monthly amounts being greater. However, I am concluding and I'll tell you right now I am concluding, that they are entitled to $13,500.00 set off on the basis of accord and satisfaction that was executed and approved by their company.

COURT: If you have other evidence with regard to that particular part of this case I'll be glad to hear it. I've got an open mind about it. But I'm saying that on the basis of what I have seen thus far I think I am bound by my oath to do what the law says and what the facts indicate, and I ain't seen anything to the contrary.

. . . .

MR. PARK: Well, Your Honor has already made up his mind, as I understand it.

COURT: Mr. Park, I just told you I hadn't. I told you that on the basis of what I've seen that's the way I, that's what it indicates to me under the evidence that you gentlemen have put in. It's not my fault that you can't bring Mr. Shillington here. It's not your fault either. But I am bound by what the evidence says. And if you have got other evidence I have an

open mind about it. That's all I'm saying. But to go on into the delay evidence is wasting your time and mine except as it relates to that agreement. I'm just trying to tell you up front where we stand. I think that's only fair to you.

In addition to the fact that we find no prejudice to Consolidated's cause because the trial court clearly stated its willingness to hear additional relevant evidence, the parties' election of a non-jury trial also subjects them to a now familiar rule: the rules prohibiting expressions of opinion by trial courts have no application in proceedings before a judge *sitting without a jury. Cf. Everette v. D. O. Briggs Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959) (interprets old N. C. Gen. Stat. § 1-180 (1978)). Although the provisions of G.S. § 1-180 have been repealed and are now embodied in N. C. Gen. Stat. § 1A-1, Rule 51(a) (1969), the law remains, for all practical purposes, unchanged. *See, Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971). Our conclusion is bolstered by the fact that both G.S. § 1-180 and its replacement, Rule 51(a), proscribe expressions of opinion in the presence of a jury, and understandably so, since most juries lack the training needed to consider only relevant and competent evidence without guidance. In contrast, in a trial without a jury, the fact finder is also a highly trained legal expert, and thus the evil addressed by the statute is less likely to exist. *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971) (Held, in a non-jury trial, the presumption is that the trial court disregarded incompetent evidence in making its decision.). We find Consolidated's argument unpersuasive.

As a result, we find the trial below to have been free of prejudicial error. Accordingly, the judgment below is

Affirmed.

Judges WELLS and EAGLES concur.

GAIL GARLAND AND HUSBAND, JOHN GARLAND, JR., MRS. L. C. WHITE, FLOYD C. WHITE AND WIFE, DOROTHY WHITE, LOUIS WHITE AND WIFE, MARY WHITE, MRS. IVORY ARMSTRONG AND GLENWOOD ASSOCIATES, A PARTNERSHIP v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, ROY W. TRANTHAM, MAYOR OF THE CITY OF ASHEVILLE, F. JACK COLE, RALPH D. MORRIS, JR., NORMA PRICE, WALTER R. BOWLAND, HAROLD BROWNLEE, AND REV. H. C. WILKES, MEMBERS OF THE CITY COUNCIL OF THE CITY OF ASHEVILLE

No. 8228SC523

(Filed 2 August 1983)

1. **Municipal Corporations § 2.1— annexation ordinance—sufficiency of boundary description**

The description in an annexation ordinance and in the notice of hearing, together with tax and topographic maps referred to therein, provided a sufficient boundary description of the annexed area which could be ascertained on the ground. The fact that the description contained only approximate distances did not invalidate the ordinance where all points except the second referred to ascertainable monuments and every point in the description could be easily ascertained without the aid of exact distance measurements.

2. **Municipal Corporations § 2.3— annexation ordinance—topographic features as boundaries—use of contour rather than ridge lines**

The trial court did not err in finding that natural topographic features were used where practical to do so in fixing the boundaries of an annexed area because contour rather than ridge lines were used where the city council chose the contour lines as the boundary because the city could not furnish water beyond the elevation of 2,350 feet without extensive additional resources, and petitioners failed to show that it would have been more practical to use the ridge lines as a boundary.

APPEAL by respondent City of Asheville from *Jolly, Judge.* Judgment entered 30 January 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 April 1983.

Petitioners instituted a proceeding to review annexation Ordinance 1217 adopted by the City of Asheville on 14 May 1981. The petition was served upon respondent by certified mail. Respondent made a special appearance in which it moved unsuccessfully to dismiss for insufficiency of process. The parties stipulated, prior to the hearing, that petitioners were owners of land within the area annexed by respondents under Ordinance 1217.

After hearing extensive evidence for petitioners, the trial court held that the annexation ordinance was invalid and void. From the order and judgment entered, respondent appealed.

Long, Parker, Payne & Matney, by Robert B. Long, Jr. and Ronald K. Payne for petitioner-appellees.

Herbert L. Hyde and Redmond, Stevens, Loftin & Currie, by John S. Stevens and Thomas R. West for respondent-appellant.

EAGLES, Judge.

For the reasons discussed in the concurring opinion to *In Re: Annexation Ordinance No. 1219 Adopted by City of Asheville, May 14, 1981*, 62 N.C. App. 588, 303 S.E. 2d 380 (1983), we find no merit in defendants' first assignment of error that service of process upon defendants was invalid.

[1] Respondent next contends that the trial court erred in its findings of fact and conclusions of law concerning the boundary description of the area annexed by Ordinance 1217. The boundary description in Ordinance 1217 and in the Notice of Hearing published pursuant to G.S. 160A-49(b) read:

> BEGINNING at a point, said point being 10 feet west of the intersection of the western right-of-way margin of Chunns Cove Road (SR 2042) and the existing City Limit boundary of the City of Asheville as shown on Sheet 26, Ward 8 of the Tax Map as recorded in the Buncombe County Tax Supervisor's office as of July 7, 1980, said point also lying on the existing Asheville City Limit line; thence in a northerly direction following a line 10 feet west of the western right-of-way margin of Chunns Cove Road and running parallel to said right-of-way margin, a distance of approximately 1,400 feet to a point; thence crossing Chunns Cove Road in a northeasterly direction following a straight line a distance of approximately 60 feet to a point 10 feet north of the northern right-of-way margin of a private road; thence in an easterly and southeasterly direction following a line 10 feet north of the northern right-of-way margin of said private road, a distance of approximately 534 feet to the intersection of said private road right-of-way with the contour line identifying an elevation of 2,350 feet as depicted on a

topographic Map No. 36-32 of Buncombe County, compiled by Fairchild Aerial Survey, Inc., and updated by Piedmont Aerial Survey, Inc.; thence in a southerly direction following said contour line a distance of approximately 1,770 feet to the existing City Limit boundary; thence in a westerly direction following said City Limit line, a distance of approximately 1,595 feet to the point of BEGINNING.

As to that description the trial court found that

4. Notwithstanding the aforesaid "metes and bounds" description contained in the annexation ordinance, the Court finds that:

(a) The beginning point called for in the purported "metes and bounds" description is not ascertainable from either the description itself or by reference to the tax map mentioned in the description.

(b) The purported description contains only approximations as to distances and does not contain appropriate courses.

(c) The description used does not refer to monuments for approximate distances, the only reference to approximate distances being that they are to run from "point" to "point," which said points are not ascertainable in and of themselves.

(d) The first call, which runs in a "northerly direction," ten feet west of the right of way margin of Chunns Cove Road, cannot be located on the ground as a course, as such right of way is not shown on the tax map from which the "metes and bounds" description purportedly was drawn; also, such right of way has not been ascertained or granted pursuant to any proceeding to either the State or the City, and the prescriptive width of said right of way has not been ascertained by any proceeding.

(e) The second call in the "metes and bounds" description is not ascertainable.

(f) The third call contained in said "metes and bounds" description runs with the northern right of way margin of a "private road," a distance of approximately

534 feet. However, only 243.9 feet of the private road has an established right of way and no other established right of way exists of record as to said private road.

Based on those findings of fact the trial court concluded that

3. The description of the external boundaries of the property to be annexed contained in Ordinance No. 1217 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.

We are persuaded that the above description, together with the maps referred to, provided a boundary description which could be ascertained on the ground and that the trial court erred in its findings of fact and conclusions of law. "Reference in the resolution to the maps is sufficient to show that the Council saw and understood the boundaries of the areas under consideration and that the members realized the significance of their action. While the description contained in the resolution may not have been clear to the general public, the oral resolution incorporating by reference the maps before the Town Council substantially complies with G.S. 160A-49(a). The rights of petitioners and the general public, are protected by G.S. 160A-49(b) and G.S. 160A-49(e)." *Kritzer v. Town of Southern Pines*, 33 N.C. App. 152, 156, 234 S.E. 2d 648, 651 (1977); *see also Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979).

The intersection of Chunns Cove Road (SR 2042) and the City of Asheville city limit line was clearly marked on both the Tax Map, Sheet 26, Ward 8, and on the Fairchild Aerial Survey, Inc. topographic Map No. 36-32, enabling petitioners to establish the western right-of-way and the beginning point of the boundary description. The testimony of Mr. Verl R. Emrick, Jr., Director of Planning for the City of Asheville since 1974, indicated that the tax map referred to in the description included the right-of-way in the total width of the road shown on that map. Similarly, the second point in the boundary description could be located by reference to both maps, although the description did not state a monument by which that point could be ascertained. The fourth point in the boundary description, found by following the north-

ern right-of-way margin of a private road, could be easily ascertained by reference to topographic Map No. 36-32. Although the established right-of-way may run only 243.9 feet of the 534 feet referred to in the description, as alleged by petitioners, the clear meaning of the description was to follow the line of the established right-of-way for the entire distance to the fourth point. Finally, the fact that the description contained only approximate distances was not enough to invalidate the annexation ordinance, since every point in the description could be easily ascertained without the aid of exact distance measurements. All points, except the second point, referred to ascertainable monuments. As we have indicated above, the second point was ascertainable without reference to such a monument.

Since we hold that the boundary description was sufficient for the purposes served by the Notice of Hearing and for Ordinance 1217, we need not address respondent's assignment of error questioning the trial court's power to invalidate and void annexation Ordinance 1217.

[2] The superior court found that respondents followed natural and topographic features where practical to do so when fixing the boundaries of the area annexed. Petitioners assigned error to this finding, suggesting that the more readily ascertainable ridge lines should have been used instead of the contour line to delineate the boundary of the annexed area. G.S. 160A-48(e) provides that

> (e) In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality land on both sides of the street and such outside boundary may not extend more than 200 feet beyond the right-of-way of the street.

In order to establish noncompliance with that statute, petitioners must show that 1) the boundary of the annexed area does not follow natural topographic features and 2) it would have been practical for the boundary to follow such features. See *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E. 2d 630 (1982). Even assuming *arguendo* that contour lines are not natural topographic features, we must uphold the trial court's finding because peti-

tioners have failed to meet their burden of proof as to the second requirement.

We agree with respondent that the language of G.S. 160A-48(e) implies that there are circumstances where the use of natural topographic features, such as ridge lines, would not be appropriate. Here, respondent chose the contour line as the boundary, rather than the ridge line, because the City could not furnish water beyond the elevation of 2,350 feet without extensive additional resources. Petitioners have failed to show that it would have been more practical to use the ridge lines as a boundary. We find no merit to their cross-assignment of error.

For the above reasons we must reverse and remand the order and judgment below.

Reversed and remanded.

Judges WELLS and BECTON concur.

IN THE MATTER OF GEORGE WESLEY THOMAS, INCOMPETENT

No. 8222SC883

(Filed 2 August 1983)

Insane Persons § 2.3— removal of guardian—insufficient evidence

The clerk and the superior court were not in error in holding that the evidence was insufficient to prove that the respondent had neglected to maintain the ward for whom he had been appointed in a manner suitable to the ward's degree as required by G.S. 33-9(3).

APPEAL by petitioner from *Wood, Judge.* Judgment entered 22 April 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 June 1983.

This is an appeal in a hearing to remove a guardian for an incompetent. Corl E. Koontz was appointed guardian for George Wesley Thomas in March 1970. Walter Finch petitioned the court to remove Mr. Koontz on 16 November 1981.

A hearing was held before the Clerk of Superior Court. The evidence at the hearing showed that Mr. Koontz and Walter

Finch are first cousins to Mr. Thomas. Mr. Finch testified that George Wesley Thomas lived in a house which had been built by his deceased parents in the early 1960's. He described the house as "drab" with no rugs on the floor except a very poor quality carpet in the living room. He characterized the clothes George wears as "hand-me-downs" given to him by Mr. Finch's sisters. When he visited George he saw no green vegetables in the refrigerator. George had TV dinners in his freezer and mainly baked beans and inferior grades of canned food in his pantry. Mr. Finch concluded George was not receiving a proper diet.

Mr. James T. Chapman of the Davidson County Department of Social Services testified that he visited George W. Thomas on 4 December 1981. He described the house as "adequate, with the exception of some difficulty with the heating system." He said the house was sparsely furnished. He said Mr. Thomas needed more prepared meals than he was receiving. He said he did not feel George's diet was adequate "in consideration of his income and financial holdings." He testified that Mr. Thomas' clothes did not fit very well and appeared to be secondhand. He testified: "Mr. Thomas' physical needs are cared for in a manner that would be satisfactory if there were less income. The care of Mr. Thomas can be described as adequate, but that is not to say satisfactory given the present arrangement."

Douglas Koontz, the brother of Corl E. Koontz, testified as to the living conditions of George Wesley Thomas. His testimony was similar to the other two witnesses.

The annual accounts of the guardian from 27 March 1970 through 26 June 1981 were introduced into evidence. They showed that the annual income which the guardian received for Mr. Thomas during that period ranged from a low of $2,616.82 for the period ending 14 December 1972 to a high of $8,305.97 for the year ending 26 June 1981. The receipts in most of the years were approximately $4,000 and the guardian expended an average sum of $3,546.18 for George Wesley Thomas in each year. His disbursements in 1981 were $4,606.22. The assets held by the guardian increased from $11,070.35, at the first accounting period, to $17,805.92 at the last accounting period. There was also evidence that Mr. Thomas owned some real estate, including his home, which produced no income.

At the conclusion of the hearing, the court found that no evidence had been presented which showed that the guardian had failed to maintain his ward in a manner suitable to which the estate of the ward would permit him and found further that the guardian had seen to the proper maintenance and support of the ward. The Clerk dismissed the petition. The petitioner excepted to the findings of fact made by the Clerk and appealed to the Superior Court. A *de novo* hearing was held in the Superior Court which affirmed the order of the Clerk. The petitioner appealed.

Brinkley, Walser, McGirt, Miller and Smith, by Walter F. Brinkley and Stephen W. Coles, for petitioner appellant.

Stoner, Bowers and Gray, by P. G. Stoner, Jr., for respondent appellee.

WEBB, Judge.

This proceeding to remove the respondent as guardian for George Wesley Thomas was brought under G.S. 33-9 which provides in part:

> "The clerks of the superior court have power and authority on information or complaint made to remove any fiduciaries appointed under the provisions of this Chapter
>
> . . . .
>
> . . . .
>
> (3) Where the fiduciary neglects to educate or maintain the ward or his dependents in a manner suitable to their degree."

The appellant contends that the evidence before the Clerk and the Superior Court conclusively showed that the ward was not maintained in a manner suitable to the degree to which the estate would permit. He argues that it is evident that with the resources available, the guardian has neglected to maintain the ward in a manner suitable to his degree. We cannot so hold.

We believe the evidence shows the guardian has expended for his ward each year an amount which is a few hundred dollars less that his average annual income. We cannot say that the Clerk or the Superior Court was in error in holding that this evidence

was not sufficient to prove the respondent had neglected to maintain Mr. Thomas in a manner suitable to his degree. We believe that the evidence shows that considering Mr. Thomas' income, his guardian has provided him with funds which are adequate for his support. We note that the incompetent owns non-income producing real property. The guardian may want to consider selling this property and invest the proceeds of the sale in such a way as to produce more income for his ward.

Affirmed.

Judges ARNOLD and BRASWELL concur.

ADA JEAN LATCH v. GEORGE DALE LATCH

No. 8212DC768

(Filed 2 August 1983)

1. **Appeal and Error § 6.3— subject matter jurisdiction—denial of motion to dismiss—no right of immediate appeal**

Denial of a motion to dismiss for lack of subject matter jurisdiction is an interlocutory order not affecting a substantial right and is, therefore, not immediately appealable.

2. **Divorce and Alimony § 23.5; Infants § 5— custody of child in another state—subject matter jurisdicition**

The courts of this State have subject matter jurisdiction of an action for custody of a child who is physically present in Pennsylvania pursuant to the "significant connection" provisions of G.S. 50A-3(a)(2)(i) and the "substantial evidence" provisions of G.S. 50A-3(a)(2)(ii) where the child's mother, who was granted custody under a separation agreement, resides in North Carolina and has lived in this State most of her life; the child was residing with her mother in this State when she was abducted by the father and taken to Pennsylvania; and the child resided in North Carolina approximately one-half of the two years that had elapsed between her parents' separation and her abduction. Furthermore, jurisdiction was also authorized under G.S. 50A-3(a)(4) where it appears that a Pennsylvania court has declined to exercise jurisdiction on the ground that this State is the more appropriate forum and it is in the best interest of the child that North Carolina assume jurisdiction.

Judge HEDRICK concurring in the result.

Latch v. Latch

APPEAL by defendant from *Hair, Judge.* Orders entered 23 March 1982 and 8 April 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 17 May 1983.

Plaintiff sued to obtain custody of and support for the parties' child, now five years old. When married in 1976, the parties lived in Pennsylvania where the child was born, and they lived in that state until they separated in January, 1980. The separation agreement entered into gave plaintiff custody of the child, and she and the child moved to North Carolina and lived with plaintiff's mother in Fayetteville until September, 1980, when they went back to Pennsylvania and resided there in one of the houses owned by the parties until August, 1981, when they returned to Fayetteville.

In September, 1981, defendant instituted a custody action in Pennsylvania, alleging therein that plaintiff was residing in Pennsylvania, even though he knew she and the child were living in North Carolina, and plaintiff did not receive a copy of the suit papers until 26 February 1982. On 5 December 1981, while plaintiff and the child were at a shopping center in Fayetteville, defendant abducted the child and took her back to Pennsylvania with him. Two weeks later, plaintiff filed this action.

In responding to plaintiff's suit, defendant contested the Court's jurisdiction of the subject matter; but after two hearings on defendant's motion, the court concluded, in two separate orders, that it had jurisdiction and ordered a custody hearing.

No counsel for plaintiff appellee.

Reid, Lewis & Deese, by Renny W. Deese, for defendant appellant.

PHILLIPS, Judge.

[1] Denial of a motion to dismiss for lack of subject matter jurisdiction is an interlocutory order, not affecting a substantial right, and therefore not immediately appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982). However, in order to facilitate an early resolution of the custody issue, which the child's welfare requires, we will treat defendant's appeal as a writ of certiorari pursuant to Rule 21(a), N.C. Rules App. Proc.

[2] Defendant contends the North Carolina trial court never had subject matter jurisdiction. The Uniform Child Custody Jurisdiction Act lists four alternative grounds for subject matter jurisdiction. G.S. 50A-3. Plaintiff's claim falls under two of these grounds for jurisdiction.

G.S. 50A-3(a)(2) authorizes North Carolina court jurisdiction of a child custody matter if:

> It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships . . . .

Plaintiff has lived most of her life in North Carolina and therefore has a significant connection with this state. Although the child spent the first twenty-two months of her life in Pennsylvania, she has resided in North Carolina approximately one-half of the two years that elapsed between her parents' separation and her abduction. The child's mother, who was granted custody under the separation agreement, resides in North Carolina. The child would still be in North Carolina if she had not been abducted. Under these circumstances, the child has a "significant connection" with this state.

The facts that the child had settled into North Carolina residence and that her mother lives in this state support the statutory requirement that there is available in North Carolina "substantial evidence relevant to the child's present or future care, protection, training, and personal relationships . . . ." The trial court properly concluded it had jurisdiction under G.S. 50A-3(a)(2).

Jurisdiction is also authorized under G.S. 50A-3(a)(4) if:

> (i) It appears that . . . another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

In a letter to defendant, the Pennsylvania court stated it was relinquishing jurisdiction to the North Carolina court. This was done to avoid a jurisdictional conflict that would have created difficulties for the child, the parties and the courts, and because the Pennsylvania court was of the opinion that this state is the more appropriate forum under the circumstances. We agree.

The orders appealed from are therefore

Affirmed.

Judge WELLS concurs.

Judge HEDRICK concurs in result.

Judge HEDRICK concurring in the result.

I concur in the result reached by the majority; however, I believe the appeal should be dismissed since it is from an interlocutory order not affecting a substantial right. To "treat defendant's appeal as a writ of certiorari pursuant to Rule 21(a)" frustrates the expeditious administration of justice in this case, and encourages appeals from interlocutory orders which causes unnecessary and unreasonable delay and expense.

ROBERT EARL RADFORD v. JAMES LLOYD NORRIS AND BECKY ANN NORRIS

No. 8210SC880

(Filed 2 August 1983)

Damages § 9— failure to instruct on doctrine of avoidable consequences error

The trial court erred in failing to give a requested instruction on the doctrine of avoidable consequences where the evidence tended to show that plaintiff had sought medical treatment from an orthopedic surgeon who prescribed a program of back exercises as part of the treatment for his back injury and that plaintiff stopped doing the exercises even though he was repeatedly advised by the orthopedic surgeon to continue to do the exercises.

APPEAL by defendants from *Farmer, Judge.* Judgment entered 31 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 7 June 1983.

This is an action for personal injuries in which the evidence showed the plaintiff was injured while riding a motorcycle which was involved in a collision with an automobile driven by the defendant Becky Ann Norris. The jury answered the issues favorably to the plaintiff. The defendants appealed from a judgment against them.

Van Camp, Gill and Crumpler, by William B. Crumpler, for plaintiff appellee.

Moore, Ragsdale, Liggett, Ray and Foley, by William Woodward Webb and John N. Hutson, Jr., for defendant appellants.

WEBB, Judge.

At the conclusion of all the evidence, the court held a charge conference pursuant to Rule 21 of the North Carolina General Rules of Practice, at which time the defendants submitted several written requests for specific instructions. The court refused to give these requested instructions. At the conclusion of the charge, defendants duly excepted to the court's failure to give the requested instructions. Among the requested instructions was a request for an instruction on the doctrine of avoidable consequences. For the reasons that follow, we conclude that such an instruction should have been given and order a new trial.

> The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had. *Johnson v. R.R.*, 184 N.C. 101, 113 S.E. 606. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable. 22 Am. Jur. 2d *Damages* §§ 30-32 (1965).

Miller v. Miller, 273 N.C. 228, 239, 160 S.E. 2d 65, 73-4 (1968).

This doctrine has generally been held to preclude recovery for those consequences of the tort-feasor's act which could have been avoided by acting as a reasonable prudent man in following medical advice. 22 Am. Jur. 2d *Damages* § 40 (1965). "Damages will not be reduced merely because the injured party fails to

follow the medical advice given. All he must do is to act reasonably concerning the advice which he receives." *Id.* at 65. Since the test is one of reasonableness, and depends upon the circumstances of the particular case, it is a jury question except in the clearest of cases. Annot., 62 A.L.R. 3d 70 (1975). Factors which are to be considered in determining whether a plaintiff reasonably refused medical attention include "[t]he degree of risk in, as well as the amount of pain of, the degree of relief hoped for from, and the chance of success of the treatment." D. Dobbs, *Remedies*, § 8.9 at 580-81 (1973).

Plaintiff testified that he sought medical treatment from Dr. O. P. Miller, an orthopedic surgeon, who prescribed a program of back exercises as part of the treatment for his back injury. He tried doing these exercises in the beginning, but stopped doing them because they were too painful. He was not doing the exercises at the time of the trial and did not plan to do them despite Dr. Miller's suggestions.

Dr. Miller testified that the back exercises he recommended were considered routine treatment for plaintiff's kind of injury. The exercises were "designed to work out stiffness because the stiff back has a propensity to remain painful" and to strengthen the muscles which support the back. Plaintiff could best control his back pain by doing his exercises regularly, and he had told plaintiff so. On 25 January 1978 plaintiff advised him that he was slowly improving and that the exercises for his back had caused him some soreness but less than that he had experienced previously. On 1 March 1978, however, plaintiff advised him that he had stopped doing the exercises. From that visit forward, he repeatedly advised plaintiff to resume the exercises. He could not say with a reasonable medical certainty that the exercises, if done regularly, would cure the back pain, but he declared, "I know they make it better." There is no absolute remedy.

There was thus evidence that plaintiff's regular and continued performance of the prescribed exercises would have alleviated the pain, and thus that pain was a consequence that could have been avoided. "[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in sub-

stance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error." *Bass v. Hocutt*, 221 N.C. 218, 220, 19 S.E. 2d 871, 872 (1942). Whether the plaintiff reasonably discontinued the exercises is a question for the jury to decide, as well as the effect, if any, plaintiff's failure to continue the exercises had upon the amount of damages. The trial court should have thus submitted an instruction on the doctrine of avoidable consequences.

We do not consider defendants' remaining assignments of error as the questions they raise may not recur at a new trial.

New trial.

Judges ARNOLD and BRASWELL concur.

ANN M. HOLBROOKS AND GENE HOLBROOKS v. DUKE UNIVERSITY, INC.

No. 8219SC876

(Filed 2 August 1983)

1. **Physicians, Surgeons and Allied Professions § 17— negligent injection by nurse—sufficiency of evidence**

In a medical malpractice action to recover for injuries allegedly suffered by plaintiff as the result of a negligent injection by a nurse at defendant's hospital, plaintiff's evidence was sufficient to be submitted to the jury on the issue of whether a violation of the standard of care for administering injections by defendant's nurse was a proximate cause of plaintiff's injury where a registered nurse testified that giving such an injection at the location in question was not in accordance with the standard of care in the nursing profession in Durham and similar communities, and an orthopedic doctor testified that the injection could have caused damage to a nerve in plaintiff's leg.

2. **Rules of Civil Procedure § 32— reading portion of deposition into evidence—requiring other portions to be read into evidence**

Where plaintiffs read into evidence a portion of a doctor's deposition dealing with plaintiff's nerve injury and its causation, it was not error for the trial court to require plaintiffs to read into evidence a part of the doctor's deposition concerning his treatment of plaintiff and the proper place to make the intramuscular injection involved in the case. G.S. 1A-1, Rule 32(a)(5).

Holbrooks v. Duke University

APPEAL by plaintiffs from *Gaines, Judge.* Judgment entered 18 March 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 7 June 1983.

This is an action for medical malpractice in which the *feme* plaintiff alleges she suffered personal injuries as the result of a negligent injection by a nurse at the defendant's hospital. Plaintiffs' evidence showed that she underwent a surgical procedure at Duke University Hospital. Following the procedure, a nurse employed by the defendant administered an intramuscular injection of Vistaril and Demerol to Mrs. Holbrooks approximately three or four inches above her knee. Mrs. Rebecca Allen, who was found by the court to be a licensed registered nurse and an expert in the field of nursing, testified that giving an intramuscular injection of Demerol and Vistaril at the location in question would not be in accordance with the standard of care among members of the nursing profession in Durham, North Carolina, and similar communities. Dr. James R. Urbaniak, who also was found to be an expert in the field of orthopedic medicine, testified that in his opinion the injection could have caused an injury to a nerve in Mrs. Holbrooks' thigh. Mrs. Holbrooks testified as to her pain since the injection.

At the close of the plaintiffs' evidence, the court granted the defendant's motion to dismiss. The plaintiffs appealed.

Bailey, Brackett and Brackett, by Martin L. Brackett, Jr. and Cynthia L. Pauley, for plaintiff appellants.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon and Faison, by E. C. Bryson, Jr. and William P. Daniell, for defendant appellee.

WEBB, Judge.

[1] We hold it was error to grant the defendant's motion to dismiss. Mrs. Rebecca Allen was qualified to testify before the jury as to the standard of care for giving injections by nurses in Durham. *See Maloney v. Hospital Systems,* 45 N.C. App. 172, 262 S.E. 2d 680, *disc. rev. denied,* 300 N.C. 375, 267 S.E. 2d 676 (1980). She testified the injection was not in accordance with the standard of care in Durham. Dr. Urbaniak testified the injection could have caused damage to a nerve in Mrs. Holbrooks' leg. We be-

lieve this was sufficient evidence to be submitted to the jury as to whether the violation of the standard of care for the administering of injections by the defendant's agent was a proximate cause of injury to Mrs. Holbrooks.

The defendant argues that the motion to dismiss was properly granted. It says that Mrs. Allen testified that the injection was made in the wrong place and Dr. Urbaniak testified the injection caused the damage to the nerve but neither of them testified that the damage was caused because the injection was made at the wrong place. We believe that from the testimony of these two witnesses, the jury could infer that the damage to the nerve was caused by the injection being administered in the wrong place.

[2] The plaintiffs also assign error to the court's requiring them to read into the record certain portions of a deposition by Dr. Urbaniak. We shall discuss this assignment of error because the question upon which it is based may arise again at a new trial. The plaintiffs read into evidence a portion of Dr. Urbaniak's deposition dealing with the nerve injury and its causation. The court then required the plaintiffs to read into evidence a part of Dr. Urbaniak's deposition as to his treatment of Mrs. Holbrooks and the proper place to make an intramuscular injection of Vistaril and Demerol.

G.S. 1A-1, Rule 32(a)(5) provides in part:

> "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced . . . ."

We believe the segments of the deposition which the court compelled the plaintiffs to read into evidence were sufficiently relevant to the parts of the deposition which the plaintiffs offered into evidence so that it was not error for the court to compel the plaintiffs to read them to the jury.

For the reasons stated in this opinion, there must be a

New trial.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. ROBERT MILTON FOSTER

No. 8228SC1292

(Filed 2 August 1983)

Criminal Law § 138— aggravating factors improperly considered in determining sentence

In a prosecution for robbery with a firearm under G.S. 14-87, the trial court improperly considered as factors in aggravation that (1) the offense was committed for pecuniary gain, and (2) the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Evidence necessary to prove the offense of armed robbery was also used to prove the pecuniary gain factor which is proscribed by G.S. 15A-1340.4(a). Further, the trial judge failed to find specifically that in the defendant's prior convictions, he was not an indigent or, if he were an indigent, he was represented by counsel as required by G.S. 15A-1340.4(e).

Judge BRASWELL concurring in part and dissenting in part.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 22 July 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 July 1983.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Mecham, Jr., for the State.

Assistant Public Defender Lawrence C. Stoker, for the defendant.

ARNOLD, Judge.

Defendant appeals from a conviction of robbery with a firearm under G.S. 14-87 for which he received a prison sentence.

A careful review of the record and the transcript before us reveals no error in the defendant's trial.

The trial judge gave the defendant a sentence of 18 years, which was in excess of the minimum 14-year term prescribed by G.S. 14-87(d). Two factors were found in aggravation:

3. The offense was committed for pecuniary gain. . . .

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

finement, including larceny, breaking or entering, assault with a deadly weapon, escape and robbery.

Although one factor was found in mitigation, the trial judge concluded that the factors in aggravation outweighed those in mitigation.

Both aggravating factors were erroneously considered. Evidence necessary to prove the offense of armed robbery, a taking of goods or money of any *value, see State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974), was also used to prove the pecuniary gain factor. This is proscribed by G.S. 15A-1340.4(a).

In addition, the trial judge failed to find specifically that in the defendant's prior convictions, he was not an indigent or, if he were an indigent, he was represented by counsel. The court in *State v. Thompson*, 61 N.C. App. 679, 300 S.E. 2d 29, *disc. rev. allowed*, 308 N.C. 391, 302 S.E. 2d 258 (1983), held that before prior convictions can be proved by the defendant's own testimony on cross-examination, as was done here, G.S. 15A-1340.4(e) requires the State to show by a preponderance of the evidence that the defendant was not indigent or that he had or waived counsel at the time of his prior convictions. That was not done in the case *sub judice*.

Because the factors in aggravation were improperly considered, we remand for resentencing. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

No error in the trial. Remanded for resentencing.

Judge WELLS concurs.

Judge BRASWELL concurs in part and dissents in part.

Judge BRASWELL concurring in part and dissenting in part.

I concur in that portion of the opinion which finds no error in defendant's trial.

As to the aggravating factor of pecuniary gain found by the trial judge in the sentencing hearing, I agree that this factor was erroneously considered, but I would hold that the error does not by statute or by constitution require a resentencing hearing. The

defendant failed to object, except, move to suppress, or assign as error the erroneous use of this aggravating factor in sentencing.

I dissent from the holding that places the burden of proof upon the State to show that the defendant was indigent or waived counsel when using a prior conviction as an aggravating factor. In my view the majority are misreading G.S. 15A-1340.4(e). My reasons are the same as expressed in my dissent in *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983). In the present case the defendant did not object, except, move to suppress, or assign as error the erroneous use of a prior conviction as an aggravating factor in sentencing.

We should not *sua sponte* raise collateral points that do not go to the jurisdiction of the court when the parties have raised no objection to the action below, have taken no exception, and have not assigned the topic as error. *See Dilliplaine v. Lehigh Valley Trust Co.*, 475 Pa. 255, 322 A. 2d 114 (1974), for a discussion on when appellate courts should consider basic and fundamental error despite specific exception or assignment of error.

I dissent from the decision awarding any resentencing hearing.

LOUIS F. ROSHELLI v. LAWRENCE F. SPERRY

No. 8215SC801

(Filed 2 August 1983)

1. Actions § 10; Rules of Civil Procedure § 4— summons naming person not a party—summons naming defendant—new action—statute of limitations

Where plaintiff filed a complaint against defendant on 27 March 1981 seeking recovery under the family purpose doctrine for injuries received in an automobile accident on 31 March 1978, a summons was issued in the name of defendant's daughter on the date the complaint was filed and was served on 31 March 1981, and a summons was issued in defendant's name on 7 April 1981, plaintiff's failure to cause a summons to be issued in defendant's name within five days of the filing of his complaint resulted in a discontinuance of the action against the defendant, the summons issued on 7 April in defendant's name initiated a new action at the time of its issuance, and the action was thus barred by the three-year statute of limitations of G.S. 1-52. G.S. 1A-1, Rule 4(a) and (b).

2. Rules of Civil Procedure § 4— endorsement of summons—purpose of Rule 4(d)

The purpose of G.S. 1A-1, Rule 4(d) is to keep an action alive by means of an endorsement on the original summons or by the issuance of an alias or pluries summons in situations where the original, properly directed summons is not yet served, and the statute does not apply to cause a summons issued in defendant's name and endorsed by the clerk to relate back to an original summons issued in the name of a person who is not a party to the action.

APPEAL by plaintiff from *Morgan, Judge*. Order entered 24 June 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 May 1983.

On 27 March 1981 plaintiff filed a complaint against Lawrence F. Sperry seeking recovery under the family purpose doctrine for personal injuries received on 31 March 1978 in an automobile accident allegedly caused by the negligent driving of defendant's daughter Beverly N. Sperry. On the date the complaint was filed, a summons was issued in the name of Beverly Sperry. The summons was served on 31 March 1981. A summons in the name of the defendant, Lawrence F. Sperry, was issued on 7 April 1981 and served on 13 April 1981. From denial of his motion to dismiss under Rules 12(b)(2), (4), (5), and (6), defendant appealed and this Court affirmed. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982). On 27 May 1982 defendant filed a motion for summary judgment on the ground that plaintiff's action was barred by the three-year statute of limitation of G.S. 1-52. From the trial court's order granting defendant's motion, plaintiff appeals.

Charles C. Thompson, III, for plaintiff-appellant.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Joseph F. Brotherton, for defendant-appellee.

EAGLES, Judge.

[1] In arguing that the defendant's motion for summary judgment was erroneously granted, plaintiff acknowledges that the summons directed to the defendant was not issued until eleven days after the complaint was filed and more than three years after the occurrence of the injuries for which he seeks recovery. He contends that the applicable three-year statute of limitations, G.S. 1-52, was tolled when the action was commenced by the filing

of his complaint on 27 March 1981 and continued to be tolled subject only to having the defendant properly served with a copy of the complaint and summons, even though issuance of the summons against defendant occurred more than five days after filing of the complaint. We do not agree.

An action is commenced under G.S. 1A-1, Rule 3, by the filing of a complaint or the issuance of a summons. Here, plaintiff's lawsuit was commenced by the filing of his complaint on 27 March 1981, within the three year limitation period of G.S. 1-52 governing personal injury actions. G.S. 1A-1, Rule 4(a) states that upon the filing of the complaint, summons "*shall* be issued forthwith, *and in any event within five days.*" (Emphasis added.) G.S. 1A-1, Rule 4(b) mandates that the summons "*shall be directed to the defendant . . .*" (Emphasis added.) A summons was properly issued within the five day limit allowed by Rule 4(a) but it was directed to Beverly N. Sperry, who was not a party defendant to this lawsuit. The summons issued in the name of the defendant Lawrence F. Sperry was issued eleven days after the filing of the complaint. Plaintiff's failure to cause a summons to be issued in the name of Lawrence Sperry within five days of the filing of his complaint resulted in a discontinuance of the action against defendant. The summons which was issued on 7 April 1981 for service on Lawrence Sperry initiated a new action at the time of its issuance. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982); *Cf. Morton v. Insurance Co.*, 250 N.C. 722, 110 S.E. 2d 330 (1959) (effect of issuance of second summons after a discontinuance of first action, decided under former law). The commencement of the action on 7 April 1981 occurred more than three years after the accident on 31 March 1978. The action is barred by G.S. 1-52.

[2] Plaintiff argues that because the 7 April 1981 summons issued in the name of Lawrence Sperry was endorsed by the clerk, it related back to the 27 March 1981 issuance of the original summons in the name of Beverly N. Sperry. G.S. 1A-1, Rule 4(d), on which plaintiff relies, pertains to the extension of time for "service" of a summons which has been properly issued against a named defendant. In this case the original summons was issued in the name of a person other than the defendant and not a party to the action, a circumstance to which Rule 4(d) does not apply. *Roshelli v. Sperry, supra.* The purpose of Rule 4(d) is only to keep

the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served.

The order of the trial court which granted summary judgment to the defendant is

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. JAMES LEVONE MONK

No. 824SC691

(Filed 16 August 1983)

1. **Criminal Law §§ 29, 146.6— compelling defendant to take medication—moot issue**

The issue concerning the constitutionality of an order compelling defendant to take medication necessary to render him competent to stand trial was moot where the administration of all compelled medication had terminated some three months prior to defendant's trial.

2. **Criminal Law § 162.6— objection to evidence en masse—portion of evidence competent**

An objection to the admission of evidence *en masse* is ordinarily insufficient if any part of that evidence is competent.

3. **Criminal Law § 75.14— history of mental illness—competency of in-custody statements**

The evidence supported a determination by the trial court that in-custody statements made on three occasions by a defendant who had a history of mental illness were made freely and voluntarily after defendant knowingly, intelligently and understandingly waived his constitutional rights. Furthermore, a fourth statement made by defendant in his jail cell was not the result of custodial interrogation, and *Miranda* warnings were not required.

4. **Criminal Law § 5.1— insanity defense—denial of bifurcated trial**

The trial court in a homicide case did not abuse its discretion in the denial of defendant's motion requesting a bifurcated trial to allow one jury to pass on the issue of his sanity and a separate jury to pass on the question of guilt or innocence where the record revealed no substantial defense on the merits which could have been prejudiced by simultaneous presentation with an insanity defense.

5. Criminal Law § 128.2— motion for mistrial—improper testimony stricken—curative instructions

The trial court in a homicide case did not err in failing to declare a mistrial when two witnesses testified that defendant's brother told them that defendant "did it" where the court allowed defendant's motion to strike this testimony and instructed the jurors to disregard it.

6. Criminal Law § 63.1— mental capacity of defendant—nonresponsive answer—harmless error

Error, if any, in the admission of a witness's testimony in response to a question concerning defendant's ability to distinguish right and wrong at the time of a killing that he believed defendant knew what he did was harmless.

7. Criminal Law § 63.1— mental capacity—basis for opinion

The trial court did not err in failing to strike testimony from two law enforcement officers that their opinions of defendant's mental capacity were based on the fact that defendant left or ran away from the crime scene.

8. Criminal Law § 138— sentencing hearing—prior convictions—insufficient record

The omission from the record on appeal of the transcript of defendant's sentencing hearing precluded the appellate court from reviewing defendant's contention regarding the sufficiency of the evidence to support the trial judge's finding that defendant had a prior conviction or convictions. App. Rule 9(b)(3).

9. Criminal Law § 138— aggravating circumstance—age of victim—irrelevancy

The trial court erred in finding the age of the victim as an aggravating circumstance in imposing a sentence on defendant for the shooting death of his stepfather.

Judge EAGLES concurs in the result.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 4 March 1982 in Superior Court, DUPLIN County. Heard in the Court of Appeals 13 January 1983.

Defendant was charged with the 11 July 1981 murder of his stepfather. Several days after the offense occurred, the defendant, who had a long history of mental illness, was committed to Dorothea Dix Hospital for a mental examination to determine his competency to stand trial. During three days of his seventeen day stay at Dorothea Dix, defendant took his prescribed anti-psychotic medication but then refused to take any more. Defendant was released from the hospital and returned to the Duplin County Jail. On 9 October 1981, following a competency hearing, the court ordered that defendant be recommitted to Dorothea Dix and be

administered medication necessary to make him likely to become competent to assist in his defense. During his second commitment, which lasted 53 days, defendant was administered haldol, an anti-psychotic medication, and artane, a medication designed to relieve muscle tension which can be caused by haldol. Following this commitment, the court conducted another hearing and found, on 15 January 1982, that defendant was competent to stand trial.

A third hearing was later held on defendant's motion to suppress statements made to law enforcement officers in July and August of 1981. The court held these statements to be admissible, after finding that they had been freely and voluntarily given.

Prior to trial, the court denied a motion by defendant for a bifurcated trial on the issues of sanity and guilt. A number of other pretrial motions were made by defendant. Several of those motions are the subject of assignments of error and will be discussed in the opinion.

At trial, the State presented evidence tending to show that at about 3:30 or 3:45 p.m. on 11 July 1981, the defendant was at home alone with his stepfather, Isaac Miller. Between 5:30 and 6:00 p.m., Miller's brother, who lived nearby, heard a gunshot which he thought came from Miller's house. He saw defendant run from the direction of that house. At about 1:30 the next morning, near that house, Miller's son, Bryant, found Miller's body lying in a pool of blood. He had died from a gunshot wound to the neck. In July and August of 1981, defendant made several inculpatory statements to law enforcement officers, including an admission that he had killed his stepfather. Dr. Mary Rood, a forensic staff psychiatrist who examined the defendant at Dorothea Dix after the crime occurred, testified that in her opinion the defendant would have known the difference between right and wrong, with respect to killing someone, at the time the offense occurred.

Defendant presented numerous witnesses who testified that he was incapable of distinguishing right from wrong at the time of the alleged offense.

Defendant was convicted of voluntary manslaughter. From a judgment imposing a 20 year sentence, defendant appeals.

Attorney General Edmisten, by William F. Briley, Assistant Attorney General, for the State.

Vance B. Gavin, for defendant appellant.

JOHNSON, Judge.

Defendant brings forth 17 assignments of error on appeal which concern (1) his competency to stand trial, (2) the admission of his in-custody statements, (3) the court's failure to order a bifurcated trial, (4) the court's evidentiary rulings and (5) the sentence imposed on him.

I

The first two assignments of error we address are those involving defendant's competency to stand trial.

The court's order of 9 October 1981 recommitting defendant to Dorothea Dix provided, among other things, that:

> 4. The treating physician in his or her discretion shall administer such medication at such times as is necessary to make the defendant likely to become competent to assist in preparation of his defense and to participate in his trial so long as such medications do not create a substantial risk of serious or long term side effects. If the defendant refuses to voluntarily take the required and necessary medication, the attending physician or physicians and their staff assistants, are authorized and are directed by this court to utilize such medically safe procedures as they reasonably believe necessary to compel the patient to take the medication, so long as such procedures are reasonable under the circumstances and the life, health or safety of the patient is not endangered by these procedures which shall be consistent with the approved or acceptable medical practice under similar circumstances.

Defendant recognizes that G.S. 15A-1002 authorizes the court, in its discretion, to commit a defendant to a state mental health facility for observation and treatment when his capacity to proceed is questioned. He contends, however, that this court order, which forces him to take medication against his will, invades his constitutional rights. The second error complained of concerns the denial of, and later refusal to hear, a motion filed by defendant

after he was returned to the Duplin County Jail following his second commitment. In that motion, he requested that his medication be discontinued to enable the jury to observe him free from the influence of drugs. However, we note here that at that point in the proceedings such a request was unnecessary. The court's 9 October 1981 order, recommitting the defendant, did not contemplate that defendant would be compelled to take medication after his discharge from Dorothea Dix. No other order was entered requiring that drugs be administered to defendant after discharge or during trial. In the present case there is no evidence that the process or content of defendant's thoughts were affected by the drugs that he received. To the contrary, the evidence in this case shows that the medication would have a beneficial effect on defendant's ability to function.

[1] The North Carolina Supreme Court has recognized that a defendant, who is otherwise incompetent, may become competent as a result of receiving medication. *State v. Buie*, 297 N.C. 159, 254 S.E. 2d 26, *cert. denied*, 444 U.S. 971, 62 L.Ed. 2d 386, 100 S.Ct. 464 (1979). Our research has not, however, disclosed a North Carolina case determinative of the issue raised here—whether a defendant may be compelled to take medication necessary to render him competent to stand trial. There is authority in other jurisdictions which supports such an order; *State v. Law*, 270 S.C. 664, 244 S.E. 2d 302 (1978); *State v. Hayes*, 118 N.H. 458, 389 A. 2d 1379 (1978), as well as authority to the contrary, *State v. Maryott*, 6 Wash. App. 96, 492 P. 2d 239 (1971). We do not question the seriousness of the issues presented by defendant's assignments of error—the right to bodily integrity free from unwarranted infringement by the State; the right to control of one's own thought processes free from the influences of compelled psychotropic medication to insure the fairness of the adversary process; and the right to appear before the jury free from the effects of drugs that affect the thought, expression, manner and content of the person compelled to take the drugs. However, we need not address these issues in the case before us because the administration of all such compelled medication had terminated some three months prior to the time of defendant's trial. Therefore, the issue of whether defendant's right to appear before the jury free from the influence of psychotropic drugs and participate unimpaired in the adversary process is not implicated in this case

and the question concerning the constitutionality of the order of 9 October 1981 was thereby rendered moot.

We next consider defendant's contention that the court erred when it admitted opinion testimony from Dr. Robert Rollins, director of the Dorothea Dix forensic unit, at the hearing on defendant's motion questioning his capacity to proceed. Dr. Rollins, a medical expert in psychiatry, served as defendant's attending physician for several weeks during his second hospitalization while he was being administered medication. The testimony about which defendant complains is Rollins' opinion that defendant was competent to proceed even without medication. Rollins based this opinion on his conversations with Dr. Rood and on findings in her report. Defendant's argument is twofold: that Rollins' opinion should have been excluded because it was based entirely on Dr. Rood's report which was inadmissible, and because it was based on hearsay rather than personal knowledge.

[2] In our opinion, the defendant may not now question the admissibility of Dr. Rollins' opinion testimony. When Rollins was called as a witness, defense counsel entered a general objection. During Rollins' extensive testimony, counsel failed to object or move to strike the particular testimony which he now claims was erroneously considered by the court in determining whether defendant was competent to stand trial. An objection to the admission of evidence *en masse* is ordinarily insufficient if any part of that evidence is competent. *State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978). Since a great deal of Rollins' testimony was based on his own personal knowledge, and was, therefore, clearly competent, we find no error in the admission of his opinion concerning defendant's competency. Defendant's challenge to the court's order of 15 January 1982, determining him competent to proceed, is without merit.

In a related argument, defendant contends the court erred in refusing to hear a renewed motion questioning his capacity to proceed on the date of trial, 1 March 1982. We find no merit to this argument. The court declined to hear further evidence concerning competency only after being informed by defense counsel that the evidence would be substantially the same as it was when the court's 15 January 1982 ruling was entered regarding defendant's competency. Since there was no indication that there had

been any change in circumstances, there was no justification for another competency hearing to be conducted. We also find no merit to defendant's contention that the court erred in failing to rule on a pretrial motion, which he made pursuant to G.S. 15A-954, alleging a denial of his constitutional rights. In our opinion, this motion merely restates matters raised in other pretrial motions which had previously been considered and ruled upon by the court. The court was not required to rule again upon these matters.

II

[3] We now consider defendant's arguments relating to the order denying his motion to suppress in-custody statements made to law enforcement officers on 12 July, 12 August and 14 August 1981. At a hearing on this motion, testimony was given by two interrogating officers, as well as by a number of defense witnesses including defendant and a psychiatrist who treated him while he was an in-patient at Duplin General Hospital.

As to defendant's 12 July and 12 August in-custody statements, one of the law enforcement officers testified to the following: On both dates, he advised defendant of his constitutional rights, prior to obtaining any statements from him. Defendant appeared to understand, and responded to, the officer's questions regarding his *Miranda* rights. He signed a waiver of those rights on both occasions. His speech was coherent, and he did not appear to be intoxicated by alcohol or drugs. He agreed to talk without an attorney present, and he made statements to the officer without being threatened, coerced or promised anything. After making his statement on 12 July, defendant requested an attorney, and the officer immediately ceased questioning him. On 12 August, defendant asked, and was allowed, to make a phone call prior to being interrogated. The officer testified that on both dates defendant's statements were freely and voluntarily given. This evidence conflicted with evidence presented by defendant which tended to show that he could not fully comprehend the gravity of his situation or understand the meaning and intent of the *Miranda* warnings.

After hearing this evidence, the court entered an order finding that on each of these two occasions, when defendant talked to law enforcement officers, he knowingly and understandingly

waived his constitutional rights and freely and voluntarily made statements to the officers. These findings are conclusive on appeal if supported by any competent evidence, even where there is conflicting evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Based on these findings, the court concluded that the statements attributed to defendant on 12 July and 12 August were voluntarily and intelligently made. We hold that there was ample competent evidence to support the court's findings and that the findings in turn supported its conclusion of law.

The uncontradicted evidence shows that on 14 August 1981, an officer came to defendant's jail cell at defendant's request. Defendant initiated a conversation with the officer in which he confessed. He was not subjected to interrogation. He was immediately taken to the sheriff's office where he was read his *Miranda* warnings. Defendant agreed to talk to the officers, and in response to questioning, defendant stated that he had killed his stepfather. We find that defendant's initial statement, made in the jail cell, was not the result of custodial interrogation but was volunteered by defendant; thus no *Miranda* warnings were required. *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973).

As to his subsequent statement, which was made after he was advised of his constitutional rights, the State presented evidence that defendant appeared to understand his rights and questions regarding those rights. According to the officers, defendant signed a waiver of his rights and said he would talk with the officers without his attorney present. The testimony further showed that defendant's speech was coherent and that he did not appear intoxicated. He was allowed to make a phone call. There was evidence that no promises or threats were made to elicit his confession. The court found in its order that defendant knowingly, intelligently and understandingly waived his rights and concluded that defendant's statement was freely and voluntarily made. Again, we hold that there was ample competent evidence to support the court's findings and that the findings supported its conclusion of law. Defendant's assignments of error regarding the statements which he made to law enforcement officers are overruled.

III

[4] Next, we consider the denial of defendant's pretrial motion requesting a bifurcated trial to allow one jury to pass on the issue of sanity and a separate jury to pass on the question of guilt or innocence.

A ruling on a motion to bifurcate rests within the sound discretion of the trial judge and is not reviewable absent abuse. *State v. Ward*, 301 N.C. 469, 272 S.E. 2d 84 (1980); *State v. Helms*, 284 N.C. 508, 201 S.E. 2d 850, *cert. denied*, 419 U.S. 977, 42 L.Ed. 2d 190, 95 S.Ct. 240 (1974). The North Carolina Supreme Court in *Helms* noted that:

> Other jurisdictions hold that the sound exercise of the trial court's discretion should result in a bifurcated trial *only* when "a defendant shows that he has a substantial insanity defense and a substantial defense on the merits to any element of the charge, either of which would be prejudiced by simultaneous presentation with the other." *Contee v. United States*, 410 F. 2d 249 (D.C. Cir. 1969).

284 N.C. at 513, 201 S.E. 2d at 853. In *Helms*, the trial court's denial of a defendant's motion to bifurcate was upheld because the record revealed no substantial defense on the merits which could have been prejudiced. We have the same situation here. Defendant alleged in his motion that he had a substantial defense on the merits because there were no eyewitnesses to the crime, no weapon was ever found, and all the evidence was highly circumstantial. These allegations, at most, merely constitute a weakness in the State's case-in-chief, and not a defense on the merits. We have reviewed the record, and having found no substantial defense on the merits, we conclude that the motion was properly denied.

IV

We now address defendant's arguments concerning various evidentiary rulings made by the court.

[5] First, defendant contends the court should have declared a mistrial when two witnesses testified that defendant's brother told them that defendant "did it." Although defendant admits that the court allowed his motion to strike this testimony and in-

structed the jurors, in substance, to disregard it, he contends the court's instructions were inadequate to erase these damaging statements from the jury's mind.

We believe that the court's prompt action in striking the testimony and so instructing the jury was sufficient to cure any possible prejudice. Jurors are assumed to have sufficient intelligence to understand and comply with the court's instructions and are presumed to have done so. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938). A defendant's motion for mistrial must be granted, pursuant to G.S. 15A-1061, "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision as to whether such prejudice has occurred is addressed to the discretion of the trial judge. *State v. Thomas*, 52 N.C. App. 186, 278 S.E. 2d 535, *disc. rev. all'd*, 304 N.C. 198, 287 S.E. 2d 127 (1981); *State v. Rogers*, 52 N.C. App. 676, 279 S.E. 2d 881 (1981). His decision is not reviewable absent a showing of gross abuse of discretion. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). We find no such abuse.

[6] Defendant next contends that the court should have sustained his objection to testimony from a State's witness that "I believe he [defendant] knew what he done; I believe that." Defendant asserts that the witness' answer was not responsive to the question asked ". . . as to whether or not . . . [defendant] had the capacity to distinguish between right and wrong at the time of the alleged murder . . . ." Although the witness' answer could have been more responsive, no prejudice has been shown. Error, if any, was clearly harmless.

[7] Defendant further argues that the court erred in failing to strike testimony from two law enforcement officers that their opinions of defendant's mental capacity were based on the fact that defendant left or ran away from the scene. Defendant argues that the court should have stricken this testimony primarily because it was not based on the witnesses' personal knowledge. We find no prejudicial error. It was certainly proper for the State to try to elicit the bases for both witnesses' opinions to enable the jury to determine the credibility of those opinions. In any event, there could have been no prejudice to defendant since the

jury had heard his confession of 14 August in which he stated that he got frightened and ran down the road after he killed his stepfather. Furthermore, the record reveals that one of the witnesses had been told by defendant himself that he, the defendant, ran away after committing the offense. This assignment of error is overruled.

V

The final question presented is whether defendant's sentence is supported by the evidence. Defendant contends that the trial court erred in imposing a sentence greater than the presumptive term upon insufficient evidence of aggravating circumstances. Defendant was sentenced to 20 years imprisonment, the maximum time under G.S. 14-1.1(a)(6) for the Class F felony he committed. The presumptive sentence for this crime is six years under G.S. 15A-1340.4(f)(4). Pursuant to G.S. 15A-1340.4(a)(1), Judge Bruce found the following factors in aggravation:

> 10. The victim was very old or physically infirm.
>
> 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.
>
> The defendant has the propensity due to mental disease to commit dangerous and violent acts in response to hallucinations and delusions and therefore needs to be confined in order that society be protected.

[8] The record on appeal contains several volumes of stenographic transcripts of defendant's *voir dire* hearings and trial. However, the record does not contain a transcript of the sentencing hearing and is devoid of any other evidence in either testimonial or narrative form demonstrating the events that transpired during the sentencing hearing. Rule 9(b)(3) of the Rules of Appellate Procedure states that the record on appeal shall contain so much of the evidence as is necessary for the understanding of all errors assigned. The omission from the record on appeal of the transcript of defendant's sentencing hearing precludes this Court from reviewing defendant's contention regarding the sufficiency of the evidence to support the trial judge's finding that

defendant had a prior conviction or convictions. We are fully cognizant of the fact that the State has the burden of proving that defendant was convicted and that he had or waived counsel, *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983); *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983), before the defendant's sentence may be aggravated by this factor. However, it is simply impossible to review the sufficiency of the State's evidence supporting Finding No. 15 without the inclusion of the sentencing hearing transcript containing that evidence in the record on appeal. In contrast, the record is sufficient to permit review of the two other findings in aggravation because the evidence supporting them was presented during the phases of defendant's trial for which transcripts were filed.

[9] We conclude that the trial judge erred by finding, as an aggravating factor, that the victim was very old. The age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age or condition of the victim. *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983). The age of the victim to a shooting offense is irrelevant. *Id.* Therefore, it was error to find this factor in aggravation of defendant's offense.

The trial judge made an additional finding in aggravation, that defendant's mental disease rendered him dangerous to society. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), the Supreme Court recognized that the same evidence establishing the factor of mental condition may be found to either reduce culpability, in mitigation, or to show dangerousness, and thus support a finding in aggravation. *See also State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Inasmuch as this case is to be remanded for a new sentencing hearing because the judge erred in finding the age of the victim in aggravation and imposed a sentence beyond the presumptive term, we do not reach the question presented by defendant's assigning error to Finding No. 16, as it may not recur upon resentencing. For the reasons stated, defendant's sentence must be vacated.

We conclude that although defendant had a fair trial free from prejudicial error, defendant's sentence is to be vacated and the case is to be remanded for a new sentencing hearing.

Affirmed in part, reversed in part, and remanded.

Judge HEDRICK concurs.

Judge EAGLES concurs in the result.

ESSIE H. EDWARDS v. BROWN'S CABINETS AND MILLWORK, INC., AND LEO HARPER, SHERIFF OF LENOIR COUNTY

No. 828SC378

(Filed 16 August 1983)

1. **Judgments § 35.1— inapplicability of res judicata—no identity of issues**

An action involving the determination of the liability of plaintiff's daughter upon an account was not *res judicata* in plaintiff's action to remove a cloud on title to real property conveyed to plaintiff by her daughter after an order of attachment had issued in the action against the daughter since there was no identity of issues in the two cases.

2. **Courts § 9.4— summary judgment—no overruling of another judge's order**

The trial judge's allowance of defendant's motion for summary judgment on the ground that the present action is barred by the judgment in a prior action did not overrule another judge's order denying defendant's motion to dismiss for lack of jurisdiction.

3. **Attachment § 5; Lis Pendens § 1— defective levy of attachment—no invalidation of lis pendens—judgment binding on subsequent property owner**

Although an order of attachment issued against property later acquired by plaintiff from her daughter was not properly executed in that the levy was not carried out within the ten days provided by G.S. 1-440.16(c), the defective levy was a non-jurisdictional procedural defect which did not invalidate the docketing of *lis pendens* notice of the order of attachment and which did not prohibit the judgment against plaintiff's daughter from relating back to the docketing of *lis pendens* and from being binding on the plaintiff. Plaintiff's proper remedy to attack the attachment of the property she acquired from her daughter was by a motion in the cause pursuant to G.S. 1-440.36 or G.S. 1-440.37, and her action to remove a cloud on her property because of the attachment thereof constituted an impermissible collateral attack on the judgment in the prior case.

APPEAL by plaintiff from *Llewellyn, Judge.* Judgment entered 25 January 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 16 February 1983.

This is a civil action wherein plaintiff seeks to remove a cloud on her title to certain real property and to enjoin the sale of that property by the defendant Sheriff of Lenoir County to satisfy a monetary judgment held by defendant Brown's Cabinets and Millwork, Inc., against plaintiff's predecessor in title.

The judgment which defendant seeks to have satisfied is the result of a prior civil action instituted in Duplin County by defendant (Brown's) against plaintiff's predecessor in title (Elmore), who is also plaintiff's daughter. As an ancillary proceeding to the judgment in that action (*Brown's v. Elmore*), Brown's secured the issuance of an order of attachment of certain real property held by Elmore in Lenoir County, pursuant to G.S. 1-440.1 *et seq.* Notice of the issuance of the order was filed in Lenoir County by the Clerk of Superior Court and entered on the *lis pendens* docket on 24 August 1979. On 27 August 1979, the Sheriff of Lenoir County received the order from the Clerk directing him to attach Elmore's property. The sheriff levied on the property on 7 September 1979. The endorsed order of attachment and other documents noting the levy were returned to the Clerk and filed on 9 September 1979. Prior to the levy, on 6 September 1979, Elmore conveyed the land described in the order of attachment to plaintiff by general warranty deed.

The action proceeded to trial and judgment for Brown's was filed on 19 February 1980. Elmore appealed from this judgment and the Court of Appeals upheld the trial court in an unpublished decision filed 17 March 1981.

Pursuant to that judgment, public sale of the attached land was set for 9 December 1981. Plaintiff received notice of the sale on 10 November 1981. Plaintiff initiated this action by filing a complaint seeking a temporary restraining order, preliminary and permanent injunctions restraining the sale of the land, and seeking to remove the attachment in *Brown's v. Elmore* as a cloud on her title. A temporary restraining order was issued on 3 December 1981 and a preliminary injunction was issued on 11 December 1981.

In her complaint, plaintiff alleged that certain irregularities in the order of attachment respecting the land conveyed to her by Elmore invalidated the judgment lien asserted by defendant. Defendant answered, asserting as affirmative defenses that plain-

tiff's action was barred by the doctrine of *res judicata* and that plaintiff's action constituted an improper collateral attack on the prior judgment.

The parties moved for summary judgment and a hearing on the motions was held on 11 January 1982. From a judgment granting defendant's motion and denying plaintiff's motion, plaintiff appealed.

White, Allen, Hooten, Hodges & Hines, by John C. Archie, for plaintiff appellant.

Wells, Blossom & Burrows, by Richard L. Burrows, for defendant appellees.

JOHNSON, Judge.

[1] The primary issue in this appeal is whether the trial court acted properly in awarding summary judgment to defendant. Plaintiff first argues that the doctrine of *res judicata*, asserted as an affirmative defense by defendant, does not apply in this case to bar her action to have the judgment lien on her property removed as a cloud on her title. We agree with plaintiff on this point. In order for the doctrine of *res judicata* to apply, there must be "a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and . . . a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit." (Citations omitted.) *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E. 2d 799, 805 (1973), *quoting Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962). "*Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action." *Id.* at 355, 200 S.E. 2d at 804. The cause of action in *Brown's v. Elmore* involved the determination of the liability of plaintiff's daughter for monetary damages under an account. The present action was brought to remove a cloud on title to real property conveyed to plaintiff after an order of attachment had issued. The required element of identity of issues is not present in this case and *res judicata* does not apply.

[2] In her third argument, plaintiff contends that the trial judge erred in granting defendant's motion for summary judgment

because another Superior Court judge had previously denied defendant's motion to dismiss for lack of jurisdiction. Plaintiff argues that by granting summary judgment, one Superior Court judge, in effect, overruled another Superior Court judge. We find no merit to this argument. The motion to dismiss was based on jurisdictional grounds whereas the motion for summary judgment raised the affirmative defense that the present action was barred by the judgment in the prior action. Since the basis for each motion was different, the trial judge's award of summary judgment did not overrule the prior order denying defendant's motion to dismiss.

[3] Plaintiff's remaining arguments are related and will, therefore, be considered together. Plaintiff argues that her action is one to remove a cloud on her title and is not an attack on the *Brown's v. Elmore* judgment. The validity of that judgment, plaintiff contends, has nothing to do with the validity of the attachment ancillary thereto that is the cloud on plaintiff's title. Since plaintiff does not attack the validity of that judgment, she argues, her action cannot be termed a collateral attack on it. Concededly, plaintiff never questions the validity of the judgment in *Brown's v. Elmore*, nor does she ask us to invalidate it. Rather, plaintiff argues that she seeks only to invalidate the attachment of Elmore's property, to which she now claims title, that occurred prior to that judgment.

Careful scrutiny reveals that these arguments are inconsistent and, in the present context, without merit. Whether plaintiff's attack on the ancillary attachment constitutes an attack on the judgment proper depends on the same issues that determine whether her attack would be proper if it were a collateral attack. Further, the question of the validity of the attachment, assuming that plaintiff's attack on it is properly advanced, would necessarily affect the validity of the judgment.

Plaintiff argues that the judgment in *Brown's v. Elmore* is not binding as to her because the order of attachment issued against the property that she later acquired from her daughter, defendant Elmore, was not properly executed. Plaintiff points out and the record discloses that the levy by the Sheriff under the order was not carried out within the ten days provided for that purpose by statute. G.S. 1-440.16(c). Plaintiff argues that this

failure to levy within the time provided by law invalidates the order of attachment. In support of her position, plaintiff cites the case of *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971), where this Court held a levy invalid because it did not take place until after the time allowed by the statute had expired. Without a valid levy, the order of attachment is not perfected so as to create a lien of attachment, but remains executory until tolled by judgment in the principal action, G.S. 1-440.16, or until perfected by a levy under an alias or pluries order. G.S. 1-440.13.

When an order of attachment is perfected by a levy, a lien of attachment is created thereby which establishes the lienor's claim as against all other creditors and subsequent lienors. The date to which the lien relates back and fixes the priority of the claim is established, with respect to real property, is the time at which the notice of the order of attachment is docketed in the record of *lis pendens* in the county where the property is located. G.S. 1-440.33(b)(1). A person claiming under a conveyance or encumbrance executed subsequent to the docketing of the notice of the order with respect to the property conveyed or encumbranced takes subject to the action whose pendency was so noted. *Cutter v. Realty Co.*, 265 N.C. 664, 144 S.E. 2d 882 (1965); Webster, Real Estate Law in North Carolina § 497 (1981).

Plaintiff argues that because the order of attachment was not properly executed, it cannot be the basis of a valid notice of *lis pendens* such that the principal judgment against her predecessor in title relates back to the docketing of *lis pendens* and is binding on plaintiff. We disagree.

> Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring the property of the defendant within the legal custody of the court in order that it may be subsequently applied to the satisfaction of any judgment for money which may be rendered against defendant in the principal action.

G.S. 1-440.1. *Lis pendens*, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property

sold in satisfaction of the judgment. G.S. 1-116(a)(3); *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E. 2d 334, *mod. on other grounds*, 285 N.C. 418, 206 S.E. 2d 162 (1974); Webster, *supra*.

Our research has disclosed no authority supporting plaintiff's proposition that the improper execution of an order of attachment invalidates the *lis pendens* docketing of the notice of its issuance. Nor does such a proposition follow logically. *Lis pendens* is designed to put third parties on notice that a suit is pending. Thus, insofar as the pending suit may adversely affect the claim of a third party, the onus of inquiry is on that third party regarding the nature and merits of the claim against the owner of the property. With regard to attachment, a method is provided by statute by which third parties whose interest in the attached property may be affected by the pending suit may attack the attachment. The statute applies to "any person who has acquired a lien upon or an interest in such property, whether such interest is acquired prior to or subsequent to the attachment." G.S. 1-440.43. The statute allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve, G.S. 1-440.36, or modify, G.S. 1-440.37, the order of attachment. Inasmuch as this statutory method of third party attack on an attachment is available, the function of *lis pendens* would be to put a third party in a position to use it. This is the better view and we so hold. It is unacceptable to hold, as plaintiff would, that the efficacy of *lis pendens* to perform its designated function should depend on proper execution of the order which caused its entry.

This is not to say that plaintiff's argument is entirely without merit. If the attachment of property in the *Brown's v. Elmore* controversy was essential to the court's jurisdiction in that case, the failure to properly execute the order would nullify the court's assertion of jurisdiction and the judgment in that case would be void. *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E. 2d 700 (1976); *Mohn v. Cressey*, 193 N.C. 568, 137 S.E. 718 (1927). A void judgment may be attacked directly or collaterally by any party adversely affected thereby. *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956); *see also*, 8 N.C. Index 3d, Judgments § 17 (1977). However, the court in *Brown's v. Elmore* had personal jurisdiction and the judgment therein is valid notwithstanding the validity of the attachment. Where the defect complained of is contrary to the course and practice of the court but is non-jurisdictional,

the judgment is irregular and is voidable, but not void. *Menzel v. Menzel*, 254 N.C. 353, 119 S.E. 2d 147 (1961); 8 N.C. Index, Judgments, § 19 (1977). Such a judgment is binding on the parties until corrected or vacated in the proper manner. *Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958). Unless a judgment is void, it is not subject to collateral attack. *Id.* An irregular or voidable judgment may only be properly attacked by a motion in the cause. *Id.; Menzel v. Menzel, supra.* In *Brown's v. Elmore*, the defective levy here complained of is a non-jurisdictional procedural defect and the judgment merely irregular. The proper method of attack is, therefore, by motion in the cause. *Lis pendens* and the statutory method of attack described above are designed to put a third party on notice of the pending action and provide a means to contest the attachment and perhaps thereby remove the property and purchaser from the operation of the judgment.

Prior to her purchase of the land from her daughter, plaintiff was on notice, via the *lis pendens* record in Lenoir County, of the pendency of the action with regard to which the land to which she now claims title had been attached. The same statute that authorized the attachment also provided plaintiff with the means of asserting by motion in the cause the argument she now seeks to advance by collateral attack. Having had sufficient notice and opportunity to contest the order of attachment properly, plaintiff is estopped from doing so in this independent proceeding. The judgment in *Brown's v. Elmore* and the attachment ancillary thereto remain in full force and effect as to plaintiff and the land she purchased from her daughter. The judgment appealed from is

Affirmed.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. GEORGE THOMAS FOSTER

No. 8210SC1160

(Filed 16 August 1983)

Criminal Law § 85.2— evidence of mug shot—refusal to give limiting instruction

The trial court in an armed robbery case erred in refusing to give defendant's requested instruction that evidence of a "mug shot" taken of defendant several months prior to the crime charged was not to be considered against defendant in determining his guilt or innocence of the crime charged, and such error was prejudicial where the State's case against defendant rested exclusively on identification testimony of one witness.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 14 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1983.

The defendant, George Thomas Foster, was convicted of robbery with a dangerous weapon at the 12 July 1982 Criminal Session of Superior Court. On 14 July 1982, Judge Brewer sentenced the defendant to 17 years imprisonment. From the judgment and imposition of an active sentence in excess of the presumptive, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General John W. Lassiter, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

JOHNSON, Judge.

The sole question presented for review is whether defendant is entitled to a new trial because of the trial court's refusal to give his requested instruction limiting the purposes for which the jury could consider the evidence that a "mug shot" was taken of the defendant four months before the charged offense occurred. For the reasons set forth below, we hold that the trial court's refusal to give the limiting instruction requested by defendant was prejudicial error, entitling defendant to a new trial.

The charges against defendant arose out of the robbery of the Community Grocery Store in Wake County on the afternoon of 4 March 1982. The State's case against the defendant rested

entirely on the identification testimony of one witness. The defendant did not take the stand as a witness and did not present any evidence on his behalf.

The State's evidence tended to show that Elbert King was working at the Community Grocery Store, owned by his wife, on the afternoon in question. King testified that he was talking to a customer at the back of the store around 3:30 or 4:00 p.m. when two men walked in. King testified that when he turned around, one man was standing in front of the cash register with a pistol in his hand demanding money. King gave that man money from his pocket and from the cash register. King testified that he had never seen the robber before the day of the robbery and estimated that the robber was in the store for a total of three or four minutes. King identified the defendant as the man with the gun who robbed the store and testified that he did not get a good look at the other person.

King further testified that after the defendant got the money he ordered King to lie down behind a chair; that he did so and could not see anything further; that two shots were fired into the ceiling; thereafter King got up and went outside where he spotted the two men running about two hundred yards away. King then called the police and described the robbers as being "two colored guys."

That same evening, King looked through five or six "mug books," but was unable to positively identify the robber. A couple of days later, Deputy Bissette showed King two folders of photographs which King referred to as "mug shots." King testified that he picked out the defendant's picture as being the robber. At trial, King identified State's Exhibits 1 and 2 as being the folders that he was previously shown, and held up the folder which contained the defendant's picture and pointed to that photograph for the jury.

Detective Joe Gerrell testified that he investigated the robbery reported by Mr. King and prepared a photographic display to show Mr. King which included a photograph of the defendant. Gerrell identified State's Exhibits 1 and 2 as being the folders he prepared for the photo identification and gave the following testimony on direct examination:

Q. And who are the persons that are photographed in those sixteen separate photographs? Not necessarily by name but by description.

A. Right. They are people that, that have been photographed by CCBI, which is the City-County Bureau of Identification and we try to take—if we've got one suspect in say one folder, I try to pick seven people that are similar to same height, similar face description and so forth.

Gerrell testified that he asked Deputy Bissette to show the lineups to Mr. King on 6 March. Gerrell held up the folder which contained the defendant's photograph and pointed it out to the members of the jury.

On cross-examination Gerrell testified that fingerprints were taken at the crime scene and a fingerprint was found, but it did not match the defendant's fingerprints. No weapon was ever recovered linked to the investigation of this robbery.

Deputy P. J. Bissette identified State's Exhibits 1 and 2 as the folders containing the 16 photographs which he showed to Mr. King on 6 March 1982. Bissette identified the photograph which Mr. King picked out by holding it up and pointing to it so that the jury could see:

Q. And would you hold that up and point to it so that the members of the jury could see it.

A. This photograph here. Is, also identified by CCBI number 35464. Which each photograph is numbered and that was the number on the photograph.

Bissette testified that the defendant's photograph was taken on 5 December 1981, several months before the robbery. No testimony was presented that King had ever given the police a more detailed description of the robbers than their being "two colored guys."

At the conclusion of the State's evidence, State's Exhibits 1 and 2, the two folders containing the photographs shown to King, were admitted into evidence and passed to the jury. Thus, throughout the defendant's trial, the jury had ample opportunity to consider that the defendant's "mug shot" indicated that he had been "involved" with the police prior to the commission of the

charged offense. The record discloses that the two folders each contained eight 3½" x 5" colored glossy photographs showing 16 individuals, including defendant, in full-face, standing before height charts and holding cards in front of themselves. These cards are two-toned; the top portion is black with white numbers indicating the police file number and the larger bottom portion contains "CCBI" in bold black print against a white background. The card in front of defendant states:

12-05-81 35464
CCBI
CITY-COUNTY BUREAU OF IDENTIFICATION
RALEIGH, WAKE COUNTY
NORTH CAROLINA

The following interchange occurred at the close of all the evidence:

DEFENDANT: And, Your Honor, I would like to make a motion now for mistrial or in the alternative for a new trial on the grounds that the passing of the photographs, including that of George Foster, to the jury in which the photographs show Mr. Foster in a photographic line-up dated December of 1981, some four months prior to the offense, is the obvious circumstance of being a mug shot in which a person is under arrest or under suspicion for a crime, is character evidence put into evidence in front of the jury prior to the time that the defendant's character has ever been put into issue in this case and it, also, violates his presumption of innocence, Your Honor.

COURT: It is denied.

DEFENDANT: Thank you, Your Honor. At this time, Your Honor, as I have already related to you, I would like to put in a special request for instructions—

COURT: First, does the defendant intend to present any evidence?

DEFENDANT: No, Your Honor.

COURT: Okay. All right. We will now move to the instruction conference. Does the state have any special instructions?

STATE: No, sir.

DEFENDANT: Yes, sir. The document that I handed up to Your Honor yesterday. I would particularly request the instruction that is given regarding the identification testimony. I would request an instruction regarding the defendant's right to silence and no inference of guilt to be raised therefrom. I would, also, appreciate, Your Honor, a cautionary instruction regarding undue inferences from the fact that there was a mug shot of the defendant in December of '81 shown to them, that that is not evidence of guilt in this case.

COURT: Okay, the instruction as to the identification testimony requested will be given. The instruction as to the failure of the defendant to testify will be given. The last instruction will not be given.

DEFENDANT: Thank you, Your Honor. And may I have an exception noted into the record.

The defendant correctly contends that he is entitled to a new trial because of the trial court's erroneous refusal to give the defendant's requested instruction limiting the jury's consideration of the evidence of the defendant's "mug shot." When a defendant charged with a criminal offense does not take the stand as a witness and does not offer evidence of his good character, the State cannot offer evidence of his bad character, including his previous criminal record, nothing else appearing. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In *Fulcher*, the Supreme Court recognized that the introduction of a defendant's "mug shot" constitutes evidence of bad character:

> In the present case, the double photograph (front and side view on the same card) of each of the four subjects, with or without the small chain visible about the neck of the subject, is so similar in style to photographs of "wanted men" displayed in post office lobbies across the nation as to leave little likelihood that the jury would fail to conclude that there were photographs taken from police files. *Thus, the use of them almost inevitably conveyed to the jury the circumstance that the defendant had had prior experience with police photography and thus tended to show bad character.* (Emphasis added.)

Id. at 513, 243 S.E. 2d at 345-46. *See also State v. Segarra*, 26 N.C. App. 399, 216 S.E. 2d 399 (1975). However, the *Fulcher* court held that the photograph of the defendant was admissible because it was competent evidence relating to the issue raised by defendant as to the propriety of the pre-arrest identification procedures. Because no limiting instructions were requested in *Fulcher*, 294 N.C. at 511, 243 S.E. 2d at 344, none were required. *Absent a request*, the trial court is not required to charge on a subordinate feature of the case. *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973).

However, when evidence is competent for one purpose, but not for another, the party against whom it is offered is entitled, *upon request*, to have the jury instructed to consider it only for the purposes for which it is competent. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938), 1 Brandis on N.C. Evidence, § 79 (2d Rev. Ed. 1983). Thus, in both *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967) and *State v. Austin*, 4 N.C. App. 481, 167 S.E. 2d 10 (1969), reversible error was found in the trial court's failure to instruct the jury, upon request, that evidence of prior convictions was not to be considered as substantive evidence of the defendant's guilt. More recently, in *State v. Erby*, 56 N.C. App. 358, 289 S.E. 2d 86 (1982), this Court held that it was reversible error for the trial court to deny the defendant's request for a limiting instruction that a prior inconsistent statement of a witness was only to be considered in determining that witness' credibility.

As in *Norkett*, *Austin* and *Erby*, the defendant here was entitled, upon request, to have the jury instructed that the fact that police files contained a photograph of the defendant taken in December of 1981 was not to be considered against the defendant in determining his guilt or innocence of the charged offense. The defendant's request was timely and the court's error was not harmless. The State's case against the defendant rested exclusively on the identification testimony of one witness. That testimony consisted of the description King gave the police after the robbery that the robbers were "two colored guys"; his testimony that the robbers were in the store for only three or four minutes and that he was forced to lie down part of the time so that he could not see; that he had never seen the defendant before and that he was completely unable to identify the other robber. There was no testimony presented to indicate that King ever gave a

more detailed description of the robbers. Furthermore, the fingerprint taken from the store did not match defendant's. Identification testimony of a single witness with no other corroborating circumstantial evidence presents a substantial likelihood of mistaken identification. *United States v. Holley*, 502 F. 2d 273, 277 (4th Cir. 1974). For the foregoing reasons, defendant is entitled to a new trial.

We note that defendant also assigned as error the court's allowing the "mug shot" of defendant to be shown to the jury without taping over the printed material. However, on appeal defendant did not present the question in his brief. Therefore, the defendant is deemed to have abandoned the error assigned and we express no opinion on the issue of whether the trial court's admission of the "mug shots" without deleting or covering over the written material indicating defendant's prior involvement with the police was itself prejudicial error. *See State v. Young*, 60 N.C. App. 705, 299 S.E. 2d 834 (1983); *State v. Segarra, supra*; 30 A.L.R. 3d 908 (1970). Nor do we need to address defendant's motion to amend the record and supplement his brief to include the question presented as to the sentence defendant received as he must, in any event, be afforded a

New trial.

Judges HILL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. KENNETH O. COBLE

No. 8226SC980

(Filed 16 August 1983)

1. Criminal Law § 89.1— truthfulness of witness—opinion testimony

The trial court erred in permitting a State's witness to state her opinion that another State's witness was a truthful person.

2. Criminal Law § 89.2— evidence competent for corroboration

In a prosecution of a nursery school teacher for taking indecent liberties with a four year old child wherein defendant contended that he touched the child only to determine whether he had urinated in his pants, the trial court erred in refusing to permit a defense witness to testify for corroborative pur-

poses concerning the duties of a teacher to determine whether a child has urinated in his pants, the frequency with which such events occur with four and five year old children, and the duties of a teacher for maintaining the cleanliness of a child after such an "accident."

APPEAL by defendant from *Howell, Judge.* Judgment entered 24 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1983.

Defendant, Kenneth O. Coble, was charged in a Bill of Indictment with feloniously taking or attempting to take immoral, improper and indecent liberties with Scott Anthony Jordan, who was under the age of 16 years at the time on 8 June 1981. Defendant was arraigned, entered a plea of not guilty and was brought to trial upon the charges. From a jury verdict of guilty of taking indecent liberties with a child, and a subsequent judgment of five years imprisonment, the defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Haynes, Baucom, Chandler, Claytor & Benton, P.A., by W. J. Chandler, for defendant appellant.

JOHNSON, Judge.

The evidence at trial tended to show that in June of 1981, defendant, Kenneth O. Coble, was a teacher for four and five year old children at the Raggedy Ann and Andy Nursery in Charlotte, North Carolina. He had been employed there for about eight months and had held similar jobs since June of 1973. Coble holds degrees in child development and human services. The duties of his employment at the school required total and constant supervision of the children under his care.

On 1 June 1981, Kim Abernathy was hired to be an assistant in Coble's class of the four and five year old children. On 8 June 1981, after usual morning activities, Ken Coble's class was combined with another class of children for the afternoon nap following lunch. Both Kim Abernathy and Ken Coble were assigned to supervise the sleeping children. The area in which the classes had been combined for nap time was a regular classroom area. There were 38 to 40 children sleeping on mats on the floor and Kim

Abernathy and Ken Coble were sitting in the front of the room, no more than five or six feet from one another.

At approximately 2:15 p.m., Scotty Jordan, age four, awoke and arose from his mat. Scotty Jordan then walked a short distance to where the defendant Ken Coble was seated in his chair, reading, which was about five feet away from Kim Abernathy.

Kim Abernathy testified for the State that Ken Coble had called Scotty over to him, picked him up and put him on his lap; that Scotty was facing Coble and at first Coble was rubbing Scotty's back; that Coble had kissed Scotty on the neck and then rubbed Scotty's pants in the area of his penis for about 10 seconds. According to Ms. Abernathy, her jaw dropped as she observed this and Coble, seeing her reaction, stopped rubbing Scotty, put him down and told him to "Go back to your mat." Kim Abernathy testified that she was shocked, left the room, became hysterical, and reported the incident to Vicki Jones, the director of the day care center.

Vicki Jones testified for the State that on the day of the incident, Kim Abernathy came into the director's office in a hysterical condition and reported that she had seen Coble rubbing Scotty's penis. Ms. Jones then called Coble into her office and promptly asked for his resignation. About a month later, Ms. Jones talked to an Officer Layton of the police department about the incident. On cross-examination, Vicki Jones stated that Kim Abernathy had been at work at the school for five or six days when the incident occurred. Ms. Jones admitted that the only investigation she made of Ms. Abernathy's background before hiring her was to read her application; that she didn't call any of her previous employers to ask if Kim Abernathy was a truthful person, competent to do the job. On re-direct examination, and over defendant's objection, the State elicited Vicki Jones' opinion as to whether or not Kim Abernathy is a truthful person.

Defendant testified on direct examination that it was part of his duty as a teacher to determine whether or not a child had urinated in his or her pants and it was for that purpose that he felt the clothes of Scott Jordan on 8 June 1981. Specifically, defendant testified that the day of the incident had been a warm one and that when Scotty woke up from his nap his hair was wet

from sweating. Defendant observed Scotty bothering another child and called Scotty to sit on his lap. That when Scotty sat down, defendant noticed that he was wet from perspiration; defendant then put his hand on Scotty's legs and noticed that he was damp. Defendant testified further that he reached down with the back of his hand and rubbed Scotty's pants once to see if he was wet and smelled his hand to see if it had the odor of ammonia, but it didn't; that he asked Scotty if he wet himself and then told Scotty that if he would lay back down on his mat, defendant would let him help with the snack that day. Whereupon Scotty got off defendant's lap and returned to his mat.

Defendant also called Kay Solomon, area supervisor for Raggedy Ann and Andy Schools, for the purpose of testifying as to the duties of a teacher, including Ken Coble, to determine whether a child had urinated in his pants, the frequency with which such events occurred with four and five year old children, and the duties of a teacher for maintaining the cleanliness of a child after such "an accident." However, the defendant's questions on these matters were disallowed by the court. In addition, defendant's question propounded to Marie Davidson, the owner of the Raggedy Ann and Andy Schools and defendant's employer, regarding whether defendant's performance of his duty as a teacher had been satisfactory, was also disallowed.

Prior to the State's presentation of its evidence, the court conducted a *voir dire* hearing and determined that Scott Jordan, age four at the time of the incident and age five at the time of trial, was competent to testify. However, because of the many confused and conflicting replies to specific questions given by the child, the court stated that it was uncertain at that time if the witness could give the jury sufficient facts to assist them in reaching a decision. When the child was later placed on the witness stand, he reacted adversely to the examination process and the court instructed the jury to disregard the testimony of the child at any time during the trial as irrelevant.

Defendant noted 37 exceptions in the record and in his brief presented 11 questions for review. However, we need not address all of the errors assigned by defendant as he is clearly entitled to a new trial on the basis of the court's erroneous admission of the opinion evidence of one State's witness regarding the veracity of

another State's witness and the court's erroneous exclusion of testimony defendant sought to present that was corroborative of his version of the incident for which he was charged and tried.

Kim Abernathy was the State's sole eyewitness to the events in Ken Coble's classroom on the afternoon of 8 June 1981. Taken as a whole, Kim Abernathy's testimony formed the core of the State's evidence that defendant touched the child for the purpose of gratifying his sexual desires. The basis of the defense that defendant attempted to present is that he touched the child to determine whether he had urinated in his pants while napping. Thus, the evidence on one of the essential elements of the offense of taking indecent liberties with a child was directly in conflict, and the credibility of the witnesses of crucial importance.

[1] Defendant correctly assigns as error the question propounded to State's witness, Vicki Jones. On re-direct examination, Ms. Jones was asked,

> Based on your observation of Ms. Kim Abernathy in the course of your dealings with her at Raggedy Ann and Andy Day Care Center, do you have an opinion satisfactory to yourself as to whether or not she is a truthful person?

Over the defendant's objection, the witness answered, "Yes," and in response to a further question responded, "I think she's very truthful."

The credibility of a witness is a matter for the jury to decide. Although evidence of Ms. Abernathy's character for truth and veracity is relevant to her credibility as a witness, such character may not be proved by means of the opinion of those who know her. It is well established that a witness, offered to prove the character of another person, may not testify as to his personal opinion concerning the character of such other person, but is limited to testimony concerning the reputation of such person in the community. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978); *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); 1 Brandis on N.C. Evidence, § 110 (2d Rev. Ed. 1982); 13 Strong, N.C. Index 3d, Witnesses, § 5.2, p. 541. Therefore, it was error to admit evidence of Ms. Jones' personal opinion as to Ms. Abernathy's character for truth and veracity. The court's erroneous ruling on this matter cannot be considered harmless in light of

the fact that defendant was effectively precluded from presenting his defense by the court's erroneous exclusion of testimony defendant sought to elicit from Kay Solomon, concerning the sanitary needs and habits of the four and five year old children at the day care center. The combined effect of these rulings was to bolster the State's version of the events while simultaneously circumscribing the defendant's version.

[2] Ms. Solomon was permitted to testify that teachers must attend to everything for the children, including washing and cleaning them if they wet their pants. However, defendant was not permitted to question Ms. Solomon as to the frequence—i.e. the likelihood—of these "accidents" occurring with four and five year old children, nor whether it was defendant's specific responsibility to determine whether or not a child had wet in his pants, rather than waiting for the child to so indicate. The purpose for which defendant rubbed Scotty's pants is a crucial issue in the determination of defendant's guilt or innocence of the offense with which he was charged. The evidence excluded was obviously material and competent as corroborative of the defendant's version of the incident. The court's exclusion of this evidence was prejudicial error severely hampering defendant's ability to present his defense on this crucial issue, for which defendant is entitled to a new trial. We do not address defendant's other assignments of error as they may not recur upon retrial.

New trial.

Judges WELLS and HILL concur.

JOSEPH G. WIGGINS v. RUFUS TART TRUCKING COMPANY

No. 8219IC460

(Filed 16 August 1983)

Master and Servant § 48— workers' compensation—insufficient number of employees—insurance policy lapsed

The evidence supported a determination by the Industrial Commission that it had no jurisdiction of a workers' compensation claim because defendant employer did not regularly employ four or more employees at the time of

plaintiff's accident and for one year prior thereto, and because defendant did not have a workers' compensation insurance policy in effect at the time of the accident, a policy voluntarily purchased by defendant having lapsed some 25 days prior thereto. Defendant employer was not personally liable to plaintiff because it failed to notify its employees or the Industrial Commission that its policy had lapsed or that it intended to permit it to lapse.

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 15 February 1982. Heard in the Court of Appeals 11 March 1983.

Plaintiff, Joseph G. Wiggins, was employed by defendant, Rufus Tart Trucking Company, as a truck driver on 18 May 1979, and for approximately two years prior thereto. While making a run in the employment of defendant on 18 May 1979, plaintiff was involved in a multi-vehicle accident on Interstate 95 near Jacksonville, Florida. As a result of the severe injuries sustained in that collision, plaintiff has had both legs amputated above the knee. Plaintiff filed this action with the North Carolina Industrial Commission on 23 June 1979. Deputy Commissioner Rich filed an opinion and award on 4 August 1981, finding that an employment relationship existed between the parties, but dismissing plaintiff's claim for lack of jurisdiction because the defendant did not regularly employ four or more employees at the time of plaintiff's accident and did not, on 18 May 1979, have in effect a Workers' Compensation insurance policy. Plaintiff appealed to the Full Commission. On 15 February 1982, an opinion and award was entered by the Full Commission affirming in all respects the opinion and award of the Deputy Commissioner. From entry of the order dismissing his claim, plaintiff appeals.

Morgan, Bryan, Jones & Johnson, by James M. Johnson, for plaintiff appellant.

Stewart and Hayes, P.A., by D. K. Stewart, for defendant appellee.

JOHNSON, Judge.

This is a Workers' Compensation action in which plaintiff seeks to recover total disability benefits as provided in the North Carolina Workers' Compensation Act, G.S., Chap. 97. The issues on appeal are whether the evidence in the record supports the Full Commission's findings (1) that the defendant was not subject

to the Workers' Compensation Act ("Act") because on 18 May 1979, and for one year prior thereto, defendant did not have four or more employees in his employment and (2) that defendant did not have a Workers' Compensation insurance policy in effect at the time of the accident. We find no error in the opinion and award of the Industrial Commission.

Plaintiff contends that the evidence supports a finding that the defendant did employ the requisite number of employees within one year of the plaintiff's accident. G.S. 97-2(1) and G.S. 97-13(b) require that the defendant employer regularly employ four or more employees in order to be bound by the Act. The question is one of jurisdictional fact and it is well established that the Industrial Commission's findings of jurisdictional facts are not conclusive on appeal. Rather, the reviewing court is required to consider the evidence and make an independent determination. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Chadwick v. Department of Conservation and Development*, 219 N.C. 766, 14 S.E. 2d 842 (1941); *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982).

The Deputy Commissioner found that on 18 May 1979, the date of the accident, the defendant had two employees including the plaintiff. The evidence supporting this finding is clear and uncontradicted as both parties testified that the defendant had only two employees in the month of May, 1979. The evidence supporting the finding that defendant did not employ four or more employees within one year prior to the date of the accident is amply supported by plaintiff's Exhibit No. 5, the contents of which appear in the record by stipulation of the parties as follows:

> Plaintiff's Exhibit 5 is a copy of the defendant's Employer's Annual Federal Unemployment Tax Return showing defendant employing four (4) employees in the first quarter of 1978, three (3) in the second and third quarters, and only (2) in the fourth quarter.

The foregoing evidence, coupled with the testimony as to the number of employees in May 1979, is the extent of the evidence offered on this issue and it conclusively supports the Deputy Commissioner's finding that defendant did not regularly employ the requisite number of employees from May, 1978 to May, 1979.

Plaintiff's exception to this particular finding is obviously based on what appears to be a clerical error in Finding of Fact No. 1 where the Deputy Commissioner stated that, "Although defendant had four employees in the first quarter of 1979, he had reduced the number to three in the second and third quarters, and by the fourth quarter employed only two." As is evident from plaintiff's Exhibit No. 5, 1978 is the year in which the evidence shows defendant to have employed four or more employees in the first quarter, prior to the month of May. There is absolutely no evidence supporting such a finding for the year 1979. Accordingly, the Deputy Commissioner's finding and conclusion based thereupon, that defendant did not regularly employ four or more employees at the time of the accident nor in the preceding twelve months, is amply supported by the evidence of record and plaintiff's exception is without merit.

Plaintiff next contends that even if defendant did not have the requisite number of employees to be subject to the Act, he nonetheless became subject to it when he voluntarily took out a Workers' Compensation insurance policy. Plaintiff argues that the Deputy Commissioner erred by finding that defendant was not personally liable to plaintiff on the basis of this policy, despite the fact that the evidence conclusively shows that the policy had lapsed 25 days prior to plaintiff's accident, because defendant failed to notify both the Industrial Commission and his employees that his policy had lapsed or that he intended to permit it to lapse.

An employer who voluntarily purchases a Workers' Compensation insurance policy is conclusively presumed to have accepted the provisions of the Act during the life of the policy. G.S. 97-13(b). In Finding of Fact No. 1 the Deputy Commissioner found that the defendant purchased a policy on 23 April 1977, which expired on 23 April 1979. Pursuant to G.S. 97-13(b), the Deputy Commissioner refused to find the defendant subject to the provisions of the Act beyond the expiration date of his policy. Plaintiff excepts to the Deputy Commissioner's findings and conclusion on the grounds that this Court's opinion in *Crawford v. Pressley*, 6 N.C. App. 641, 171 S.E. 2d 197 (1969), established the rule that an employer who voluntarily takes out a Workers' Compensation insurance policy and allows it to lapse because he doesn't pay the premium remains personally liable to an employee who is injured

after the lapse of the policy, unless prior to the time of injury, the employer notifies his employees that the policy has lapsed or that he intends to allow it to expire.

We hold that the Industrial Commission correctly rejected plaintiff's contention that defendant remains subject to the provisions of the Act due to his failure to notify the Commission and his employees of the policy's expiration, despite the obvious appeal of this argument. *Crawford v. Pressley, supra,* is inapplicable precedent because the statutory notice provisions upon which the decision was predicated were repealed by the Legislature prior to plaintiff's accident. G.S. 97-3 and 97-4, on which *Crawford* was based, required an employer to give notice as provided therein when he was rejecting the provisions of the Act which he had previously presumptively accepted by his purchase of a Workers' Compensation insurance policy. G.S. 97-3 and 97-4 were modified and repealed, respectively, on 1 January 1975. G.S. 97-3 established a requirement of notice if an employer was going to waive acceptance of the provisions of the Act. Effective 1 January 1975, this statute was modified and the notice requirement was deleted. Session Laws 1973, c. 1291, s. 1. G.S. 97-4 provided the manner in which notice was to be given and it was deleted altogether. Session Laws 1973, c. 1291, s. 2.

Therefore, no statutory requirement of notice exists today and none existed on 23 April 1977, when defendant purchased the insurance policy, nor did any exist at the time the policy lapsed and plaintiff was injured. The Act as applicable to Workers' Compensation actions arising after 1 January 1975, clearly states that a self-insured employer is presumptively subjected to the provisions of the Act only for the life of the policy. G.S. 97-13(b). Once the policy ends, this presumption ends.

Plaintiff contends that there is no good reason for this Court to eliminate the notification requirement that a policy has been cancelled merely because G.S. 97-4 has been repealed. We do not disagree with plaintiff's contention regarding the value of a notice requirement when an employer is only subject to the provisions of the Act by virtue of his voluntary purchase of a Workers' Compensation insurance policy. Notice, especially to the employee, of the employer's intention to terminate the policy would at the least allow the employee the opportunity to obtain some form of

protection against disabling injury for himself. The plaintiff's injuries in this case are quite severe and the timing of his accident, just under one month after the lapse of defendant's policy, extraordinarily unfortunate. However, the rule of liberal construction cannot be employed to attribute to a provision of the Act a meaning divergent to the plain and unmistakable words in which it is couched. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976). Finding merit in plaintiff's argument would be to ignore the plain meaning of G.S. 97-13(b). Plaintiff's pleas that those employers rejecting the provisions of the Act should be required to give notice are more appropriately addressed to the lawmakers in the Legislature, rather than the courts. Once defendant's insurance policy lapsed, he was no longer subject to the provisions of the Act, G.S. 97-13(b), and could not be held personally liable to plaintiff for his injuries.

For the reasons set forth above, we hold that the Industrial Commission correctly found and concluded that it lacks jurisdiction over the defendant because the defendant did not employ the requisite number of employees on 18 May 1979, and one year prior thereto, and did not have a Workers' Compensation insurance policy in effect at the time of the plaintiff's accident, to make him subject to the Act. The Industrial Commission's order dismissing plaintiff's claim for lack of jurisdiction is

Affirmed.

Judges WELLS and HILL concur.

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 16 August 1983)

Mortgages and Deeds of Trust § 25— right to foreclose deed of trust—whether beneficiaries in possession of note—insufficient findings

The trial court's findings were insufficient to resolve the issue of whether the beneficiaries of a deed of trust who had assigned the note secured thereby

to a bank as security for a loan had possession of the note at the time of trial so as to be holders of the note entitled to foreclose the deed of trust. 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. 45-21.16(d); 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.

In our initial opinion, filed 17 May 1983 and reported at 62 N.C. App. 300, 302 S.E. 2d 481 (1983), we affirmed the judgment of the trial court. We allowed petitioners' petition to rehear.

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.

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, *appeal dismissed*, 301 N.C. 90, --- S.E. 2d --- (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 petitioners' rights to foreclose. The record before us does not make clear whether petitioners were in possession of the note which the mortgage secured. The record on appeal indicates that prior to trial, the parties stipulated as to the existence and proper execution of "the note and deed of trust."

The record further indicates that petitioners "introduced the originals of the note and deed of trust." But petitioner Frank Moody testified that in February of 1978 petitioners assigned the $260,000.00 note to First Citizens Bank and Trust Company as security for a $12,500.00 loan; that the $12,500.00 note had been paid off at some undetermined time; and "that he and his wife had not gotten back the note for $260,000.00" but that "they had left the big note at the bank, for security purposes." The findings of fact made by the trial court did not address the question of who had actual possession of the $260,000.00 note.

Petitioners cite *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 petitioners' status as a holder *at the time of the institution of the action* was controlling. The matter being before Judge Freeman *de novo*, petitioners' status *at the time of trial* was determinative of the question of "holdership."

The evidence, as narrated in the record on appeal, raised questions as to whether petitioners ever regained possession of the $260,000.00 note of 14 October 1975, and whether they actually had possession of that note at the time of trial. The findings of the trial court did not resolve these critical questions.

For the reasons stated, the judgment of the trial court must be vacated and the case must be remanded for further proceedings not inconsistent with this opinion.

Our opinion reported in 62 N.C. App. 300, 302 S.E. 2d 481 (1983) is hereby withdrawn and is superseded by this opinion.

Vacated and remanded.

Judges JOHNSON and PHILLIPS concur.

FRANK B. LEWIS v. THE CITY OF WASHINGTON, A NORTH CAROLINA MUNICIPAL CORPORATION; ABBOTT N. SAWYER, MAYOR; CARLOTTA MORDECAI, CAROL COCHRAN, J. R. JONES, JACK WRIGHT AND FLOYD BROTHERS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS MAYOR AND MEMBERS OF THE CITY COUNCIL OF THE CITY OF WASHINGTON, NORTH CAROLINA

No. 822SC950

(Filed 16 August 1983)

1. **Appeal and Error § 6.2— action for specific performance or damages—summary judgment on specific performance claim—right of appeal**

In an action for specific performance of a contract or monetary damages, plaintiff's appeal from the trial court's grant of summary judgment for defendants on the specific performance claim was not interlocutory because, if summary judgment was improperly granted on the specific performance claim, plaintiff had a substantial right to have his specific performance claim tried at the same time as his monetary damages claim. G.S. 7A-27(d)(1); G.S. 1-277(a).

2. **Municipal Corporations § 22.2— lease of city property—ultra vires contract—no recovery of rental payments**

A city's contract to lease city-owned waterfront property to plaintiff on the condition that plaintiff would construct boat slips on the property for rental to the public was *ultra vires* and void where the city zoning laws prohibited such use of the property, since the city's proprietary or corporate power to lease its property could not be exercised so as to "disadvantageously affect" the governing body's governmental powers of zoning. Furthermore, plaintiff was prohibited from recovering the rental fees it had paid to the city under the *ultra vires* contract.

APPEAL by plaintiff from *Bruce, Judge.* Judgment entered 7 July 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 10 June 1983.

On 17 August 1981 Frank Lewis and the City of Washington entered into a contract, pursuant to G.S. 160A-272, for the lease of municipal property. The contract provided that the City would lease a described portion of the City's waterfront property to Lewis on the condition that he would construct boat slips on that property for rental to the public. At the time the contract was executed, the zoning laws of the City of Washington prohibited this type of construction in the area leased to Lewis. Subsequent to the signing and pursuant to the terms of the contract, Lewis made two $250.00 rental payments to the City. Lewis had not yet begun construction on the docks when he was informed that the City Council would not change the zoning laws to allow him to build and rent boat slips on the leased site.

Lewis filed suit on 6 May 1982, alleging breach of contract and requesting specific performance or monetary damages. Both Lewis and the defendants moved for summary judgment. The court granted partial summary judgment for defendants as to plaintiff's request for specific performance, leaving for determination at trial the issue of whether plaintiff could recover monetary damages. Plaintiff appealed from this judgment and defendants cross-appealed.

Wilkinson & Vosburgh, by James R. Vosburgh for plaintiff-appellant.

McMullan & Knott, by Lee E. Knott, Jr., for defendant-appellees.

EAGLES, Judge.

[1] We first note that plaintiff's appeal, assigning as error the court's grant of summary judgment in favor of defendants on plaintiff's claim for specific performance, is not interlocutory. If summary judgment as to plaintiff's claim for specific performance was improperly granted in favor of defendants, plaintiff has a "substantial right" under G.S. 7A-27(d)(1) and G.S. 1-277(a) to have that claim for relief tried at the same time as the claim for monetary damages. *See Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 280 S.E. 2d 501 (1981).

The only issue properly before this Court is whether the trial court erred in granting defendants' motion for summary judgment as to plaintiff's request for specific performance of the leasing contract. Since the parties are in agreement as to the facts, summary judgment was proper if defendant was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

[2] The basis for this action was a written contract to lease a particular section of city-owned waterfront property to plaintiff on the condition that he would erect docks on the property and rent them to the public. The determinative issue is whether the City of Washington had the legal power to enter into this contract and incur liability for its breach.

G.S. 160A-272 empowers a city to lease or rent any property owned by the city "for such terms and upon such conditions as the council may determine." This power is to be exercised by the

governing body of the municipality acting in its proprietary, rather than its governmental, capacity. *See Wa-Wa-Yanda, Inc. v. Dickerson*, 18 App. Div. 2d 251, 239 N.Y.S. 2d 473 (1963) (lease of city-owned property for dock is proprietary). It is a commercial municipal activity involving a "monetary charge" in the form of rental fees, and it is "not one of the 'traditional' services rendered by local governmental units." *Sides v. Cabarrus Memorial Hospital*, 287 N.C. 14, 25, 213 S.E. 2d 297, 304 (1975). The distinction between a municipality's governmental and proprietary functions is clearly stated in 2 McQuillin Municipal Corporations § 10.05.

> A municipal corporation has a twofold character and dual powers . . . . The one is variously designated as public, governmental, political or legislative, in which the municipal corporation acts as an agency of the state. The other is variously designated as municipal, private, quasi-private, or proprietary . . . among the factors denoting a governmental function is the fact that an activity was historically engaged in by local government, that it is uniformly so furnished today, that it could not be performed as well by a private corporation, that it is not undertaken for profit or for revenue, and that it is not within the imperative public duties imposed on a municipality as agent of the state. . . . If the power conferred has relation to public purposes and is for the public good, it is generally classified as governmental in its nature. . . . Private, municipal, proprietary functions and powers are those relating to the accomplishment of private corporate purposes in which the public is only indirectly concerned, and as to which the municipal corporation is regarded as a legal individual.

The city's proprietary or corporate power to contract for the leasing of its property is limited. *See Rockingham Square Shopping v. Town of Madison*, 45 N.C. App. 249, 262 S.E. 2d 705 (1980). It cannot be exercised so as to "disadvantageously affect" the governing body's governmental powers. *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 199 S.E. 712 (1938). "The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." *Id.* at 520, 199 S.E. at 714.

Our courts have previously held that zoning is a governmental rather than a proprietary function. *Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837 (1968). If plaintiff were to be awarded specific performance at trial, the city council would be *forced* to alter the zoning laws to allow plaintiff to construct his docks. Since the contract between plaintiff and defendant restricted the discretionary zoning authority of the city council, "disadvantageously affecting" one of the city's governmental powers, it was *ultra vires* and void. *Rockingham Square Shopping v. Town of Madison, supra.* Plaintiff's complaint on its face disclosed that the leasing contract was *ultra vires.* There is no right of action upon an *ultra vires* contract for its breach and no performance on either side can validate it. *Id.* Therefore, partial summary judgment for defendants was properly granted.

Defendants cross-appealed, assigning as error the court's refusal to grant summary judgment in favor of defendants on all issues. Ordinarily this cross-appeal would be interlocutory. Denial of a motion for summary judgment is not immediately appealable. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980). However, this Court may, in its discretion, review an order of the trial court not otherwise appealable when such review will serve the expeditious administration of justice or some other exigent purpose. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975).

Acting within our discretion to review the trial court's order denying defendants' motion for summary judgment on all issues raised by plaintiff, we hold that on the basis of *Rockingham Square Shopping v. Town of Madison, supra*, the trial court erred in granting only partial summary judgment in favor of defendant. The trial court should have granted full summary judgment in favor of defendant because the plaintiff is barred from recovering even the $500.00 in rental fees paid to the City of Washington under the leasing contract. Where "the express contract is *ultra vires* because the power of the municipality to contract is absent . . . the municipality may not be bound, even in implied contract, for the value of benefits received (citations omitted) . . . the law will not permit a party to benefit indirectly from a contract which is against a public policy. . . . plaintiff may not recover on account of the money he expended in executing his part of the agreement." *Id.* at 254, 262 S.E. 2d at 709.

Affirmed in part, reversed in part, and remanded for entry of a judgment consistent with this opinion.

Judges WHICHARD and JOHNSON concur.

MARTIN COUNTY v. R. K. STEWART & SON, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. STATESVILLE ROOFING AND HEATING, INC. AND THE CELOTEX CORPORATION, THIRD PARTY DEFENDANTS

No. 822SC681

(Filed 16 August 1983)

Limitation of Actions § 4.6— subcontract—assumption of general contractor's obligations—statute of limitations

Where the contract between the owner and general contractor was incorporated into a subcontract and the subcontractor expressly assumed the general contractor's obligations to the owner with respect to the work subcontracted, the trial court erred in dismissing the general contractor's third party claim against the subcontractor on the ground that the subcontract was not under seal and work under the subcontract was completed more than three years before the suit was brought, since, if the general contractor was contractually bound to the owner because of the subcontract work, then the subcontractor was to the same degree and extent still bound to the general contractor.

APPEAL by defendant R. K. Stewart & Son, Inc. from *Small, Judge.* Order entered 24 May 1982 in Superior Court, MARTIN County. Heard in the Court of Appeals 11 May 1983.

On June 2, 1970, defendant Stewart, a general building contractor, agreed to build a hospital building for plaintiff. A few days later, Stewart subcontracted the roofing part of the project to Statesville Roofing and Heating, Inc. The completed building was turned over to plaintiff in October, 1972.

On August 26, 1981, plaintiff sued Stewart for damages caused by Stewart's failure to construct the hospital roof according to specifications. In the complaint, plaintiff alleged that the contract sued on was under seal, which allegation was denied by Stewart. That contract is not in the record.

Stewart, as a third party plaintiff, then joined and sued Statesville Roofing, alleging that if it is liable to plaintiff then

Statesville is liable to it under its contract to do the roofing work in accord with the original contract and specifications. In answering, Statesville pleaded the three-year statute of limitations, and later moved for summary judgment on that basis, attaching to the motion a copy of the subcontract, which is not under seal, and an affidavit showing that the work required by the subcontract was completed in January, 1972.

After a hearing on the motion, an order granting summary judgment was allowed and Stewart's claim against Statesville was dismissed.

Byerly & Byerly, by Steven E. Byerly and W. B. Byerly, Jr., for defendant appellant R. K. Stewart & Son, Inc.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for defendant appellee Statesville Roofing and Heating, Inc.

PHILLIPS, Judge.

Statesville's legal obligations to Stewart in this case depend not upon the facts that the contract between Stewart and Statesville is not under seal and Statesville completed its work on the roof more than three years before suit was brought, as decided by the trial court, but upon the following provisions of their contract:

> ARTICLE 1
>
> THE CONTRACT DOCUMENTS
>
> The Contract Documents for the Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner and Contractor dated June 5, 1970, the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Conditions), Drawings, Specifications, all Addenda issued prior to execution of the Agreement between the Owner and Contractor, and all Modifications issued subsequent thereto, Including Addenda G-1 and G-2; Page 2-A inserted herein; Exhibits "A", "B" and "C" attached. All of the above documents, which form the Contract between the Owner and Contractor, are a part of this Subcontract and shall be available for inspection by the Subcontractor upon his request.
>
> * * *

ARTICLE 11

SUBCONTRACTOR'S RESPONSIBILITIES

11.1 The Subcontractor shall be bound to the Contractor by the terms of this Agreement and of the Contract Documents between the Owner and Contractor, and shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the Owner, and shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those Documents, has against the Owner, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any provision of this Agreement, this Agreement shall govern.

Because of these contract provisions, the enforceability of Stewart's claim against Statesville cannot be determined by merely examining the subcontract for a seal and counting the years that have passed, numerous though they have been. By incorporating into their contract another contract and several other contract documents, as was expressly and deliberately done, the parties bound and subjected themselves to all the provisions that those several instruments contain. *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). What those provisions are, what obligations were created by them, how long they extended, and what statute of limitations applies to them, we have no way of knowing, since none of these papers are in the record before us. Thus, the absence of any genuine issue of fact between the parties at this time can only be surmised or guessed at; it has not been established. *Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E. 2d 808 (1980).

But more directly conclusive of this appeal are the Subcontractor's Responsibilities quoted above. A plainer example of a subcontractor expressly assuming and being responsible for all of a building contractor's obligations to the owner with respect to the work subcontracted can scarcely be imagined. What those obligations are, we do not know, but what this part of the subcontract means is quite clearly that: *If*, after all this time, Stewart is *contractually* obligated to Martin County because of the roofing job that Statesville did, then Statesville is to the same degree

and extent still bound to Stewart; and if Stewart has no further obligation to the plaintiff because of the roof, Statesville has none to Stewart. That we do not now know whether that contract was under seal, or that Statesville denied in its answer that it was, is beside the point at this juncture. Statesville was at liberty under our law to contract as it did and is bound thereby. *Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945). Having expressly assumed all of Stewart's contract obligations to Martin County because of the roof, Statesville cannot avoid those obligations by pointing to the absence of a seal on its own subcontract; it must await and abide by the outcome of the suit involving Stewart's contract with Martin County. Thus, the dismissal of Stewart's claim against Statesville was both premature and erroneous.

Reversed.

Judges HILL and JOHNSON concur.

RANDALL CLAY GAITHER v. ELBERT L. PETERS, JR., COMMISSIONER OF MOTOR VEHICLES

No. 8221SC863

(Filed 16 August 1983)

Automobiles and Other Vehicles § 2.1 — three convictions — offenses not committed on single occasion — assessment of points for each offense

Convictions of plaintiff for failure to yield the right-of-way, hit-and-run driving, and reckless driving after drinking were not convictions for traffic offenses "committed on a single occasion" within the purview of G.S. 20-16(c) where the first offense occurred when defendant ran a stop sign and struck another car, the second offense occurred when defendant left the accident scene, and the third offense occurred when plaintiff was caught three miles away driving after drinking. Therefore, the Commissioner of Motor Vehicles properly added points to defendant's driving record for each of the three offenses.

APPEAL by plaintiff from *Wood, William Z., Judge.* Judgment entered 8 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 June 1983.

Before March 2, 1981, plaintiff admittedly had seven points on his current driving record. Because of various events that oc-

curred on that day while he was operating his car in Davidson County, plaintiff was charged with several offenses, and when these charges were tried, plaintiff pleaded guilty to reckless driving after drinking, G.S. 20-140(c), to failure to yield the right-of-way, G.S. 20-158, and to hit-and-run driving, G.S. 20-166(b).

Under G.S. 20-16(c), convictions for reckless driving after drinking and for hit-and-run carry four points each, and failure to yield the right-of-way three points. But that statute also provides:

> In case of the conviction of a licensee of two or more traffic offenses committed on a *single occasion*, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value. (Emphasis supplied.)

After receiving proof of the above convictions, the defendant added four points to plaintiff's record for the hit-and-run violation and four for the reckless driving after drinking violation and suspended the plaintiff's driving privileges under G.S. 20-16(a)(5) for having accumulated twelve or more points during the preceding three years. The departmental hearing requested by plaintiff resulted in the suspension being affirmed, after which this action to restrain the enforcement of the suspension was filed pursuant to G.S. 20-25.

At trial, the evidence was to the following effect: On March 2, 1981, in Davidson County, while operating his car, plaintiff ran a stop sign at the intersection of Eller Road and U. S. Highway 52, struck another car in the intersection, and drove away from the accident scene without giving his name or address. An ambulance driver, not involved in the wreck, saw plaintiff drive away, followed plaintiff's vehicle down Highway 52, with the ambulance's red light flashing, and radioed the sheriff. The sheriff in turn radioed all of his vehicles about the chase, and a deputy cruising down Highway 52, but in the other direction, heard the report and shortly thereafter saw the two vehicles at the intersection of Highway 52 and Hickory Road. The deputy turned his vehicle around, gave chase, and stopped plaintiff's car at the intersection of Highway 52 and Gumtree Road, about three miles from the accident scene. Upon interrogating plaintiff and smelling alcohol on his breath, the deputy charged him with driving under

the influence, which at trial was reduced to reckless driving after drinking.

The trial court found that the three offenses were committed on three separate occasions—the first when the stop sign was run and the accident occurred, the second when the accident scene was left, and the third when plaintiff was caught three miles away driving after drinking—and affirmed the suspension.

Bruce A. Mackintosh for plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for defendant appellee.

PHILLIPS, Judge.

The only issue before us is whether the three traffic offenses described above were "committed on a single occasion," as those words are employed in G.S. 20-16(c). If so, plaintiff has less than twelve points on his driving record and the suspension order is invalid; if not, he has more than twelve points and the order is valid. In our opinion, the offenses were committed on more than one occasion and the order appealed from is affirmed.

Though the word "occasion" has more than one meaning, when used as a noun and limited to the singular, as in the statute, a commonly understood definition is—"a particular time at which something takes place: a time marked by some happening." Webster's Third New International Dictionary. No doubt that is the meaning the General Assembly had in mind when the word was used in the statute, the manifest purpose of which is to punish more lightly those licensees unfortunate enough to be convicted of two or more offenses because of what, in substance, is only one occurrence. To conclude that any of the word's other meanings was intended would render that part of the statute both incomprehensible and pointless; and, certainly, no purpose to benefit licensees that commit a series of offenses, even though within a brief span of time, is discernible from the statutory language.

Giving the word "occasion" its intended meaning, it is quite plain to us that: One particular time at which something took place relevant to plaintiff's case was when he ran his car through a stop sign at the Eller Road intersection and caused an accident; another such time was when he left that place without identifying

himself; and still another was when he drove recklessly five minutes later near Gumtree Road, three miles away. These offenses could not have occurred on a single occasion—approaching an accident scene is not the same occasion as leaving it, nor is either the same occasion as driving several minutes later at a completely different place, under completely different circumstances.

The order appealed from is

Affirmed.

Judges HEDRICK and WELLS concur.

IN THE MATTER OF: O'SHEA STERLING, A MINOR CHILD

No. 8229DC820

(Filed 16 August 1983)

Parent and Child § 1— neglect of child—termination of parental rights

The trial court's conclusions that respondent mother neglected her child within the meaning of G.S. 7A-289.32 and G.S. 7A-517(21), that respondent has demonstrated that she will not properly care for the child, and that the child's best interests require that respondent's parental rights be terminated were supported by the court's findings which established that the child was left in foster care from October 1977 until March 1979, during which respondent visited the child on only five occasions for a total of only eleven days, and that for substantial periods during such time her whereabouts were unknown; soon after custody was returned to respondent in March 1979, she left the child with distant relatives and received psychiatric hospital care until 9 April 1980; following her release from the hospital, she and the child lived with a certain man for two weeks, after which respondent requested that the child be returned to foster care or placed for adoption; the child was returned to foster care and since then respondent has visited him only twice; respondent has made no reasonable effort to obtain regular employment and dropped out of a CETA program; respondent drank heavily, was arrested for drunkenness several times, lived under a bridge for several days, and was again committed to a mental health care facility for inebriancy; and respondent failed to provide any amount whatever for the child's support during the period involved.

APPEAL by respondent Koketta Sterling from *Guice, Judge.* Judgment entered 24 February 1982 in District Court, MCDOWELL County. Heard in the Court of Appeals 19 May 1983.

In 1976, O'Shea Sterling was born out of wedlock to the respondent mother, then a student in high school. The father of the child has released all of his rights to the child. Since October 14, 1977, the child has been under the control of the McDowell County Department of Social Services, whose suit to terminate the respondent's parental rights was filed in September, 1981. After trial, judgment was entered terminating respondent's parental rights.

E. Penn Dameron, Jr. for petitioner appellee.

Carnes and Little, by Stephen R. Little, for respondent appellant.

PHILLIPS, Judge.

The respondent having excepted to none of the court's findings of fact, they are conclusive, *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981), and the only question for determination is whether the facts so found support the court's conclusions that the respondent neglected the child within the meaning of G.S. 7A-289.32 and G.S. 7A-517(21), has demonstrated that she will not properly care for it, and that the child's best interests require that the respondent's parental rights be terminated.

The court's findings, among other things, establish that during the four years or so preceding the filing of the action that: The child was left in foster care from October, 1977 until March, 1979, a period of seventeen months, during which respondent visited the child on only five separate occasions for a total of only eleven days, and that for substantial periods during those seventeen months, her whereabouts were unknown; soon after custody was returned to respondent in March, 1979, she left the child with distant relatives and received psychiatric care for a mental and emotional malady at Broughton Hospital until April 9, 1980; following her release from the hospital, she and the child lived with a man named Ronnie Sears for two weeks, after which respondent requested that the child be returned to foster care or placed for adoption; the child was returned to foster care and since then respondent has visited him only twice; she has made no reasonable effort to obtain regular employment or even to be employable, and, without reason or explanation, dropped out of a

CETA program that Social Services got her in after two weeks; she drank heavily, was arrested for drunkenness several times, lived under a bridge for several days, and was again committed to Broughton Hospital for inebriancy; and failed to provide any amount whatever for the child's support during all the period involved.

These findings support the conclusions made and the order appealed from is therefore

Affirmed.

Judge WELLS concurs.

Judge HEDRICK concurs in result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 AUGUST 1983

BOYER v. BOYER No. 8321DC248	Forsyth (80CVD4229)	Affirmed
BROWN v. BROWN No. 8229DC1247	McDowell (82CVD7)	Affirmed
BUMGARNER v. BUMGARNER No. 8325DC228	Catawba (80CVD1447)	Affirmed
CHASE v. BOWERS No. 824SC913	Onslow (81CVS1564)	Affirmed
HOGAN v. HOGAN No. 8220SC811	Richmond (79CVS325)	Affirmed
IN RE CONNELLY v. GREAT LAKES CARBON CORP. No. 8310SC129	Wake (82CVS863)	Dismissed
IN RE JONES No. 8318DC150	Guilford (82JO35)	Affirmed
IN RE MANLEY No. 8230SC1080	Jackson (79CVS74)	Affirmed
IN RE SCHWEIZER No. 823DC1304	Craven (82J36-"A")	Affirmed
JONES v. JONES No. 827DC1348	Edgecombe (81CVD48)	Affirmed
NEAL v. McFADDEN No. 8318DC48	Guilford (81CVD7043)	No Error
OSBORNE v. OSBORNE No. 8323DC159	Wilkes	Reversed & Remanded
PADGETT v. STUTTS No. 8319DC268	Randolph (82CVD699)	Affirmed
PERKINS v. PERKINS No. 8321DC73	Forsyth (81CVD3275)	Affirmed
PIERCE v. THE ZONING BD. OF ADJUSTMENT No. 8320SC37	Union (82CVS0054)	Affirmed
PREVETTE v. HOLLAR No. 8223DC1319	Wilkes (80CVD915)	Remanded
SMITH v. BARKER No. 8212SC723	Cumberland (78CVS1581) (78CVS1582)	Affirmed

STATE v. AIKENS No. 8316SC265	Robeson (82CRS420) (82CRS3055)	No Error
STATE v. ALSTON No. 837SC250	Nash (82CRS10631)	Affirmed
STATE v. ATKINSON No. 838SC14	Wayne (82CRS1559)	No Error
STATE v. BELL No. 828SC1325	Wayne (81CRS13391)	No Error
STATE v. BOONE No. 8227SC1334	Gaston (82CRS69)	No Error
STATE v. BOYETTE No. 834SC68	Duplin (82CRS2000)	No Error
STATE v. CAMPBELL No. 828SC1305	Wayne (81CRS16659) (81CRS16660) (81CRS16661)	No Error
STATE v. CASSITY No. 834SC42	Onslow (80CRS24593) (81CRS1806)	No Error
STATE v. ELLER No. 8222SC1322	Iredell (82CRS2833-2840) (80CRS11397) (80CRS13782)	No Error
STATE v. GATTIS No. 8315SC158	Orange (82CRS6170)	No Error
STATE v. GRANBERRY No. 827SC1290	Wilson (81CRS11849) (82CRS618)	No Error
STATE v. HENEZ No. 834SC142	Onslow (82CRS4078) (82CRS4079)	No Error
STATE v. HICKS No. 837SC16	Wilson (81CRS11531)	No Error
STATE v. JACKSON No. 8221SC1344	Forsyth (82CRS19029)	No Error
STATE v. JACOBS No. 8216SC1335	Robeson (81CRS16351) (81CRS17748-50) (81CRS17752-58)	Affirmed
STATE v. JENNINGS No. 8321SC25	Forsyth (82CRS15736)	No Error

STATE v. KINDLEY No. 8319SC143	Randolph (80CRS347) (80CRS582) (80CRS595)	Affirmed
STATE v. LEWIS No. 8314SC105	Durham (82CRS9087)	No Error
STATE v. McDOWELL No. 8227SC1321	Gaston (82CRS9861)	No Error
STATE v. MORTON No. 8319SC133	Montgomery (82CRS2356)	No Error
STATE v. PHELPS No. 822SC1339	Tyrrell (82CRS250)	No Error
STATE v. RENEGAR No. 8222SC1309	Iredell (82CRS3091) (82CRS3092)	No Error
STATE v. SAUNDERS No. 8210SC1365	Wake (82CRS17548) (82CRS17549)	No Error
STATE v. SMITH No. 8226SC1164	Mecklenburg (81CRS86486)	No Error
STATE v. TAVARES No. 834SC332	Onslow (82CRS14673) (82CRS14674)	No Error
STATE v. TOLAR No. 8312SC141	Cumberland (82CRS7115)	No Error
STATE v. UNDERWOOD No. 838SC49	Wayne (82CRS1056)	No Error
STATE v. WARD No. 8216SC1030	Scotland (81CRS2550)	Reversed
STATE v. WILLIAMS No. 8311SC215	Lee (82CR4028)	No Error
STATE v. WILSON No. 8324SC190	Watauga (82CRS2025) (82CRS2026)	No Error
STATE v. WRIGHT No. 8321SC26	Forsyth (82CRS29156)	No Error
TERRY v. DEWBERRY No. 8310SC92	Wake (81CVS843)	Affirmed
WILKES v. SANFORD FINISHING CORP. No. 8210IC605	Industrial Commission (H-3832)	Affirmed

WITHERS v. WITHERS No. 8327DC30	Gaston (80CVD2105)	Affirmed
WOLFE v. CITY OF ASHEVILLE No. 8228SC522	Buncombe (81CVS1536)	Reversed
WOODLIEF v. WOOD No. 839DC111	Vance (81CVD736)	Affirmed

FILED 16 AUGUST 1983

DRIGGERS v. UNITED INSURANCE No. 8312SC151	Cumberland (82CVS495)	Affirmed
HARDY v. HARDY No. 8321DC117	Forsyth (81CVD3484)	Affirmed
IN RE LOVE No. 8226DC636	Mecklenburg (72J420) (73J323)	Affirmed
JOYCE v. NANCE No. 8318DC224	Guilford (81CVD5099)	No Error
LEDFORD v. LEDFORD No. 8228SC680	Buncombe (81CVS1879)	Affirmed
STATE v. DAVIS No. 838SC271	Wayne (80CRS16905)	No Error
STATE v. GARVIN No. 8327SC157	Gaston (82CRS9844)	No Error
STATE v. GORE No. 8213SC1025	Columbus (81CRS9532)	No Error
STATE v. LYON No. 8326SC232	Mecklenburg (82CRS27263)	No Error
STATE v. McELRATH No. 8328SC170	Buncombe (82CRS8185)	Appeal Dismissed
STATE v. ROSS No. 833SC177	Craven (82CRS3426-29) (82CRS3689-90)	No Error
STEWART v. STEWART No. 8216DC1356	Scotland (82CVD196)	Vacated and Remanded

HENRY ANGELO & SONS, INC. v. PROPERTY DEVELOPMENT CORPORATION, RIVERSIDE ASSOCIATES, A LIMITED PARTNERSHIP, GLEN F. LAMBERT, STANLEY A. GERTZMAN, W. H. McMULLEN, JR., AND NATIONAL BONDING AND ACCIDENT INSURANCE COMPANY

ATLANTIC GLASS COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

ATLANTIC GLASS COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

BAKER-MITCHELL COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

BAKER-MITCHELL COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

BECKER BUILDERS SUPPLY CO. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

E. W. GODWIN'S SONS, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

E. W. GODWIN'S SONS, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

B. A. HOFT & ASSOCIATES, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

LEE'S PAINT & HARDWARE CO. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

LONGLEY SUPPLY COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

LOWE'S OF WILMINGTON, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

LOWE'S OF WILMINGTON, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

MARSH FURNITURE COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

MARSH FURNITURE COMPANY v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

JOHN H. SMITH D/B/A SMITH LAWN SERVICE v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

SOUTHEASTERN SHELTER CORPORATION v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

TILECRAFT DISTRIBUTORS, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

TRASH REMOVAL SERVICE, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

TRASH REMOVAL SERVICE, INC. v. PROPERTY DEVELOPMENT CORPORATION, ET AL.

No. 825SC475

(Filed 6 September 1983)

Principal and Surety § 10— bonding company's right to reimbursement by indemnitors under an indemnification agreement

G.S. 58-54.23 did not prevent a bonding company from seeking reimbursement from its indemnitors under an indemnification agreement made before the bonding company agreed to bond a general contractor. G.S. 58-54.20, G.S. 58-54.21, G.S. 58-54.22 and G.S. 58-3.

APPEAL by defendant National Bonding and Accident Insurance Company from *Strickland, Judge.* Order entered 31 December 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 March 1983.

These twenty suits, consolidated for trial and appeal purposes, were filed by subcontractors and suppliers to recover for labor and materials furnished to two construction projects in Wilmington; but none of the plaintiffs or the general contractor primarily responsible to them are involved in this appeal, which concerns only the secondary defendant, the appellant National

Bonding and Accident Insurance Company, and its indemnitors, Stanley A. Gertzman, Jeri A. Gertzman and William H. McMullen, Jr., the appellees. The claims of the suppliers and subcontractors against the general contractor have been settled and paid off by the bonding company in accord with the bonds given for the contractor; the bonding company obtained a default judgment against the contractor for monies so paid out; and the only matter remaining for adjudication is the bonding company's right to reimbursement by the appellees under an indemnification agreement made between them before the bonding company agreed to bond the general contractor in the first place.

The construction projects involved the renovation and refurbishment of two old apartment complexes under the authority and financial sponsorship of the United States Department of Housing and Urban Development. The general contractor for both projects was Property Development Corporation, whose original stockholders were Stanley A. Gertzman, Glen F. Lambert and William H. McMullen, Jr., Lambert being President of the company, McMullen Secretary, and Gertzman the Registered Agent. The owner of one complex was a partnership known as Riverside Associates, the general partners of which were the same three persons. The owner of the other complex was Sunbelt Corporation, whose stockholders were Property Development Corporation, Gertzman, Lambert and McMullen. Gertzman and McMullen are both Charlotte lawyers and Lambert was then a Florida real estate man and investor; if either of them had any experience in construction, the record does not reveal it. All the above enterprises were formed in anticipation of participating in these speculative projects, the purchase of the properties involved was contingent upon HUD-guaranteed financing being obtained, and the transactions were not closed until it was.

Before HUD approved the two projects, of course, all of its many requirements had to be complied with. One requirement, the last one met by the investors, was that payment and performance surety bonds for the general contractor be supplied. The task of getting these bonds was assumed by Mr. Lambert and proved to be quite difficult. Before the bonds were eventually obtained, Lambert had contacted a number of agencies or brokers in different places and Gertzman and McMullen had inquired about the delay many times. Finally, after making trips to Atlanta and

Minneapolis, Lambert and brokers from those two cities contacted National Bonding at its main office in St. Louis and that company agreed to serve as surety for the two projects if the three investors—Gertzman, Lambert and McMullen—and their wives, as well as the general contractor, would personally indemnify it for any and all costs and expenses that it incurred as a consequence thereof. These terms were accepted by the investors and a formal application and indemnity agreement bearing the notarized signatures of the six individuals involved, as well as the President and Secretary of Property Development Corporation, was delivered to National Bonding; after which the surety bonds were issued, HUD approved both projects and guaranteed the financing, the apartment purchase transactions were closed, and construction on the projects was begun.

In the course of construction, however, the plaintiff subcontractors and suppliers were not paid by the contractor, and upon the bonding company being made a secondary defendant in these cases, it cross-claimed against the Gertzmans and McMullens. Later a voluntary dismissal as to Mrs. McMullen was taken upon her alleging that she did not sign the indemnification agreement. The Gertzmans and McMullen admitted executing the indemnification agreement, but moved to dismiss the bonding company's claim against them under the provisions of G.S. 58-54.23, on the ground that the transaction involved was insurance business conducted in the state, and National Bonding had not obtained a certificate of authority from the Commissioner of Insurance, as the statute required. The bonding company also moved for summary judgment against the indemnitors.

Upon the various motions being heard, the evidence indisputably showed that (a) the bonding company issued the surety bonds for the general contractor, guaranteeing thereby to pay the contractor's debts to suppliers and subcontractors if it did not; (b) it had transacted no other business of any kind in the state and had no agencies, employees, or officers here; (c) it had received no certificate of authority from the North Carolina Department of Insurance; (d) the appellees executed the indemnification agreement, promising thereby to repay the bonding company for any costs and expenses that it incurred because of giving the bonds; and (e) the bonding company had incurred costs and expenses in these

cases in the total amount of $264,673.87 because of the contractor's default.

In reliance upon G.S. 58-54.23, which in pertinent part reads as follows—

> . . . no company *transacting insurance business in this State* without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a certificate of authority

[Emphasis supplied], an order of summary judgment dismissing National Bonding's cross-claim against the appellees for indemnification was entered.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, for defendant appellant National Bonding and Accident Insurance Company.

Poisson, Barnhill & Britt, by L. J. Poisson, Jr., for defendant appellees, Stanley A. Gertzman, Jeri A. Gertzman and William H. McMullen, Jr.

PHILLIPS, Judge.

G.S. 58-54.23 and the several other statutes in Article 3C of Chapter 58 that it depends upon and relates to have no application to this case and it was error to close the court to National Bonding's cross-claims against the appellee indemnitors under authority of it. Since these are confiscatory and punitive statutes in fundamental derogation of the common law—statutes which abrogate the right of those affected to sue, as basic a right as the common law knows, and authorize the imposition of penalties in the amount of $1,000 a day—they, of course, cannot and will not be extended beyond their express terms by us. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). The statutes concern only "unauthorized insurers" who write "contracts of insurance" or otherwise transact "insurance business" in the state; they have nothing whatever to do with those who sign payment and performance bonds for building contractors and seek to obtain reimbursement from indemnitors who induce them to issue bonds by promising to hold them harmless with respect thereto.

Before examining the statutes that were deemed to apply to appellant's cross-claims, however, a resort to the ABC's of insurance and suretyship law would seem to be in order. In the law, insurance and suretyship are not synonymous terms, and if any appellate court anywhere has ever so held, our research has failed to disclose it. They involve different functions, relationships, rights and obligations; and have been recognized and treated by the profession as distinctive fields of law for generations. *See* 44, 45 and 46 C.J.S. *Insurance;* 72 C.J.S. *Principal and Surety;* 32 and 33 C.J. *Insurance;* 50 C.J. *Principal and Surety.* "While insurance contracts are in many respects similar to surety contracts, there is a very wide difference between them." 44 C.J.S. *Insurance* § 1, p. 473. The statutory provisions that control and regulate insurance in this state are contained in Chapter 58 of the General Statutes entitled "Insurance"; those that regulate suretyship in Chapter 26 entitled "Suretyship."

Insurance is "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the 'insurer' or 'underwriter;' the other, the 'insured' or 'assured;' the agreed consideration, the 'premium;' the written contract, a 'policy;' the events insured against, 'risks' or 'perils;' and the subject, right, or interest to be protected, the 'insurable interest.' " Black's Law Dictionary 943 (rev. 4th ed. 1968).

"A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest." G.S. 58-3.

A surety is one "who engages to be answerable for the debt, default or miscarriage of another." Pingrey, Treatise on the Law of Suretyship and Guaranty 2 (1901).

A contract of suretyship is "[a] lending of credit to aid a principal having insufficient credit of his own; the one expected to pay, having the primary obligation, being the 'principal,' and the one bound to pay, if the principal does not, being the 'surety.' " Black's Law Dictionary 1611 (rev. 4th ed. 1968).

"In law, suretyship is a lending of credit to aid a principal who has insufficient credit of his own, and is a direct contract to pay the principal's debt or perform his obligation in case of his default, . . ." 83 C.J.S. *Suretyship*, p. 911.

The statutes that the appellees contend rendered their agreement to indemnify National Bonding unenforceable in the courts of this state are all in Article 3C of Chapter 58 of the General Statutes. Article 3C, entitled "Unauthorized Insurers," contains six statutes. Two of them—G.S. 58-54.24, empowering the Commissioner to enjoin unauthorized companies, and G.S. 58-54.25, permitting service of process on the Secretary of State as agent for unauthorized companies—are irrelevant to this appeal; and a third—G.S. 58-54.23, which deprives unauthorized insurers of the right to sue in our courts—is already quoted above in pertinent part. G.S. 58-54.20, which enumerates the acts forbidden, is hereafter quoted in its entirety, and so much of the other two statutes as is relevant to the question before us:

§ 58-54.20. Purpose of Article.

It is the purpose of this Article to abate and prevent the practices of unauthorized insurers within the State of North Carolina, and to provide methods for effectively enforcing the laws of this State against such practices. The General Assembly finds that there is within this State a substantial amount of insurance business being transacted by insurers who have not complied with the laws of this State and have not been authorized by the Commissioner of Insurance to do business. These practices by unauthorized insurers are deemed to be harmful and contrary to public welfare of the citizens of this State. The difficulties which arise from the acts and practices of unauthorized insurers is compounded by the fact that such companies are licensed in foreign jurisdictions and conduct a long-range business without having personal representatives or agents in proximity to insureds. The General Assembly further declares that it is a subject of vital public interest to the State that unlicensed and unauthorized companies have been and are now engaged in soliciting by way of direct mail and other advertising media, insurance risks within this State, and that such companies enjoy the many benefits and privileges provided by the State as well as the protection af-

forded to citizens under exercise of the police powers of the State, without themselves being subject to the laws designed to protect the insurance consuming public. The provisions of this Article are in addition to all other statutory provisions of Chapter 58 relating to unauthorized insurers and do not replace, alter, modify or repeal such existing provisions.

§ 58-54.21. Transacting business without certificate of authority prohibited; exceptions

Except as hereinafter provided, it shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State as set forth in G.S. 58-54.22 of this Article, without a certificate of authority issued by the Commissioner of Insurance.

§ 58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State.

The following acts, if performed in this State, shall be included among those deemed to constitute transacting insurance business in this State:

(1) a. Maintaining any agency or office where any acts in furtherance of an insurance business are transacted, including, but not limited to the execution of contracts of insurance with citizens of this or any other state;

b. Maintaining files or records of contracts of insurance; or

c. Receiving payments of premiums for contracts of insurance.

(2) Likewise, any of the following acts in this State, whether effected by mail or otherwise by an unauthorized insurer, is included among those deemed to constitute transacting insurance business in this State:

a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein;

b. The soliciting of applications for contracts of insurance through the use of the United States mail or any other media, method or device;

c. The collections of premiums, membership fees, assessments or other considerations for such contracts; or

d. The transaction of any matters prior to or subsequent to the execution of such contracts in contemplation thereof or arising out of them.

Any company violating any of the provisions of this section, by doing any of the foregoing acts or transactions while not authorized to do business within this State, shall be subject to penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense; . . . Provided, that each day in which a violation occurs shall constitute a separate offense.

A reading of these provisions makes it obvious that they do not apply to this case. They say nothing of surety performance bonds, or contracts to pay the debts of others, but mention only insurers, contracts of insurance, and transacting insurance business. Their purpose, plainly stated, is to protect unwary North Carolinians against the overreaching machinations and solicitations of unauthorized out-of-state insurers in selling insurance policies; certainly, their purpose is not to immunize from liability indemnitors who travel to other states and induce foreign sureties to bond fledgling North Carolina building contractors that have no credit of their own and that require bonds to stay in business. The acts prohibited and punishable by the statutes are also too explicitly stated to be easily confused with others or misunderstood; in essence, they are soliciting insurance contracts, and contracting to pay insureds or their beneficiaries under insurance policies. Agreeing to stand good for the debts of others, as happened here, is not condemned, and we know of no reason why it should be.

The appellees contend that the terms "contracts of insurance," "insurer," and "insurance business," as used in the statute are interchangeable with "surety," "contracts of suretyship," and "surety bonding business" because of language contained in two decisions of the North Carolina Supreme Court.

In the first decision, *Guilford Lumber Mfg. Co. v. Johnson*, 177 N.C. 45, 97 S.E. 732 (1919), a suit by suppliers and laborers against a defaulting building contractor and his performance bond, the Court, in strictly construing the bond against the surety, used this language: ". . . guarantee or indemnity bonds of this character are regarded in this jurisdiction and under well-considered authority elsewhere as being *in the nature of insurance contracts* and, for like reasons, subject to similar rules of interpretation." (Emphasis supplied.) *Id.* at 48, 97 S.E. at 734. But this, of course, no more justifies the conclusion that sureties are insurers and performance bonds are contracts of insurance than does the commonly known fact that sheep are somewhat like goats justify the conclusion that sheep are goats.

The second, *Maxwell, Comr. of Revenue v. Southern Fidelity Mutual Ins. Co.*, 217 N.C. 762, 765-66, 9 S.E. 2d 428, 431 (1940), contains the following:

> "The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities, the rules peculiar to suretyship do not apply." See 193 N.C. 710.

Why the Court directed us to 193 N.C. 710 we have been unable to ascertain, as that decision (*Forest City Building and Loan Association v. Davis*) contains nothing whatever that is relevant to either that case or this, or to the remarks quoted. Nor have we been able to deduce why the quoted remarks were made in the first place. In that suit by a creditor against the debtor's surety company, the only question before the Court was whether the surety was discharged when the creditor took additional security from the debtor and extended the time of payments. The answer and decision that the surety was not discharged was dictated, as the Court, after many digressions, recognized, by the fact that the surety bond expressly gave the Commissioner of Revenue the right to take other or additional security from the distributor as he saw fit. Rhetoric so random, irrelevant, and unsound is no basis for this or any other court deciding that the General Assembly had surety bonds in mind when it undertook to curb un-

authorized insurers by enacting Article 3C of Chapter 58 of the General Statutes.

But even if the payment and performance bonds in this case fell within the purview of Article 3C, the order dismissing the bonding company's cross-claims would have still been without authority. This is because G.S. 58-54.23 deprives unauthorized insurers only of the right "to maintain an action at law or in equity" in regard to their prohibited business, it says nothing at all about maintaining cross-claims against co-defendants. The appellant has maintained no action against anybody, least of all the creditors for whose benefit the bonds were given; it has only defended the twenty actions brought against it by the contractor's creditors and sought to enforce cross-claims against its co-defendants—not because of the bonds or anything in them, but because of the appellees' separate promises of indemnity. The words, "action at law or in equity," designed only to prevent unauthorized insurers from suing their victimized policyholders or beneficiaries, cannot be interpreted to prevent cross-claims among defendants sued by others.

But this decision does not rest on just the rules of statutory construction. Just and equitable principles fundamental to our jurisprudence require that these appellees not be exonerated from liability in this case; for those who willingly gather unto themselves all the fruits of bargains fairly made, as the appellees did here, but look for technical loopholes through which to squirm when called upon to meet the burdens agreed to cannot and should not be aided by our law. Having sought out the appellant in a distant state when no one here would bond their contractor, with the entire real estate purchase and construction project hanging in the balance; having induced it to execute the bonds by solemnly promising to repay any losses sustained thereby, and enterprises that they owned having benefitted therefrom; the appellees will not be heard by this Court to claim that they are immune from liability because the appellant obtained no certificate in this state before standing good for and paying what, in essence, were their debts! The utter absurdity of the contention requires no demonstration; it offends every principle of equity and good morals, and will not be heeded by this court. And under fundamental principles of law, we are not obliged to. "It is a rule of general application that, where a bond has accomplished the pur-

pose for which it was given, or the principal has derived benefit from it, both the principal and sureties are estopped to deny liability on the bond on any ground whatever." 31 C.J.S. *Estoppel* § 110(4), p. 571. *See also* 21 C.J. *Estoppel* § 213, p. 1211 and the cases there cited. *A fortiori*, since the principal and surety are estopped, the indemnitors, for whose benefit the projects were conceived and promoted, from aught that the record shows, are likewise estopped.

Since the appellees admit executing the indemnity agreement and both the contractor's default and the monies paid out by the bonding company before this appeal was taken have already been judicially established, upon remand the bonding company's motion for summary judgment, not yet ruled on apparently, should be allowed, after the expenses incurred by the bonding company because of this appeal have been ascertained.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

IN THE MATTER OF: CHRISTIE LYNN BALLARD

No. 8226DC1016

(Filed 6 September 1983)

1. **Parent and Child § 1— parental rights—termination for neglect**

The evidence in a proceeding to terminate parental rights, including a prior order placing the child in the temporary custody of a county department of social services because of the mother's neglect of the child, was sufficient to support the court's order terminating the mother's parental rights under G.S. 7A-289.32(2) on the ground that she had neglected the child.

2. **Trial § 58— failure to make tendered findings**

A trial court is required to make only those findings of fact necessary to support the judgment, and the court is not bound to find facts as proposed by a party even though there be competent evidence to support such findings.

3. **Parent and Child § 1— termination of parental rights—sufficient finding of jurisdiction**

The trial court sufficiently found that it had jurisdiction of a proceeding to terminate parental rights under the provisions of G.S. 50A-3 where the court

found "that it has jurisdiction to hear and decide this matter under the provisions of the Uniform Child Custody Jurisdiction Act."

Judge WELLS dissenting.

APPEAL by respondent from *Jones (William G.), Judge.* Order entered 22 June 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 25 August 1983.

This is an action wherein the Mecklenburg County Department of Social Services petitioned for the termination of parental rights of Russell Carlton and Sandra Ballard Ard, the parents of Christie Lynn Ballard. The Department of Social Services (hereinafter DSS) assumed custody of Christie under a non-secure custody order on 3 December 1980. By an order entered 23 January 1981 the District Court adjudged Christie a neglected and dependent child. The trial court supported its order with specific findings of fact, including the following:

. . .

5. The mother is approximately 20 years old, has had no regular place to live since the birth of her child, and has always lived with other people.

. . .

7. The mother recently spoke to Ms. Bullins of putting the child in an orphange after Christmas, 1980. In June of 1980 the mother called the Department of Social Services and stated that she could not take care of the child and requested that said child either be placed in foster care or adopted. At the five-day hearing in this matter, held December 8, 1980, [the mother], prior to the hearing, indicated to Mrs. Johnson that she was not able at the present time to care for this child.

8. In prior conversations with Mrs. Johnson, [the mother] admitted that in the last two years she has been leaving her child with anyone who would take her; that in November, 1980, she left the child at Dot Simpson's house, knowing said house had no heat; that she has had no permanent place to live since the birth of the child; that she has not been regularly employed since the birth of the child.

9. [The mother] was informed by Mrs. Johnson as to the availability of AFDC aid and encouraged by Mrs. Johnson to apply for such aid. Mrs. Johnson told [the mother] that she would assist [her] in obtaining such aid provided that [she] contacted her. [The mother] never applied for such aid and consequently did not receive any AFDC funds in November, 1980.

10. There was very little clothing for the child when she was picked up at the Bullins' residence by Mrs. Johnson pursuant to an immediate custody order issued by this Court. Subsequently, DSS has had to issue an emergency clothing check to the mother in order to suitably clothe the child.

. . .

On 25 February 1981 the court ordered Sandra Ballard and DSS to enter into a parent/agency agreement. On 9 December 1981 DSS petitioned to terminate the parental rights of Russell Carlton and Sandra Ballard Ard. At a hearing on the petition the court made the following findings of fact and conclusions of law.

1. That Christie Lynn Ballard was born in Mecklenburg County on December 12, 1978, to Sandra Elaine Ballard and Russell Carlton, who were not married.

2. That shortly after the birth of the child, to wit in January, 1979, the Department of Social Services received a referral concerning the care which said child was receiving from her parents.

3. That additional referrals were received by the Department of Social Services; and in December of 1980 an immediate custody order was issued by this Court and the child was placed in the custody of the Department of Social Services.

4. That an adjudicatory hearing upon the petition alleging the child to be a neglected and dependent child was held by this Court on January 5, 1981, and extensive findings of fact were made by the Honorable Judge Walter H. Bennett, Jr., Judge Presiding; and that Judge Bennett found Christie Lynn Ballard to be a neglected child by virtue of the failure of the mother to properly care for said child; and that no ap-

peal from the decision of Judge Walter H. Bennett, Jr. was taken.

5. That subsequent to the child coming into the care of the Department of Social Services, the mother, Sandra Elaine Ballard, entered, on June 8, 1981, into a parent/agency agreement with the Department of Social Services pursuant to the order of February 25, 1981, in which, among other things, she agreed to pay support of $8.00 a week for the child, to maintain steady employment and a stable residence; but that subsequent to June 8, 1981 (the date of the agreement), the respondent has had and lost at least three separate part time jobs and has changed her residence six or seven times. Mrs. Ard was unable to work in January and February, 1982, because of medical problems.

6. That progress was made by Sandra Ard from time to time toward regaining custody of her child; and, in particular, progress became evident in July, 1981, when Sandra Ballard married Mr. Ard; but that in August, 1981, shortly after she was told that a temporary placement of Christie with her mother was going to be recommended by the Department of Social Services, Sandra Ard had a fight with her husband, went to Florida with another man and stayed there almost a month; and that again in February, 1982, Sandra Ard was advised by the Department of Social Services that because her situation had stabilized to a degree, a temporary placement would be recommended to begin on or about March 5, 1982; but that within a few days after being told that her child might be returned on a temporary basis, Sandra Ard again had a fight with her husband and left the residence of her in-laws and husband where she had been living since their marriage, and the placement of Christie with her was therefore never made.

7. That Christie Lynn Ballard has been in the custody of the Department of Social Services continuously since December of 1980 and the mother has worked from time to time and has paid absolutely no support for the child in the almost year and a half the child has been in the custody of the petitioner; and that neither has the respondent Russell Carlton paid any support whatever for the child, nor has he made any

contact with the Department of Social Services concerning the child's condition and well-being.

8. That the mother of said child, Sandra Ballard Ard, has throughout the life of this child evidenced a propensity to let other things come before the care and responsibility of her child; and this child has been in foster care almost a year and a half during her three and one-half years of life; and this child is in need of permanent placement and a stable home, which this court is convinced cannot be provided by either respondent, Russell Carlton or Sandra Elaine Ballard Ard.

9. That Russell Carlton, the biological father of said child, did not, prior to the filing of the petition herein, (a) marry the mother of said child, (b) establish paternity judicially or by registered affidavit, (c) legitimate the child, or petition to legitimate the child, nor (d) provide substantial financial support or consistent care with respect to said child and her mother.

10. That this Court adopts the findings and facts contained in the order of Judge Walter H. Bennett, Jr. dated January 23, 1981, and further adopts the conclusion of the Court that Sandra Elaine Ballard Ard neglected the child prior to her coming into the custody of the Department of Social Services.

11. That said child has resided in Mecklenburg County for her entire life, and this Court has determined that it has jurisdiction to hear and decide this matter under the provisions of the Uniform Child Custody Jurisdiction Act.

12. That based upon the foregoing, this Court concludes as a matter of law that grounds for termination of the parental rights of the mother, Sandra Elaine Ballard Ard, exist under the provisions of G.S. Sec. 7A-289.32(2) and (4); and with respect to Mr. Carlton under G.S. Sec. 7A(2), (4) and (6); and the Court further concludes that the best interests of Christie Lynn Ballard require that this Court terminate the parental rights of Sandra Elaine Ballard Ard and Russell Carlton with respect to said child.

From the order entered 22 June 1982 terminating her parental rights, respondent Sandra Ballard Ard appealed.

Robert D. McDonnell as Guardian ad Litem for Christie Lynn Ballard, appellee.

Richard F. Harris, III for the respondent, appellant.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski and William H. McNair for the petitioner, appellee.

HEDRICK, Judge.

[1] The trial court in a hearing on termination of parental rights is required to "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32. . . ." N.C. Gen. Stat. Sec. 7A-289.30(d). The trial court in this case concluded that circumstances existed under N.C. Gen. Stat. Sec. 7A-289.32(2), which identifies as a ground for termination a finding that "[t]he parent has abused or neglected the child." Respondent assigns error to this conclusion, asserting that it is not supported by the findings and the evidence.

The record indicates that DSS introduced the order of 23 January 1981 which contained the earlier court's conclusion that respondent had neglected Christie. Also introduced was the parent-agency agreement showing Mrs. Ard's agreement to pay support, maintain steady employment, and establish a stable residence. Laverne King, a DSS social worker, testified that Mrs. Ard had held various jobs, gone for periods of time without employment, and lived with several different friends for varying periods of time. Ms. King also testified that Mrs. Ard's living situation began to stabilize after she married Mr. Ard and moved in with his parents. Shortly after DSS told Mrs. Ard that it would recommend a trial placement of the child with her, however, she had an argument with her husband and left the Ard residence. She remained away from 22 August 1981 to 9 September 1981. Respondent again left her husband in February 1982, shortly after learning of a possible trial placement of the child with her, and remained absent for approximately one month.

Assuming *arguendo* that the order of 23 January 1981 did not itself establish grounds for termination of parental rights under N.C. Gen. Stat. Sec. 7A-289.32(2), we nevertheless find the court's conclusion adequately supported by the evidence. The

neglectful conduct forming the basis for that order occurred little more than a year prior to the filing of the petition for termination. Further, the evidence supports the findings of the trial court that Mrs. Ard was unsuccessful in establishing a stable living situation in the interim, and that she continued to evidence "a propensity to let other things come before the care and responsibility of her child." These findings provide ample basis for the court's conclusion that grounds for termination existed under N.C. Gen. Stat. Sec. 7A-289.32(2).

The respondent also contends that the court erred in concluding that grounds for termination existed under N.C. Gen. Stat. Sec. 7A-289.32(4). If a conclusion that grounds exist under any section of the statute is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed. *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982). Because we have upheld the court's conclusion that grounds existed under N.C. Gen. Stat. Sec. 7A-289.32(2), it is unnecessary to discuss respondent's contention that grounds did not exist under N.C. Gen. Stat. Sec. 7A-289.32(4).

The respondent also assigns error to the trial court's use of the same file number for both the child neglect proceedings and the termination of parental rights petition. We find it unnecessary to address this assignment of error since the respondent failed to object at the trial proceedings and properly preserve the issue for appeal. North Carolina Rule of Appellate Procedure 10(b)(1); *see also*, 1 N.C. Index 3d, Appeal and Error Sec. 24. Furthermore, we fail to see how the respondent has been prejudiced in any way by the use of the same file number.

The respondent makes numerous assignments of error to individual findings of fact and challenges the competency and sufficiency of the evidence to support them. We have carefully reviewed the record and find all the trial judge's findings amply supported by the evidence.

[2] The respondent argues through her Assignment of Error Nos. 4 through 11 that the trial court erred by refusing to include in its order her findings of fact. We overrule these assignments of error for two reasons. First, a trial court is required to make only those findings of fact necessary to support the judgment. *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). Sec-

ond, a trial judge "is not bound to find facts as proposed by a party, even though there be competent evidence to support such a finding, and his rejection of the party's tendered finding of fact may not be reversed by the appellate court and is not ground for a new trial." *Branch Banking & Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 355, 211 S.E. 2d 327, 336 (1975).

[3] The respondent next assigns error to the adequacy of the trial court's finding of jurisdiction. She argues that the court failed to make a finding, as required by N.C. Gen. Stat. Sec. 7A-289.23, that it had jurisdiction under the provisions of N.C. Gen. Stat. Sec. 50A-3. The court did state in Finding of Fact No. 11 "that it has jurisdiction to hear and decide this matter under the provisions of the Uniform Child Custody Jurisdiction Act." This assignment of error borders on the frivolous.

Respondent's final two assignments of error relate to (1) the trial court's refusal to allow into evidence testimony that respondent's mother-in-law could help the mother in the same way as a parent aid and (2) the exclusion of portions of a letter from the executive director of the Family Support Center. The respondent cites no authority for her position, nor does she demonstrate any prejudice to her case. These assignments of error are overruled.

The order terminating the parental rights of the respondent is

Affirmed.

Judge PHILLIPS concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

There being insufficient evidence presented of grounds to terminate the parental rights of respondent-appellant Sandra Ballard Ard, I must respectfully dissent.

The statute, G.S. 7A-289.32, provides in pertinent part, that parental rights may be terminated where:

. . .

(2) The parent has abused or neglected the child. . . .

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

It is clear that Ms. Ballard's daughter, Christie Lynn, has been in foster care for less than two years, and therefore termination may not be based on G.S. 7A-289.32(3). Further, there was insufficient evidence to terminate parental rights on the grounds of nonsupport under G.S. 7A-289.32(4). A finding that a parent has ability to pay support is essential to termination for nonsupport. *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). At the trial below, the judge made no finding of fact that Ms. Ard was able to contribute to her daughter's support.

The issue of termination of parental rights on the grounds of neglect requires more detailed discussion. There are two contexts in which the issue of parental neglect becomes important. First, neglect may be alleged as grounds for transferring temporary custody (non-secure custody order) from the parent to a social welfare organization under the provisions of G.S. 7A-576. Second, neglect is one of the three possible grounds discussed above for permanent termination of parental rights. A neglected child for purposes of either proceeding is

[a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State

law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law. G.S. 7A-517(21). *See In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440 (1982).

In the case at bar, the Mecklenburg County Department of Social Services (DSS), obtained temporary custody of Christie in January, 1981, based on a judicial finding that Christie was a neglected child within the meaning of G.S. 7A-517(21). Neglect was also found as a basis for termination of respondent-mother's parental rights at the hearing in June, 1982. The trial court purported to "adopt" the findings of fact and conclusion of neglect made in the 1980 custody hearing as evidence of neglect to support termination in the 1982 hearing.

The question before us therefore is what weight the judge in the termination hearing could properly accord the finding of neglect made in the temporary custody hearing a year earlier.

Clearly, the prior finding of neglect may not be the sole factor relied upon in a later termination hearing, for to do so would render the termination provisions in the statute meaningless. Further, the finding of neglect is only relevant for conditions up through December, 1980, when the non-secure hearing was held. *In the Matter of Chosa*, 290 N.W. 2d 766 (Minn. 1980); *In re Bender*, 170 Ind. App. 274, 352 N.E. 2d 797 (1976). The issue of a prior finding of neglect in a custody hearing used in a termination hearing arose in *In re Smith, supra*, but was not decided because the parties in that case stipulated that the finding could be judicially noticed in the termination proceeding. No such stipulation was made in the case at bar, however.[1]

Although there have been relatively few cases decided on this point, some courts considering the issue have held that a judge in a termination hearing must consider all evidence in the case, and make an independent finding of the existence of neglect as of the time of filing of the petition for termination of parental rights. *Chapman v. Chapman*, 96 Nev. 290, 607 P. 2d 1141 (1980);

1. Following recognition of the stipulation of the court's earlier finding of neglect, Judge Martin noted ". . . the court was correct in recognizing that this case could not be decided in a vacuum. The procedural and factual history of the case was relevant and necessary to a full and fair determination of the issues." *Id.*

In the Matter of Chosa, supra; In re Terry D., 148 Cal. Rptr. 221, 83 Cal. App. 3d 890 (1978); *In the Matter of Mirelez*, 18 Wash. App. 790, 571 P. 2d 969 (1977); *In re Bender, supra.* Other courts have held that findings in a temporary custody proceeding may be judicially noticed by the court in a later termination hearing. *In re Interest of Adkins*, 298 N.W. 2d 273 (Iowa 1980); *In re Interest of Norwood*, 203 Neb. 201, 277 N.W. 2d 709 (1979); *In re Adoption of K*, 417 S.W. 2d 702 (Mo. Ct. App. 1967). These decisions do not state clearly what effect the taking of judicial notice has upon the evidence, but seem to indicate that the only issue to be considered in the termination hearing is whether neglect has occurred *after* the temporary custody proceeding.

The question of what effect the trial court's prior findings in a non-secure custody proceeding should have in the termination hearing is not confined to mere relevance, but must be examined in light of due process requirements. A petition for non-secure custody does not put the parent on notice of the threat of termination of parental rights. In a temporary custody hearing, the trial court is not faced with the same awesome responsibility involved in a parental rights termination case. This is not to say that temporary custody proceedings are not profound; but the orders flowing from them are only temporary; while in a termination proceeding a possible result is that the parent's rights will be forever terminated. I, therefore, am persuaded that the trial court, in order to afford due process in termination proceedings, must in every case make its own findings, based on evidence presented in support of the petition for termination, and must afford the parent the opportunity to refute or rebut all the evidence at the termination proceeding. Under my interpretation of what due process requires, the petitioner might offer into evidence the prior orders of the court, but such orders would constitute only some evidence of the issues tried previously, and would be subject to refutation or rebuttal. The record in this case makes it clear that Judge Jones took judicial notice of Judge Bennett's prior order, accepting his findings as conclusive and his conclusions as binding. This was error.

The judgment below should be reversed. First, the record shows that Judge Jones failed to make an independent finding of neglect based on all the evidence in the case, including events before and after the January, 1981 order placing custody of

Christie with DSS. Second, there was no showing of neglect following the custody order sufficient to meet the clear and convincing evidence test. *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed. 2d 599, 102 S.Ct. 1388 (1982); *In re Matter of Smith, supra.*

Courts have no power to terminate parental rights merely upon showing that a parent is a transient and has a troubled marriage. Not only are the standards of behavior used by the trial court in the case at bar suspect, but there is no showing in the record that Ms. Ard's nomadic lifestyle after January, 1981, in any way harmed her daughter, Christie. Indeed, where DSS has custody of a child, it will be difficult in many cases to prove evidence of neglect at all. Where a parent is not in physical control of a child, neglect in the form of failure to provide shelter, food, clothing or medical attention simply cannot occur. The issue of nonsupport is of course a different matter. *Accord, Chapman v. Chapman, supra* (neglect cannot be established "when a child is left by a parent in an environment where the child is known to be receiving proper care.") No one in the case at bar suggests that Christie received improper care from DSS or her foster family.

While there are ways in which neglect may be shown even when DSS has custody of a child, e.g., failure to maintain contact and affection with a child, *See In re Smith, supra, and In re APA*, 59 N.C. App. 322, 296 S.E. 2d 811 (1982), in this case there was ample evidence that respondent-mother maintained regular, loving contacts with her daughter during the entire time Christie was in foster care. On at least one occasion, Ms. Ard requested more visitation rights than DSS was willing to permit.

Petitioner-DSS' arguments about Ms. Ard's failure to change her lifestyle to a more stable, conventional routine are more properly addressed to a petition to terminate parental rights under G.S. 7A-289.32(3). Under that portion of the statute, parental rights may be terminated if a parent fails to show sufficient progress toward correcting conditions which led to the initial determination of neglect, after the child had been in DSS custody *for more than two years.* This portion of the statute is designed to encourage courts and social services organizations to permit a parent to "rehabilitate" himself or herself, with help and counseling from social service agencies. It also places a two-year limit, to permit termination of parental rights and possible adoption in cases where no progress is made. *See* Note, *Protecting Children*

From Parents Who Provide Insufficient Care—Temporary and Permanent Statutory Limits on Parental Custody, 1980 Ariz. St. L.J. 953, 969-73.

Because there was no finding of clear and convincing evidence of neglect based on all the facts up to the time of the 1982 termination petition, due process was not accorded the respondent-mother in this case and I respectfully dissent.

DAVID WAYNE DIXON v. CALVIN R. PETERS AND DUKE UNIVERSITY

No. 8214SC754

(Filed 6 September 1983)

1. **Constitutional Law § 6; Physicians, Surgeons and Allied Professions § 17.1— informed consent statute—no legislative infringement on judicial power**

G.S. 90-21.13(a)(3), which deals with informed consent to health care treatment, is not unconstitutional as a legislative infringement on the judicial power delegated to the courts by Art. IV, § 1 of the North Carolina Constitution. Proof of causation in a malpractice action is an evidentiary matter, and the legislature's decision to legislate in this area is not an infringement of the judicial powers of the state courts.

2. **Physicians, Surgeons and Allied Professions § 17.1— informed consent cases—objective standard for determining proximate cause proper**

Using an objective (reasonable person) standard, rather than a subjective (personal) standard, for determining proximate cause in informed consent cases does not violate the substantive due process rights under both the North Carolina and the United States Constitutions.

3. **Physicians, Surgeons and Allied Professions § 17.1— standard of review for informed consent statute**

The standard of review for cases arising under the informed consent statute is not the middle tier/substantial state interest constitutional test. Rather the constitutional test for the informed consent statute is the lower tier/rational basis/legitimate state interest test, and there is a rational basis for the promulgation of G.S. 90-21.13.

4. **Physicians, Surgeons and Allied Professions § 15— sustaining of objection to testimony not reversible error**

The trial court did not commit reversible error by sustaining an objection to testimony by the plaintiff that he would not have consented to hair transplant operations if he had been informed of the possibility of permanent scarring or of the possibility that he might look worse after the operations than before since plaintiff answered the question asked before any objection was made and sustained and no motion to strike plaintiff's answer was ever made.

APPEAL by plaintiff from *Giles Clark, Judge.* Judgment entered 5 February 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 May 1983.

McCain, Essen & Orcutt, by Jeff Erick Essen and Grover C. McCain, Jr., for plaintiff appellant.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by E. C. Bryson, Jr., and Charles F. Carpenter, for defendant appellee.

BECTON, Judge.

I

In this medical negligence action, plaintiff, David Wayne Dixon, sued Dr. Calvin R. Peters, who performed a hair transplant procedure on the plaintiff, and Duke University, where the procedure was performed. At the close of plaintiff's evidence, Duke University was granted a directed verdict. At the close of all the evidence, plaintiff, having tried the case on an informed consent theory, consented to the entering of a directed verdict in Dr. Peters' favor on the issue of operative negligence. The question involving "informed consent" was submitted to the jury, and the jury returned a verdict in favor of Dr. Calvin Peters. Plaintiff appealed, and we are required to determine (a) whether N.C. Gen. Stat. § 90-21.13(a)(3) (1981), dealing with "Informed consent to health care treatment or procedure," is constitutional; and (b) whether the trial court's exclusion of evidence relating to plaintiff's consent was prejudicially erroneous. We hold that the challenged statute is constitutional and that the trial court did not err in its evidentiary rulings.

II

Facts

By the time he was thirty-three years old, plaintiff David Dixon had male pattern baldness and was bald approximately halfway back from the top of his head. Because he was self-conscious about this condition, Dixon contacted Dr. Peters, a plastic surgeon practicing in Durham, who performed hair transplant procedures. Dixon originally requested information on hair "plugging," a procedure whereby plugs of healthy hair are

surgically removed from one area of the head and transferred to another area of the head. However, Dr. Peters, after a consultation with Dixon, recommended a surgical procedure whereby strips of scalp bearing hair would be surgically removed from the backside of Dixon's head and sutured into place on the front of his head to create a hairline. A later operation would be necessary to fill in, behind this newly created hairline, plugs of healthy hair.

An operation to transplant the strips was performed on 12 November 1976, but by 16 March 1977 no hair was growing on either of the two strips, although the transferred scalp was alive and well. Because the strips had failed under optimal circumstances, Dr. Peters recommended a Juri-flap procedure which involved rotating a flap of hair-bearing scalp on the head with one end still attached to the head. The rotated flaps in the Juri-flap procedure carry their own blood supply with them when rotated; the strips of hair-bearing scalp do not depend upon the surrounding scalp for blood supply as was the case with the unsuccessful procedure.

During the three weeks following 16 March 1977, Dr. Peters performed three operations on Dixon to effect these Juri-flap transplants. As a result of these Juri-flap procedures, Dixon had scars or bald spots on the side of his head (the donor sites for the Juri-flaps) and scars across his forehead. In an attempt to "revise" these scars, Dr. Peters performed operations on 28 September 1977, 11 January 1978, and 29 March 1978. Having determined that Dixon was forming a good hairline as a result of the Juri-flap operations, Dr. Peters also performed hair-plugging procedures (placing plugs of healthy hair) in the bald space behind the Juri-flaps.

In May of 1978, Dr. Peters left North Carolina to practice medicine in Ohio. Dr. Peters gave Dixon the opportunity to continue as his patient in Ohio and, alternatively, offered to refer or transfer Dixon to local Durham physicians since Dixon needed additional plugs and additional scar revision to complete the procedure. Dixon underwent no further scar revision. He subsequently sued Dr. Peters and Duke University for the alleged negligence of Dr. Peters in performing the procedures, and for Dr. Peters' alleged negligent failure to inform him of the risk, principally the possibility of visible scarring at the completion of the procedure.

III

The Constitutionality of N.C. Gen. Stat. § 90-21.13(a)(3)

G.S. § 90-21.13(a) reads as follows:

§ 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

Dixon makes three separate constitutional attacks on G.S. § 90-21.13(a)(3). He argues that the statute is unconstitutional (a) as a legislative infringement on the judicial power delegated to the courts by Article IV, Section 1 of the North Carolina Constitution; (b) as applied to him because it violates the requirement of

Article I, Section 18 of the North Carolina Constitution that "courts shall be open" and the substantive due process requirements of the North Carolina and United States Constitutions; and (c) because the statute violates the equal protection provisions of the North Carolina and United States Constitutions.

A.

[1] A patient, in a medical malpractice informed consent case, must first prove that the doctor breached a duty properly to inform the patient of the risks and benefits of a proposed procedure and must then prove that the negligence of the doctor was a proximate cause of the injury to the patient. Dixon concedes that "[d]efining [the] duty is a proper legislative function," but contends that "rules of causation . . . are within the realm of 'judicial' power" delegated to the general court of justice by the North Carolina Constitution. We reject Dixon's argument that G.S. § 90-21.13(a)(3) is a legislative attempt to redefine proximate cause in medical negligence cases.

We are aware of our Supreme Court's decision in *McPherson v. Ellis*, 305 N.C. 266, 287 S.E. 2d 892 (1982), defining proximate cause in informed consent cases as "whether, if informed, this particular patient would have foregone treatment." *Id.* at 272, 287 S.E. 2d at 896. In *McPherson*, however, the cause of action arose in March 1975 prior to 1 July 1976, the effective date of G.S. § 90-21.13, which establishes a "reasonable person" standard. Moreover, Article IV, Section 1 of the North Carolina Constitution which delegates judicial power to the courts of this State, must be read in conjunction with Article IV, Section 13, which grants to the legislature the power to promulgate rules of procedure to be used in the district and superior courts of this State.[1] Under Section 13, our legislature has promulgated Rules

1. (2) *Rules of procedure.* The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

of Civil Procedure; our legislature historically has defined, shaped, and mandated certain rules of evidence. *See*, for example, N. C. Gen. Stat. §§ 8-1 (1981) *et seq.* Indeed, just recently, our legislature codified the Rules of Evidence.[2] Similarly, our Constitution gives the legislature power to create new causes of action and to grant or deny immunity. Proof of causation is an evidentiary matter, and the legislature's decision to legislate in this area is not an infringement of the judicial powers of the State courts.

B.

We summarily reject Dixon's argument that G.S. § 90-21.13 (a)(3) violates Article I, Section 18 of the North Carolina Constitution which states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

[2] We also reject Dixon's argument that using an objective (reasonable person) standard, rather than a subjective (personal) standard for determining proximate cause in informed consent cases violates his substantive due process rights under both the North Carolina and the United States Constitutions, but an analysis is necessary.

Whether a subjective or objective standard should be used in cosmetic surgery informed consent cases is a subject of considerable debate. In the absence of a statute like G.S. § 90-21.13, our Supreme Court in *McPherson* noted the problems with both standards.

> The problem with a subjective standard is that the only evidence usually available is the plaintiff's bald assertion, tempered by hindsight, as to what he would have done had he known all the facts. The apparent inequity of a jury basing its decision solely on such testimony has troubled courts, once even to the extreme of excluding the plaintiff's testimony on this issue. *Watson v. Clutts*, 262 N.C. 153, 160-61, 136 S.E. 2d 617, 622 (1964).

2. 1983 N.C. Sess. Laws 701.

> The detriments of the objective standard are more severe, however. . . . In determining liability by whether a reasonable person would have submitted to treatment had he known of the risk that the defendant failed to relate, no consideration is given to the peculiar quirks and idiosyncracies of the individual. His supposedly inviolable right to decide for himself what is to be done with his body is made subject to a standard set by others. The right to base one's consent on proper information is effectively vitiated for those with fears, apprehensions, religious beliefs, or superstitions outside the mainstream of society.

Other state courts have wrestled with the problem whether to adopt an objective or subjective standard for determining proximate cause. *See, Sard v. Hardy*, 281 Md. 432, 379 A. 2d 1014 (1977); *Canterbury v. Spence*, 464 F. 2d 772 (D. C. Cir. 1972), *cert. denied*, 409 U.S. 1064, 34 L.Ed. 2d 518, 93 S.Ct. 560 (1972); *Wilkinson v. Vesey*, 110 R. I. 606, 295 A. 2d 676 (1972); *Woods v. Brumlop*, 71 N. M. 221, 377 P. 2d 520 (1962); *Poulin v. Zartman*, 542 P. 2d 251 (1975).

Although we, as did the *McPherson* Court, find the objective standard particularly harsh and find plaintiff's argument—that a person elects to change his appearance through cosmetic surgery by balancing his own insecurities about that appearance against the known risk and cost of the surgery—particularly compelling, plaintiff's challenge on substantive due process grounds must fall.

In determining whether a law violates substantive due process, the United States Supreme Court long ago formulated a two-tiered test: if the right infringed upon is a "fundamental" right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive a constitutional attack; if the right infringed upon is not a fundamental right, then the party applying the law need only demonstrate that the statute is rationally related to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483, 99 L.Ed. 2d 563, 75 S.Ct. 461 (1955).

We reject plaintiff's due process argument because (a) the statute is a rationally related means of accomplishing a desired result; (b) the due process violation claim by plaintiff is a *de minimis* one; and (c) *McPherson* is not controlling—indeed,

although effectively condemning the objective standard, the *McPherson* Court stated that "G.S. 90-21.13(a)(3) requires that the objective standard be applied to claims arising on or after 1 July 1976," 305 N.C. at 273, n. 2, 287 S.E. 2d 897, n. 2, and that "several of the principles set forth in this opinion are superseded by this statute. . . ." 305 N.C. at 269, n. 1, 287 S.E. 2d at 894, n. 1.

We discuss the State's legitimate interest in enacting G.S. § 90-21.13(a)(3) at length because the parties have so prominently set forth the medical malpractice crisis of the 1970's as a basis of the legislation. Although there is considerable support for the proposition that the medical malpractice crisis was more feigned than real,[3] and although the State has no interest, legitimate or

3. The following excerpts are taken from pages 12-16 of plaintiff's brief:

> "Meaning no disrespect, the regular voting membership of the [North Carolina Professional Liability Insurance] Study Commission during its extended deliberations consisted of 2 doctors, 2 insurance company representatives, a hospital administrator, and a pharmacist." Report of the North Carolina Professional Liability Insurance Study Commission, Minority Report (1976).

As the Study Commission Report noted, as soon as the N. C. Medical Society helped form a competing malpractice insurer—Medical Mutual Insurance Co.—St. Paul dropped its threats of leaving North Carolina. Even during the hysteria of 1976, sane and informed voices were heard.

> "It is no accident that the St. Paul Insurance Company in defending medical malpractice claims over approximately twenty years has never lost a jury trial in the entire State of North Carolina. There is no medical malpractice problem in North Carolina, only an insurance pricing problem resulting from losses in California, New York and other States where the claims climate is so much more severe than in North Carolina, and from investment losses incurred by the insurance company not unlike losses that have been suffered by other corporate investors during this period of national economic instability and uncertainty." *Id.* at 4-5.
>
> . . . .
>
> "From 1975 through 1978, during the early part of which the nation was suffering a crisis in the availability of malpractice insurance because insurers felt they were not being paid adequately for the risk, the St. Paul took in $415 million in malpractice premiums and paid out $27 million in claims and claims-settlement expenses. Even so, in the fall of 1978, a St. Paul executive told the Conference of Insurance Legislators (an association of state legislators) that St. Paul *had lost money* in medical malpractice throughout 1975, but that the line had been 'generally profitable' during 1976 and 1977. All of this was based on estimates and assumptions, presumably made in good faith, that only time could cor-

otherwise, in favoring the profits of insurance companies over the rights of patients to be compensated for bodily injury caused in medical negligence cases, unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence, *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E. 2d 903 (1976), the State does have a legitimate interest in setting the standards by which a jury can determine whether malpractice has occurred. The State most assuredly has an interest in the availability of less costly health care to all its citizens.

The problem is sharply put into perspective by the parties in their respective briefs. The plaintiff argues:

> In the early 1970's a so-called 'malpractice insurance crisis' began to receive nationwide attention. Under heavy lobbying from St. Paul Insurance Company and the medical profession, our General Assembly passed a package of special legislation aimed at reducing the number of claims by injured patients and thereby protecting the profits of the insurers. [Citation

---

roborate. (At the time of the speech, $52.7 million in premiums had been collected for 1975 but only about 6 million actually paid out.)" A. Tobias, *The Invisible Bankers: Everything the Insurance Industry Never Wanted You to Know* 31 (1982).

"By the end of 1980, it had begun to appear that 1975 had not been such a loser, after all. Of the $52.7 million the St. Paul had collected in premiums, $15.5 million had been paid out in losses and legal fees; only an estimated $9.2 million remained to be paid. Losses and loss expenses actually paid for the years 1975 through 1978—against total premiums of $415 million—had climbed to $78 million. Even after a hefty $87 million in selling and administrative expense, that still left a quarter of a billion dollars." *Id.* at 32.

. . . .

One fascinating study of malpractice insurance notes that:

"There is some evidence indicating that in recent years the malpractice insurance industry has overstated the reserves set aside for reported claims. For example, in 1974, when St. Paul requested an 82 percent rate increase for North Carolina, a task force from the state insurance department made an on-site review of the company's claims files at its home and local offices. Its examination concluded that claims reserves for claims actually paid were overstated by 33 percent, and that 19 percent of all reserves were held for claims which were settled without payment." S. Law and S. Polan, *Pain and Profit: The Politics of Malpractice* 181-82 (1978).

omitted.] This package included G.S. § 90-21.13(a)(3) which is the subject of this appeal.

The package of legislation was passed primarily on the strength of the report of the North Carolina Professional Liability Insurance Study Commission (1976) and that report clearly reveals that the sole purpose of the legislation was to avoid valid claims. Plaintiffs contend that this is not a legitimate state interest.

Responding to the assertions in plaintiff's brief, appellees state in their brief:

Although the Appellant denies it, North Carolina and the other 49 states are experiencing a 'medical malpractice crisis' of some proportion. The Appellant cannot deny that recently there has been a dramatic rise in the number of malpractice suits filed, a corresponding increase in the premium costs for malpractice insurance for doctors, and greater recoveries for successful plaintiffs. One can debate the hows and whys of these sudden increases, but the ultimate fact is that the consumer must bear greater medical bills in order to finance the high cost of malpractice litigation. The 1976 legislation was an attempt to set standards by which it could be determined whether malpractice had occurred or not while at the same time reducing the circumstances under which successful recovery for malpractice could be obtained. G.S. § 90-21.13 represents a part of that 1976 legislation.

Although the problem, real or imagined, may have been handled differently, and while a subjective standard seems the lesser of evils, it is sufficient for due process purposes that the legislative response to the perceived problem was a rational way to correct the problem. For, as the Supreme Court said in *Williamson*, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U.S. at 487-88, 99 L.Ed. 2d at 572, 75 S.Ct. at 464. For constitutional analysis, then, G.S. § 90-21.13(a)(3) serves a legitimate state function, and it does not matter that another alternative could have been chosen.

C.

[3] In his final constitutional argument, Dixon contends that the statutory standard of proximate cause discriminates against the victim of informed consent cosmetic surgery tort cases and is not substantially related to the achievement of any important state interest.

The United States Supreme Court has recently developed a three-tiered analysis for reviewing the constitutionality of statutes in an equal protection challenge context. The first and third tiers of the analysis are the same as those used for reviewing statutes challenged under a substantive due process claim—suspect class/fundamental right: strict scrutiny; rational basis/legitimate state interest: low scrutiny. The second, or middle tier, test applies when the class is close to, but not quite suspect or the interests are very important, but not quite fundamental. *See, Reed v. Reed,* 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971) (women) and *Stanley v. Illinois,* 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972) (interest of a father in raising his illegitimate children outweighed the lesser objective of administrative convenience). Under this middle tier scrutiny test, the classification must serve important governmental objectives and must be "substantially related to the achievement of those objectives" to survive an equal protection challenge. *Craig v. Boren,* 429 U.S. 190, 197, 50 L.Ed. 2d 397, 407, 97 S.Ct. 451, 457 (1976), *reh'g denied,* 429 U.S. 1124, 51 L.Ed. 2d 574, 97 S.Ct. 1161 (1977).

Dixon concedes, as he must, that he does not belong to a suspect class. Further, we find no basis to support Dixon's assertion that the statute in question should be analyzed using the middle tier (substantial state interest) test, rather than the lower tier (rational basis/legitimate state interest) test. We also reject Dixon's assertion that there is a semi-fundamental right to be compensated for the injury he received. There are constitutional provisions involving sovereign immunity, and statutory prohibitions including rules of procedure and statutes of limitation that restrict the ability of plaintiffs to recover for certain injuries. The statute in this case does not deny recovery to victims of medical negligence. As discussed in Part III-B, *supra,* there is a rational basis for the promulgation of G.S. § 90-21.13, and it survived Dixon's equal protection claim.

IV

Evidentiary Matters

[4] In his first assignment of error relating to evidentiary matters, plaintiff contends that the trial court committed reversible error by excluding testimony by the plaintiff that he would not have consented to the hair transplant operations if he had been informed of the possibility of permanent scarring or of the possibility that he might look worse after the operations than before. The parties rely on *McPherson v. Ellis; Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E. 2d 596, *disc. rev. denied*, 305 N.C. 587, 292 S.E. 2d 571 (1982); and G.S. § 90-21.13(a)(3) for their respective positions; however, no analysis based on these cases and the statute is necessary. We find no error on this issue since the record indicates that the jury twice heard plaintiff say that had he known about the outcome of the operations, he would not have consented. As the following colloquy shows, plaintiff answered the question asked before any objection was made and sustained, and no motion to strike plaintiff's answer was ever made:

> Q. I didn't ask you what you knew. Mr. Dixon, at any time before Dr. Peters performed any one of these three procedure [sic] on you, if you had been warned that you might have had permanent scarring, or if you had been warned that the results from these procedures might be worse than when you originally went to him, would you have consented to any one of these procedures?
>
> A. No, no way.
>
> OBJECTION.
>
> (Bench conference.)
>
> COURT: Sustained.

Further, while plaintiff was being cross-examined about the consent form he signed for one of the operations, the following occurred:

> Q. Now, Mr. Dixon, does that document not state that "the nature and purpose of the operation, alternative methods of treatment, and the risks involved have been explained to me."

A. Yes, sir.

Q. "No guarantee has been given as to the results that may be obtained."

A. Yes, sir, but I wouldn't have never signed it if I had known this was the way it was coming out.

No objection or motion to strike was made to this testimony. Plaintiff clearly was not prejudiced as he contends in this assignment of error.

In his final assignment of error, plaintiff contends that the trial court committed reversible error by excluding testimony by Stuart Bennett that Dr. Peters told Bennett that when he was finished, plaintiff would have a "head full of hair." We summarily reject this argument. Similar testimony was admitted by plaintiff and another one of his witnesses. More fundamentally, however, this case was tried on the theory that Dr. Peters negligently failed to inform plaintiff of the full extent of the risks of the transplant procedures; this case was not tried on a guarantee theory. Consequently, Bennett's testimony was irrelevant to the issue in controversy.

V

We summarily reject Dr. Peters' cross-assignment of error that the trial court erred in not directing a verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure in his favor. The issues were properly submitted to the jury.

VI

For the reasons stated above, the judgment entered in this action is

Affirmed.

Chief Judge VAUGHN and Judge HILL concur.

ROBERT L. SHAVER v. N. C. MONROE CONSTRUCTION COMPANY AND N. CARL MONROE, INDIVIDUALLY

No. 8218SC810

(Filed 6 September 1983)

1. **Pensions § 1— fraudulent misrepresentation as to pension plan—jurisdiction of State courts**

The courts of this State had jurisdiction of plaintiff's action against his former employer for fraudulent misrepresentation that a company pension plan was still in effect for the purpose of inducing plaintiff to remain with the employer and to forego salary increases and bonuses since (1) the Employee Retirement Income Security Act of 1974 did not give the federal courts exclusive jurisdiction over such claim because plaintiff's claim did not concern the substance or regulation of the pension plan and the pension plan was only incidentally or tangentially involved, and (2) defendant employer's pension plan terminated prior to the effective date of the Employee Retirement Income Security Act and was thus not governed by the Act.

2. **Fraud § 12; Pensions § 1— fraudulent misrepresentation concerning pension plan—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury in an action against his former employer for fraudulent misrepresentation that a company pension plan was in effect and still being funded for the purpose of inducing plaintiff to remain with the employer and to forego salary increases and bonuses.

3. **Fraud § 13; Pensions § 1— misrepresentation concerning pension plan—instructions—silence as actionable fraud**

In an action by plaintiff against his former employer for fraudulent misrepresentation that a company pension plan was in effect and still being funded, the trial court did not err in instructing the jury that silence could constitute actionable fraud where there was evidence that the employer wrote a letter to plaintiff and other salaried employees which stated that the costliness of the pension plan necessitated a cutback in salaries and bonuses and implied that contributions were still being made to the plan, and that when plaintiff inquired about the plan, he was told it was in effect or "intact," since the employer, although under no legal duty to speak about contributions to the plan, was required to make a full and fair disclosure as to the matters about which it spoke.

4. **Fraud § 13; Pensions § 1— fraudulent misrepresentation about pension plan—measure of damages—instructions**

In plaintiff's action against his former employer for fraudulent misrepresentation that a company pension plan was still in effect for the purpose of inducing plaintiff to remain with the employer and to forego salary increases and bonuses, the proper measure of damages was the difference between the amount which would have been distributed to plaintiff had continuous contributions been made to the plan and the amount which was actually distributed to him, and the trial court erred in instructing the jury that it

could choose as an alternate measure of damages the difference in value between plaintiff's services during the time he worked under the fraudulent inducement and the price he was actually paid for his services because of the deceit.

5. **Fraud § 13; Pensions § 1— fraudulent misrepresentation concerning pension plan—punitive damages**

There was sufficient evidence of fraud and of other elements of aggravation in an action to recover damages for misrepresentation that a company pension plan was still in effect to support the submission of an issue of punitive damages to the jury.

APPEAL by defendants from *Helms, Judge.* Judgment entered 7 April 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 May 1983.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert B. Humphrey, Michael D. Meeker, and Howard L. Williams, for defendant appellants.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith and Ben F. Tennille, for plaintiff appellee.

BECTON, Judge.

Plaintiff instituted this action against his former employer alleging causes of action for fraudulent misrepresentation, breach of fiduciary duty, breach of contract, violation of the Employee Retirement Income Security Act of 1974 (ERISA), and breach of duty of good faith dealing. The chief allegation is that defendants misrepresented to plaintiff that a company pension plan was still in effect for the purpose of inducing plaintiff to remain with defendants and to forego salary increases and bonuses. Plaintiff sought compensatory and punitive damages.

I

After plaintiff took a voluntary dismissal of his claim alleging ERISA violations, defendants moved to dismiss the complaint on the ground of lack of subject matter jurisdiction, and contended that ERISA removed any employee pension and benefit programs from state regulation and granted exclusive jurisdiction to federal courts. Defendants' appeal to this Court from the denial of that motion was dismissed as interlocutory. *Shaver v. Construction Co.*, 54 N.C. App. 486, 283 S.E. 2d 526 (1981).

The matter was then tried before a jury. At the close of plaintiff's evidence, defendants moved for directed verdict on all issues. The trial court allowed the motion as to the breach of fiduciary duty and the breach of fair dealing claims. The case was submitted to the jury on the fraudulent misrepresentation and breach of contract claims.

The jury found that defendants did, after 30 December 1974, fraudulently misrepresent to plaintiff that the company pension plan was still in effect, was being funded, and had not terminated. It awarded plaintiff $40,000 in compensatory damages and $40,000 in punitive damages as a result of this fraudulent misrepresentation. It also found that defendant N. C. Monroe Construction Company did not breach its employment contract with plaintiff.

The court denied defendants' motion for judgment notwithstanding the verdict and entered judgment on the verdict. Defendants appeal.

II

The issues on appeal concern subject matter jurisdiction, the sufficiency of the evidence, the submission of instructions to the jury on silence as actionable fraud, the proper measure of compensatory damages, and the propriety of submitting to the jury an issue on punitive damages.

III

[1] The first issue is whether the courts of North Carolina have jurisdiction over plaintiff's claims. Answering this issue requires an examination of ERISA.

ERISA was enacted by Congress to foster interstate commerce and to protect the interests of participants in employee benefit plans by requiring the disclosure and reporting of financial and other information to participants and their beneficiaries, by establishing standards for fiduciaries, and by providing appropriate remedies, sanctions, and ready access to federal courts. 29 U.S.C. § 1001(b). "It is hereby further declared to be the policy of [ERISA] to protect . . . the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries" by providing adequate safeguards to assure the equitable character and financial soundness of such plans. 29 U.S.C. § 1001(c).

To eliminate the threat posed by conflicting or inconsistent State or local regulation of employee benefit plans, *see* 120 Cong. Rec. 29933; 120 Cong. Rec. 29197, Congress enacted a pre-emption clause, codified at 29 U.S.C. § 1144(a), which provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Congress also granted exclusive jurisdiction to the federal courts over all actions arising under the subchapter of ERISA dealing with the protection of employee benefit rights. 29 U.S.C. § 1132(e)(1). It, however, granted concurrent jurisdiction to the states over actions brought by a participant or beneficiary to recover benefits due him or her under the terms of that plan, or to enforce or clarify his or her rights under the terms of that plan. 29 U.S.C. § 1132(e)(1); 29 U.S.C. § 1132(a)(1)(B).

Defendants thus contend that all state law claims or causes of action relating to a pension plan are superseded or pre-empted by § 1144(a) of ERISA, and that all legal actions should be brought under ERISA in federal district court, with the exception of actions brought to recover benefits when not paid or to clarify one's rights to benefits under the plan.

Upon first blush, defendants' argument appears meritorious. However, upon a closer analysis of ERISA and the nature of plaintiff's cause of action, defendants' argument is unpersuasive.

Section 1144(a) specifically provides that the provisions of the subchapter dealing with the protection of employee benefit rights "shall supersede any and all State laws *insofar as they may now or hereafter relate to any employee benefit plan.*" (Emphasis added.) Thus, the question confronting us is whether plaintiff's state law claim for fraudulent misrepresentation *relates to* the pension plan.

This is apparently a question of first impression in North Carolina. Courts in other jurisdictions which have dealt with the question have uniformly held that a state law which directly regu-

lates the content or operation of an ERISA plan is pre-empted by section 1144(a). *Provience v. Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981). The decisions have not been consistent, however, when the state law tangentially impacts upon an ERISA plan, as opposed to directly regulating it, as the following discussion shows.

In *Provience*, plaintiff alleged that defendant Trust Fund and its officers and agents (1) fraudulently misrepresented the nature of benefits available under their medical plan; (2) refused in bad faith to pay a legitimate claim for medical benefits; and (3) intentionally inflicted emotional distress on plaintiff. The court held that these state law claims were not pre-empted by ERISA because they were laws of general application pertaining to an area of important state interest and only indirectly affected, rather than directly regulated, the ERISA plan involved.

In *Cornell Mfg. Co. v. Mushlin*, 420 N.Y.S. 2d 231 (N.Y. App. Div. 1979), plaintiff brought an action against corporate officials to recover damages for self-dealing and waste of corporate assets alleging that defendants made excessive contributions into a pension fund over which defendants had exclusive control and from which they received inordinate benefits. Rejecting defendants' contention that ERISA pre-empted the claim pertaining to excessive payments to the pension fund, the court noted that the pension plan was only incidentally involved in plaintiff's claim; thus, the claim was not so limited to the pension plan as to require pre-emption under ERISA. The court also cited four factors, based upon its research, which appeared to influence the determination of the pre-emption issue:

> (1) the extent to which the law in question relates to an area traditionally within the State's domain . . . (2) the extent to which the purpose or effect of the law impinges upon employee benefit plans . . . (3) the extent to which the relief sought or procedures employed are incompatible with those of ERISA . . . and (4) the extent to which the rights sought to be enforced by the aggrieved party actually arise under an employee benefit plan . . . . (Citations omitted.)

420 N.Y.S. 2d at 236.

In *Shaw v. Westinghouse Electric Corp.*, 419 A. 2d 175 (Pa. Super Ct. 1980), plaintiff brought an assumpsit action against his

employer for disability and retirement benefits. Plaintiff alleged that one of the terms of his contract of employment with defendant was that plaintiff would receive a pension based upon 60% of his base salary. He alleged that defendant did not pay him promised salary increases, thus causing him to lose bonuses and pension benefits. Defendant moved to dismiss for lack of subject matter jurisdiction. The court held that the action was not preempted by ERISA. The action did not constitute an attempt to regulate areas explicitly governed by the provisions of ERISA, but, rather, related primarily to matters not governed by ERISA, and only indirectly affected defendant's employee benefit plan in a way not in conflict with purposes ERISA was designed to achieve.

In the case before us, the gist of plaintiff's fraudulent misrepresentation claim is that defendants lied about the continued existence of a pension plan for the purpose of inducing plaintiff to remain with defendants and to forego bonuses and salary increases. Plaintiff's claim does not concern the substance of the plan, nor does it concern the regulation of a pension plan. The pension plan is only incidentally or tangentially involved. Because plaintiff's claim is not covered by ERISA, the federal courts do not have jurisdiction. *Fulk v. Bagley*, 88 F.R.D. 153 (M.D.N.C. 1980); *Martin v. Bankers Trust Co.*, 565 F. 2d 1276 (4th Cir. 1977).

Moreover, even if plaintiff's claims were otherwise within the ambit of ERISA, defendants would nevertheless lose their subject matter jurisdiction argument. Defendants admitted in their answer that the pension plan terminated on 31 December 1974, which was prior to the effective date of ERISA, 1 January 1975. They also admitted in their answer that one of the reasons that they terminated the plan at that time was in order to avoid complying with ERISA. In addition, the U.S. Department of Labor wrote plaintiff a letter stating that since the plan terminated effective 31 December 1974, it did not have the authority to intervene on plaintiff's behalf since ERISA is not retroactive. An interpretation of a statute by an agency with expertise in administering it is entitled to due consideration by the courts. *In re Broad and Gales Creek Community Association*, 300 N.C. 267, 266 S.E. 2d 645 (1980).

We thus conclude that ERISA does not govern this case and that the State court retains jurisdiction. The motion to dismiss for lack of subject matter jurisdiction was, therefore, properly denied.

IV

[2] Defendants next assign error to the denial of their motions for directed verdict and for judgment notwithstanding the verdict on the fraud issue.

The rules of law governing the determination of the motions are familiar. The motions present the question whether the evidence, taken in the light most favorable to the non-movant plaintiff, constituted "any evidence more than a scintilla" to support the plaintiff's *prima facie* case in all its constituent elements. *Shreve v. Combs*, 54 N.C. App. 18, 21, 282 S.E. 2d 568, 571 (1981). Contradictions, conflicts and inconsistencies which appear in the evidence must be resolved in the non-movant's favor and the non-movant must be given the benefit of every inference which can reasonably be drawn. *Sumney v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

To have a *prima facie* case of actual fraud, there must be evidence tending to show: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) which was relied upon by, and which resulted in damages to, the injured party. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981). *See also, Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

Mindful of these principles, we find the following evidence, taken in the light most favorable to plaintiff, sufficient to withstand the motions.

Plaintiff was employed continuously as a construction superintendent by defendant N. C. Monroe Construction Company (Company) from 1959 until he was fired in March 1979. In 1970, the Company adopted a pension plan, which covered salaried employees such as plaintiff, and which contained provisions allowing the Company to discontinue making contributions, amend the plan, or terminate the plan at any time.

Contributions were made to the plan by the Company solely in 1970, 1971, 1972 and 1973. No contributions to the plan were made after the 1973 plan year. On December 31, 1974, the plan was terminated—defendants admitted that in their answer; Monroe, who was the President and owner of the company, stated that in a deposition; and the Company represented that to the Internal Revenue Service. No employees hired after 31 December 1974 participated in the plan. On 30 July 1979, after this action was instituted, Monroe wrote a letter to his employees in which he stated, "As you know, the pension plan was terminated in 1974 as a result of the construction recession and its effect upon the ability of the Company to continue contributing to the pension plan."

Despite this evidence that the plan had been terminated in 1974, and that defendants knew of this termination, when plaintiff asked Monroe, on several occasions after 1 January 1975, about the company's fringe benefits, so he could relay the information to new employees, Monroe told him that the benefits, including the pension plan, were still in effect. Plaintiff recited two specific occasions, in 1976 and 1978, in which he specifically inquired whether the retirement plan was still in effect and Monroe told him it was. Monroe's version of the incidents was that he told plaintiff that the plans were "intact." Whether plaintiff's interpretation of Monroe's statement was reasonable was for the jury, as was the resolution of conflicts in their stories.

There was also evidence tending to show that the representations were calculated, and made with the intent, to deceive. There was evidence that a pension plan was favorable to older employees and was used to attract experienced employees. In the early 1970's, Monroe Construction Company hired a number of older and more experienced employees. When the plan was instituted, Monroe informed plaintiff and the other employees about the pension plan and how it would help with their retirement. Monroe also told them that they would not be receiving the same bonuses or salary increases as before due to the cost of the pension plan.

Around Christmas 1974, Monroe wrote the following letter to the employees:

> Through the years, various customs have evolved within our company including company paid fringe benefits. For a very long time, the company has paid hospital benefits for the entire family plus a discretionary year end bonus. Some few years ago we adopted a company paid pension plan, which represents a much greater cost than the year end bonus. This was done with the intent of eliminating or greatly reducing any bonus. However, we did continue to pay a bonus plus the pension plan.
>
> Based on the severe economic situation, its effect on our industry and our firm, it would be neither prudent nor possible for management to grant a bonus at this time.

From this letter the jury could have inferred that an implied representation was made that contributions were being made that year. As the Christmas letter indicates, the pension plan was costly. The company contributions to the plan over the first four years totaled $83,734.00. The projected contributions were to exceed $83,000.00 for the years 1974 and 1975.

From 1974 through 1977, a period through which no contributions were being made to the plan, plaintiff's salary remained at $16,600.00. He also received no bonuses during this period. Prior to 1971, plaintiff had been receiving an annual bonus of $3,000.00. Interestingly, plaintiff and the other employees received a salary increase shortly before notice of termination of the plan was given to the employees in 1978.

Plaintiff was 52 or 53 years old when the plan was first instituted and was becoming increasingly concerned about his retirement income. He had told Monroe that the pension plan was important to him personally because of his age and financial condition. The pension plan was a governing factor in his remaining with the Company. In fact, he turned down other jobs to remain with the Company because he did not want to lose the pension plan.

From the foregoing evidence, the jury could infer that plaintiff and the other employees were led to believe that contributions were still being made to the pension plan and that it was still in effect in order to induce them to forego pay increases and bonuses and to remain with the Company, while saving the Com-

pany money. There was sufficient evidence from which the jury could conclude that the statements were false, were reasonably calculated, and made with the intent to deceive the plaintiff, and that plaintiff was deceived and suffered damages as a result.

V

[3] Defendants next assign error to the trial court's instruction to the jury that silence could constitute actionable fraud. They argue that the instruction was improperly given because they were under no legal duty to disclose that contributions were not being made.

> Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge or other attendant circumstances. . . .

Setzer v. Insurance Co., 257 N.C. 396, 399, 126 S.E. 2d 135, 137 (1962).

Although there was no fiduciary relationship in the case before us, there were "other attendant circumstances" to justify the instruction to the jury. Defendants were under no duty to speak, but once the Company spoke, it was required to make a full and fair disclosure as to the matters discussed. *See Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

Here, Monroe, in the Christmas letter of 1974, told plaintiff and other salaried employees that the costliness of the pension plan necessitated a cutback on salaries and bonuses and impliedly represented that contributions were being made to the plan that year. Further, a pension plan consultant testified that any information about contributions had to be obtained from the plan administrator. When plaintiff questioned his office after learning about the termination of the plan, the pension plan consultant referred him to Mr. Monroe, who was the plan administrator and plaintiff's only source of information.

When plaintiff inquired in 1976 and early 1978 about the status of the pension plan, he was told it was still in effect or "intact." Upon receiving that answer, plaintiff reasonably assumed

that contributions were continuously being made to the plan. It could not reasonably be expected of plaintiff to inquire further as to whether contributions were being made.

We hold that, under the circumstances of this case, the trial court did not err in submitting the instruction to the jury. There was sufficient evidence to support the submission of the instruction.

VI

[4] Defendants next assign error to the trial court's instructions on the measure of damages. The court instructed the jury that it could choose from one of two measures of damages, but not both or a combination of both. The first of these measures was the difference in the value of plaintiff's services during the time that he worked under the fraudulent inducement and the price he was actually paid for his services because of the deceit. The second measure of damages was the benefit of the bargain, which is the difference between the amount that would have been distributed to plaintiff had continuous contributions been made to the plan and the amount which was actually distributed to him. Defendants contend that the first measure was erroneously submitted to the jury. We agree.

The underlying principle in fixing damages is to compensate the injured party. E. Hightower, *North Carolina Law of Damages*, § 2-1 (1981). The objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, and give him back that which was lost, so far as possible by compensation in money. *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E. 2d 343, 347 (1950). The goal is to make the plaintiff whole.

The evidence is clear that the pension plan was important to plaintiff. He was willing to forego salary increases and bonuses and remain with the Company as long as the plan was being maintained and continuously funded. He elected to remain with the Company at a salary less than the salary that he could have commanded elsewhere. He did not lose a job at another company as the result of defendant's fraudulent misrepresentations. Indeed, he even remained with the Company after he learned of the termination of the plan in May or June 1978 until he was fired in March 1979. What plaintiff lost as a result of the misrepresenta-

tions was the amount of the contributions which supposedly were being made. To allow plaintiff to recover the difference between the value of his services and his salary at the Company would be to allow him a windfall and would be contrary to the underlying principles of compensatory damages.

The proper measure of damages in this case is the benefit of the bargain, which puts the plaintiff in the same position he would have been had the representation been true. This method allows him to recover the difference between the actual value of the subject of the representation and the value as represented, and has generally been applied in fraud cases. *Norburn v. Mackie*, 264 N.C. 479, 141 S.E. 2d 877 (1965). Under this measure, plaintiff will recover what he lost—the contributions which were not made.

We therefore hold that the court erred in submitting the first measure of damages to the jury. Since there was evidence that the maximum amount plaintiff could have received if the contributions had continued until June 1978 was $16,309.85 and that plaintiff's salary was approximately $20,000 while the value of his services was approximately $30,000, the jury's award of $40,000 was clearly based upon the first measure of damages. For this reason, this cause must be remanded for a new trial on the issue of damages.

VII

[5] Defendants lastly contend that the trial court erred in submitting the issue of punitive damages to the jury because there was insufficient evidence of fraud to support its submission.

As defendants concede, punitive damages may be recovered as a matter of law in fraud cases, because fraud, by its very nature, involves the element of aggravation or intentional wrongdoing. *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Punitive damages are allowed to punish intentional wrongdoing and to deter similar behavior. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

As we stated earlier, all of the elements of fraud are present in this case. In addition, there is evidence of other "elements of aggravation." Other employees besides plaintiff were similarly af-

fected by the fraud. Defendant could not afford to make the contributions to the plan (which would have amounted to approximately $83,000.00), yet there was evidence that a partnership in which Mr. Monroe had an interest owed the Company more than $100,000.00. The punitive damage issue was thus properly submitted to, and answered by, the jury. Although we have determined that the evidence is sufficient to support the jury's verdict that plaintiff is entitled to punitive damages, the amount of punitive damages must be determined by a jury at the new trial. As we said in *Carawan v. Tate,* 53 N.C. App. 161, 167, 280 S.E. 2d 528, 532 (1981), *aff'd,* 304 N.C. 696, 286 S.E. 2d 99 (1982), "there is a substantial likelihood that the two issues [compensatory and punitive damages] were so intertwined in the minds of the jurors that it would result in an injustice to remand this case for a new trial on one issue only."

For the foregoing reasons, defendant is entitled to a new trial relating solely to damages.

New trial.

Chief Judge VAUGHN and Judge HILL concur.

Stillings v. City of Winston-Salem

DAVID E. STILLINGS, AND FRANCIS D. SAWYER, A NORTH CAROLINA PARTNERSHIP DOING BUSINESS AS "COMMUNITY GARBAGE SERVICE" v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

CLYDE H. WHITMAN, JR., DOING BUSINESS AS "SOUTH FORK SANITARY SERVICE," A SOLE PROPRIETORSHIP v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

LARRY K. TUTTLE, DOING BUSINESS AS "FORSYTH GARBAGE AND CONTAINER SERVICE," A SOLE PROPRIETORSHIP v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

No. 8221SC315

(Filed 6 September 1983)

Eminent Domain § 2; Municipal Corporations § 23— franchises for waste disposal—municipality extending waste disposal services to areas—inverse condemnation

Defendant city's extension of waste disposal services into a newly annexed area previously served by plaintiffs under an exclusive franchise granted by the county pursuant to a county ordinance so impaired the value of plaintiffs' franchises as to amount to a taking thereof for which plaintiffs are entitled to just compensation.

APPEAL by plaintiffs from *Helms, Judge.* Judgment entered 15 December 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 February 1983.

In this civil action plaintiffs seek to recover compensation and damages for losses sustained by them allegedly resulting from certain acts by defendant.

At the time of the acts giving rise to this controversy, plaintiffs were each operating solid waste disposal services in Forsyth County. Each plaintiff operated his service under a franchise granted to him by the Forsyth County Commissioners under an ordinance. The franchises became effective 1 January 1979 and were to last for five years. The ordinance granting the franchises was enacted pursuant to G.S. 153A-136(a)(3), which specifically gives counties the authority to regulate solid waste disposal. The ordinance set out the specific areas to be served by the individual franchisee and set forth the following pertinent terms and conditions:

Section 2. *Franchise Areas*

The residential and small business franchise holders as set forth in Section 1 above are hereby granted franchises for the areas set forth in Section 1 of this ordinance and set forth in the attached documents entitled "Map of Franchise Areas," dated April, 1978, and "Description of Residential and Small Business Service Franchise Areas," consisting of fifteen (15) pages and dated July, 1978, both of which are adopted and incorporated herein by reference. . . .

Section 3. *Nature of Franchises*

The franchises for residential and small business service granted shall be and are hereby adopted as exclusive franchises within the respective areas designated. . . .

Section 4. *Period of Franchises*

The franchises for the collection and transportation of solid waste are hereby granted for a period of five (5) years beginning January 1, 1979, and ending December 31, 1983.

Section 5. *Establishment of Maximum Fees or Charges for Certain Residential Collection and Transportation and Required Services*

There is hereby established and imposed a maximum collection and transportation fee or charge for residential service, meaning once per week pickup of stored solid waste not exceeding two containers or cans each of a capacity of thirty-two (32) gallons or less, of five dollars ($5.00) per household per month. Fees or charges for additional or special services other than as specified herein may be agreed upon by the parties, subject to review and approval by the Board of Commissioners as to reasonableness if it deems advisable.

Section 6. *Required Service*

Within the franchise area, the franchise holder must provide service to everyone who requests it for domestic and household and small business solid waste disposal and related additional or special services. The Board of Commissioners may from time to time require residential and small business franchise holders to provide special programs of solid waste collection sponsored and paid for by the County.

On 17 December 1979, the Board of Aldermen of defendant City of Winston-Salem adopted ordinances extending the corporate limits of the city and annexing five adjacent areas of Forsyth County. The five areas annexed were coextensive to varying degrees with the areas served by appellants under their franchises. This annexation ordinance survived challenges by the residents of the annexed areas, its validity finally being upheld by our Supreme Court, *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981), and became effective on 22 June 1981. On that date, the city began providing residential garbage pickup, without charge, to the residents of the annexed areas on the same basis as it was provided to all residents of the city. Plaintiffs' franchises were not honored and plaintiffs received no payment from the city. Each plaintiff lost some of his business as a result of this extension of waste disposal services by the city.

Plaintiffs initiated this action on 11 September 1981, alleging their losses and the actions of the city which allegedly caused the losses. Plaintiffs asked the court to find that the city's actions amounted to a violation of their rights under the franchises or, in the alternative, that they constituted a taking of plaintiffs' property without due process of law or just compensation. Plaintiffs sought damages or compensation in the amount of their economic losses.

Defendant city answered on 5 October 1981, admitting its actions but denying any liability for plaintiffs' economic loss under either of the theories advanced. Defendant at the same time filed motions for summary judgment in each case. On 6 November 1981, plaintiffs filed cross-motions for summary judgment. A hearing on the motions was held on 16 November 1981. From an order entered 15 December 1981, awarding summary judgment to defendant and denying plaintiffs' motions, plaintiffs appealed.

Pfefferkorn and Cooley, by Jim D. Cooley, for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon and Ronald G. Seeber and Ralph D. Karpinos, for defendant appellee.

JOHNSON, Judge.

Plaintiffs argue that the provision by the city of waste disposal service in the annexed areas where plaintiffs had previously operated under their franchises from the county constitutes an expropriation of their property. Plaintiffs argue that their rights under the franchises are property rights protected under the Constitutions of the United States and North Carolina and that the effective partial termination of their franchises by the city was an interference with those property rights amounting to a taking for which plaintiffs are entitled to compensation.

There is no question that the facts before us present a case of first impression in this jurisdiction. The legal principles that govern its disposition, however, are well recognized in our state and national jurisprudence. The United States Supreme Court has long held rights under a franchise to be property rights and has long held that the holders of those rights are entitled to the Fifth Amendment protections of due process and just compensation. *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 57 L.Ed. 1389, 33 S.Ct. 988 (1913); *Boise Artesian H. & C. Water Co. v. Boise City*, 230 U.S. 84, 57 L.Ed. 1400, 33 S.Ct. 997 (1913); *see generally*, 36 Am. Jur. 2d, Franchises, § 5. Similarly, North Carolina courts have recognized such rights and accorded them appropriate protection under the State constitution.[1] *Boyce v. Gastonia*, 227 N.C. 139, 41 S.E. 2d 355 (1947); *Shaw v. Asheville*, 269 N.C. 90, 152 S.E. 2d 139 (1967).

Therefore, defendant's reliance on the case of *City of Estacada v. American Sanitary Service*, 41 Ore. App. 537, 599 P. 2d 1185, *rev. denied*, 288 Ore. 141 (1979), which holds to the contrary, is misplaced. In that case, similar in all essential respects with the present one, the Oregon Court of Appeals held that interference with franchise results in no compensable taking. The court's holding was based at least in part on its finding that the situation involved no direct or indirect taking of "tangible assets"

1. North Carolina is the only state in the nation that does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without compensation. Nevertheless, the principle is recognized as a fundamental right and is considered an integral part of the "law of the land" within the meaning of Article 1, Section 19 of the Constitution of North Carolina. *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982).

for a public purpose. *Id.* at 543, 599 P. 2d at 1188. Clearly, that rationale conflicts with the established rule in this state and we reject it. A franchise is property in all respects necessary for its protection under the Constitutions of the United States and North Carolina. The owner of a franchise or a person claiming rights thereunder has the same expectations for the protection of his interest as has the owner of any other property. Accordingly, the same remedies are available to him when his interest is impaired by governmental action. *Louisville v. Cumberland Telephone and Telegraph Co.*, 224 U.S. 649, 56 L.Ed. 934, 32 S.Ct. 572 (1912).

Defendant city does not contend that plaintiffs' franchises are not property or that their rights under the franchises are not property rights. Rather, the city argues that its extension of waste disposal services into the annexed areas was a lawful exercise of its governmental powers and that it is not liable for the economic consequences thereof.

The city first argues that rights conferred under any franchise granted by the county are inherently subject to the statutory limitations of the county's territorial jurisdiction. In support of this contention, defendant cites the following statutory provision:

> Except as otherwise provided in this Article, the board of commissioners may make any ordinance adopted pursuant to this Article applicable to any part of the county not within a city. In addition, the governing board of a city may by resolution permit a county ordinance adopted pursuant to this Article to be applicable within the city. The city may by resolution withdraw its permission to such an ordinance. If it does so, the city shall give written notice to the county of its withdrawal of permission; 30 days after the day the county receives this notice the county ordinance ceases to be applicable within the city.

G.S. 153A-122. Defendant argues that the logical extension of this statutory limitation is that any county ordinance is inherently subject to prospective limitations in territorial application due to the possibility of future municipal expansions. Therefore, defendant argues, any contractural rights conferred under a franchise granted pursuant to a county ordinance are subject to the same

prospective limitations in territorial application as is the ordinance itself.

This argument also appears in *Estacada* and the court's holding therein is obviously influenced by it.

> To hold that the franchise survived in territory in which the ordinance could not operate would be to remove all of the limiting conditions which attached to it at the creation and leave the possessor with the right to serve the area without being restricted in the way the county ordinance . . . meant it to be restricted and conditioned.

41 Ore. App. at 541-42, 599 P. 2d at 1187 (footnote omitted). While this argument is logically appealing, it is not, in our view, legally sound. Insofar as the *Estacada* decision is based on this argument, we are in disagreement with it.

G.S. 153A-122, cited by defendant and quoted above, provides for mutual exclusivity of territorial jurisdiction between city and county governments. This mutual exclusivity has been recognized by our courts as manifestly necessary to avoid confusion and disastrous conflicts of jurisdiction and authority. *Parsons v. Wright*, 223 N.C. 520, 27 S.E. 2d 534 (1943); *see also Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837 (1968); *see generally*, 9 Strong's N.C. Index 3d, Municipal Corps., § 2.5 (1977).

However, these considerations of governmental efficiency do not apply as strongly to private vested rights granted by county governments and our reading of the applicable statutes dictates a conclusion contrary to that urged upon us by defendant. County governments are delegated by the state with a general police power. G.S. 153A-121. Additionally, counties are specifically vested by statute with authority to regulate by ordinance the collection and disposal of solid waste within their jurisdictions. G.S. 153A-136. In order to effect this regulatory power and meet their police power responsibilities, counties are specifically authorized by statute to enact ordinances granting exclusive franchises "to commercially collect or dispose of solid waste within all or a defined portion of the county." G.S. 153A-136(a)(3).

Any derivative power, such as a local police power, has inherent limitations. In addition to the inherent limitations, the county police power is further subject to the express jurisdic-

tional limitation set forth in G.S. 153A-122. Defendant would have us interpret these limitations in such a way that municipal expansions, in addition to pre-empting county jurisdiction over the annexed area, would also operate to extinguish private rights vested by the county in accordance with specific statutory authorization. However, the statute is silent on this point and we disagree with defendant.

The declared policy of the Legislature in delegating its governmental powers to the counties is set forth below:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

G.S. 153A-4.

This legislative mandate requires broad construction of those statutes granting power and restrictive readings of those purporting to limit the power. Defendant's expansive reading of G.S. 153A-122 is inconsistent with the broad delegation of power contemplated by the legislature. We cannot, consistent with our duty to broadly construe, accept the reading of G.S. 153A-122 urged upon us by defendant. As plaintiffs point out, such a reading would also be contrary to the weight of legal authority in the United States, *Estacada* notwithstanding. *See* 12 McQuillin, Municipal Corporations 3d, § 34.50 (1970); 37 C.J.S., Franchises, § 8; *e.g., Scenic Hills Utility Co. v. Pensacola*, 156 So. 2d 874 (Fla. App. 1963); *Belleville v. St. Clair County Turnpike Co.*, 234 Ill. 428, 84 N.E. 1049 (1908).

Moreover, the considerations of governmental efficiency urged upon us by defendant as grounds for terminating rights vested under duly ordained franchises apply with equal force in the opposite direction. It would appear to be essential to the responsible exercise of police power that those individuals and businesses vested with the responsibility of providing certain services to the residents of the county be protected to the extent that they have invested private resources in reliance on the county's continued need for their services. Were we to hold that the

vested rights of such individuals and businesses could be impaired without compensation by municipal expansion, we would remove any incentive for the type of private investment that assures the efficient provision of quality services. To so hold would significantly impair a county's negotiating position with respect to franchised services and hinder the administration of county government. Defendant's contention in this regard is, therefore, without merit.

We now consider whether the actions of the city amounted to an impairment of plaintiff's property interest such that they are entitled to compensation. We note at the outset that the act of annexation did not by itself cause the deprivation complained of. Rather, it was the extension of the city's already existing waste disposal service into the annexed areas that displaced plaintiffs. The city correctly argues that it is required by law to provide waste disposal services on "substantially the same basis and in the same manner as such services are provided within the municipality prior to annexation." G.S. 160A-47; *see also* G.S. 160A-192 (dealing with a municipality's authority to regulate garbage collection). Waste disposal is a recognized function of local government and a service consistent with governmental responsibility under the state's delegation of police power. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *see also* G.S. 160A-174.

Defendant argues that the extension by it of waste disposal services into the annexed areas was an exercise of its police power necessary to provide a statutorily required governmental service. As such, defendant contends, plaintiffs are not entitled to compensation for the impairment of their franchises occasioned as a result thereof. In *Calcasieu Sanitation Service, Inc. v. City of Lake Charles*, 118 So. 2d 179 (La. App. 1960), cited by defendant along with *Estacada*, this argument regarding statutory duty appeared to influence the court's decision. In that case, factually similar to the case at bar, the court found that the plaintiff franchisee had no cause of action against the defendant city for a violation of contract rights. The court there reasoned that the city's provision of free waste disposal service, in accordance with its statutory duty, did not deprive plaintiff of its right to provide the service, only of its ability to find customers who would continue to pay for it. The *Calcasieu* court said that if the deprivation had been the result of a prohibitory ordinance or dis-

criminatory licensing, a "different question" would have been involved. 118 So. 2d at 181. This decision appears to be premised on the doctrine that distinguishes between the governmental and proprietary functions of local government and imposes different standards of liability for economic loss, depending on which function resulted in the loss.

Relying on *Calcasieu*, defendant here attempts to assert its legal obligation to provide waste disposal service in its governmental capacity as grounds for exempting it from liability for the resulting economic losses. As plaintiffs point out, however, the doctrine relied on by defendant and the *Calcasieu* court is limited to situations involving the negligence of officers or agents of the government. For purposes of liability for unconsitutional takings, the fact that a municipality is acting in its governmental capacity is of no consequence. *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440 (1953).

Generally, impairment of property values as a result of an exercise of police power does not entitle the property owner to compensation where no property is actually taken. *Snow v. State Highway Commission*, 262 N.C. 169, 136 S.E. 2d 678 (1964). However, when a person's rights to the use and enjoyment of his property are interfered with by governmental regulations or ordinances to the point that the value of the property is substantially impaired, that person may be entitled to compensation on a theory of inverse condemnation. *Hoyle v. Charlotte*, 276 N.C. 292, 172 S.E. 2d 1 (1970). Our Supreme Court recently examined the doctrine of inverse condemnation.

> In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental; a "taking" has been defined as "entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."

Long v. City of Charlotte, supra, 306 N.C. at 199, 293 S.E. 2d at 109, *quoting Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950).

Here, defendant has extended its waste disposal service into the annexed areas previously served by plaintiffs under an exclusive franchise granted by the county pursuant to a county ordinance. Defendant contends that its actions constitute a proper exercise of the police power. Nevertheless, defendant's actions have interfered with plaintiffs' rights under their franchises to such an extent that the franchises have been effectively vitiated with respect to the annexed areas, amounting to a taking of those rights without compensation.

Defendant contends that the theory of inverse condemnation, or taking by regulation, has been limited in its application in North Carolina to situations involving the impairment of rights in tangible property, usually real property. *See, e.g., Hoyle v. Charlotte, supra* (airplane overflight); *Guyton v. Board of Transportation*, 30 N.C. App. 87, 226 S.E. 2d 175 (1976) (access to public road); *see generally* 5 Strong's N.C. Index, Em. Dom., §§ 2, 2.3, 13 (1977 and Supp. 1982). However, while plaintiffs' franchises are neither tangible nor real property, they are nevertheless valuable property and plaintiffs' rights under those franchises are rights to the exclusive use and enjoyment thereof. Further, these franchises are so connected with the geography of the areas with respect to which they were granted that any reduction in the size of those areas necessarily entails a coextensive reduction in the size of the franchise and a consequent impairment of its value. The loss occasioned by such a reduction is irretrievable and, unlike purely economic losses, cannot be made up by simply shifting the market. Any differences between such a franchise and real or tangible property, insofar as the economic effects of a reduction in size are concerned, are merely semantic. We therefore hold, on the basis of the facts of this case, that defendant's extension of waste disposal services into the newly annexed areas previously served by plaintiffs has so impaired the value of plaintiffs' franchises as to amount to a taking thereof for which plaintiffs are entitled to just compensation.

Having thus determined this matter, we need not consider plaintiffs' remaining arguments. It was error for the trial court to deny plaintiffs' motion for summary judgment and to award summary judgment to defendant and we reverse the order appealed from.

The amount of compensation to which plaintiffs are entitled was not determined at trial. That amount is a factual matter and we remand this cause to the trial court for appropriate proceedings.

Reversed and remanded.

Judges HEDRICK and EAGLES concur.

JOHNNY E. PINKSTON v. JAMES EDWARD CONNOR

No. 8222SC298

(Filed 6 September 1983)

Municipal Corporations § 15— tree blocking street—city employee struck by automobile—no contributory negligence

In an action by plaintiff, a city street maintenance employee, to recover for injuries received when he was struck by defendant's automobile while sawing up a large tree which had fallen and was blocking three-fourths of the street on a cold and rainy night, the evidence was insufficient for the jury to find that plaintiff was contributorily negligent (1) in relying on the headlights of two vehicles shining on the fallen tree to warn approaching motorists rather than obtaining portable barricades from the city garage and placing them around the fallen tree; (2) in leaving the headlights of one of the vehicles illuminating the tree on bright; or (3) in failing to look in the direction of and to see defendant's approaching vehicle until an instant before it hit him.

Judge WEBB dissenting.

APPEAL by defendant from *Mills, Judge.* Judgment entered 9 December 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 9 February 1983.

At trial plaintiff's evidence tended to show that: The night in question had been stormy, ice had formed on trees, but not much on the streets, the temperature was about 30°, and it was drizzling rain around 8 o'clock when plaintiff, a street maintenance foreman employed by the Town of Mooresville, received instructions by telephone to remove a tree that had fallen across Sycamore Street. He telephoned a co-worker, Mike Morrow, to meet him at the tree; and Morrow, in his personal jeep, was at the tree when plaintiff got there in the Town's truck. Sycamore Street at

that point is 32 feet wide, runs north and south, and is relatively straight; the view from the south is unobstructed from where the street intersects with another, near the crest of a little hill about 200 feet away. About 250 feet to the north a street light was burning. The tree, a large cedar, blocked the eastern half of the street and part of the western half; only the westernmost 9 feet of the street was unobstructed. In some places where the limbs were large, the trunk was four feet off the ground and the limbs on top were too high for them to see over. Though flares were not available to them, portable barricades were at the Town garage. After looking at the tree, however, plaintiff and Morrow decided that rather than take time to get and place the barricades on both sides of the tree, it would be better to go ahead and get the tree out of the street as quickly as possible by sawing it up in large chunks and pulling them out of the street. Since Morrow's jeep was on the east curb headed south with its fog lights, flashers, and high beam lights on, thereby illuminating the tree on that side, plaintiff drove his truck around to the other side, headed it north, cut on the four-way blinkers, and left the headlights on, so that side would be illuminated, too. The vehicle lights shining at the tree from both sides enabled them to see while working on and about the tree.

The plaintiff had on a reflective, orange-colored vest, but Morrow did not, since his was at the shop, rather than at home. Plaintiff, standing on the south side of the tree, began sawing limbs off and Morrow dragged them to the curb. During the several minutes that the work continued, four or five cars approached them from the south, three or four of which slowed down or stopped before passing around the western tip of the tree and continuing on their way; but one or two cars, after approaching, stopped, turned around, and went in the opposite direction. Working from the tree stump several feet east of the street, plaintiff had reached the middle of the street when he looked around just before defendant's car hit him. He did not see any headlights. Neither plaintiff nor Morrow were then in the tree, but were standing a few feet south of the tree, trying to unclog plaintiff's chain saw, which had jammed.

Defendant's car skidded about six feet before impact and three feet after impact, and ended up about three feet into the

tree. Both of plaintiff's legs were broken, he was hospitalized for about a month, and unable to work for forty weeks.

Defendant testified that: The headlights of his car were on; in driving north on Sycamore Street, at a speed of about 20-25 miles an hour, upon crossing the hill he saw the lighted vehicles, knew something was in the street, and moved to the left to miss the truck; as he continued on he was blinded by the lights of the jeep, slowed down, but didn't hit his brakes until he was in the tree; upon entering the tree, he knew he had hit somebody, but did not see either workman before impact because they were in the middle of the tree.

The trial judge declined to submit an issue as to either the contributory negligence of the plaintiff or the concurring negligence of the Town of Mooresville. A verdict in favor of the plaintiff for $61,000 was returned and judgment was entered thereon.

Wardlow, Knox, Knox, Freeman & Scofield, by Charles E. Knox and John S. Freeman, for plaintiff appellee Johnny E. Pinkston.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by Richard R. Reamer, for defendant appellant James Edward Connor.

Pope and Brawley, by William R. Pope, for defendant appellee Town of Mooresville.

HILL, Judge.

Several of defendant's assignments of error, the only ones requiring discussion, raise or relate to the question whether the trial judge erred in refusing to submit issues as to the contributory negligence of the plaintiff and the concurring negligence of the Town of Mooresville. Essentially, it is just one question, since the only basis upon which the Town might have been at fault, under the circumstances recorded, was through the acts or omissions of the plaintiff, who was Morrow's superior and responsible for getting the tree out of the street and deciding how best to accomplish that. We are of the opinion that no error was committed. Neither brief cites, nor has our research found, any decision of this or any other court which involved circumstances at all similar to those recorded here. Without any precedent to guide

us, we arrived at our decision by evaluating the evidence recorded in accord with those rules of law that seem applicable to it; no unusual occurrence, really, since negligence cases, above all others perhaps, stand on their own bottoms. Nevertheless, the bottom that this negligence case stands on is very unusual, indeed.

As to the guiding principles of law, first of all, of course, too elemental to require citation of authorities, contributory negligence is not to be presumed, but has to be shown by evidence. Whose evidence shows this, whether the defendant's or plaintiff's, does not matter, but evidence tending to show a lack of due care on the plaintiff's part which proximately contributed to his injury there must be before this issue can be submitted to the jury. Next, streets and highways have to be maintained for the safety of the public, and because those who do the maintaining, either on foot or by vehicle, have to devote much of their attention to their work, they are not held to the same degree of care that ordinary pedestrians and motorists are, whose only proper concern is their own safety. *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903 (1956).

This necessary rule has been confirmed, if not enlarged, by two legislative enactments. G.S. 20-175 exempts street workers from its provisions prohibiting persons from standing or loitering in highways or streets for certain purposes; and G.S. 20-168 exempts drivers of state, county, and city vehicles from many rules of the road "[w]hile actually engaged in maintenance or construction work on the highways." Nevertheless, though the degree of care required of highway and street workers when actually performing their duties is justifiably less than that required of others, the common law duty to use due care for their own safety under whatever circumstances they find themselves still abides for them as it does for all others. "The rule is constant while the degree of care which a reasonably prudent man exercises or should exercise varies with the exigencies of the occasion." *Greene v. Meredith*, 264 N.C. 178, 183, 141 S.E. 2d 287, 291 (1965).

Defendant contends that plaintiff was contributorily negligent in several distinct ways. Consideration of these separate contentions will be facilitated if we first consider the core circumstances relating to the incident, rather than the evidence *en*

masse, and then consider the additional circumstances, one by one, which defendant contends tended to show that plaintiff was contributorily negligent. The evidence is without conflict that: (1) It was a wild and stormy night; (2) a tree, blown down by the storm, was partially blocking the street; (3) plaintiff, a street maintenance employee of the Town of Mooresville, had just been directed to remove the tree from the street; and (4) plaintiff was in the street in the process of getting the tree out of it when he was hit by defendant's vehicle. Obviously, these circumstances by themselves do not tend to show that plaintiff was contributorily negligent; they merely show that public safety required that the street be cleared of a dangerous obstacle, plaintiff had the duty to clear it, and was in the process of doing his duty, under emergency conditions, when he was hurt. Nor, for that matter, does defendant contend that these circumstances by themselves establish plaintiff's contributory negligence; he relies instead upon various other circumstances, which are likewise undisputed.

The circumstance most vigorously relied upon by defendant as tending to establish plaintiff's contributory negligence is plaintiff's failure to place barricades or flares in the street, so as to warn him and other motorists of his and the tree's presence, before beginning his work. The only evidence about barricades or flares was that: Flares were not available to plaintiff, portable barricades were available "at the shop," and if plaintiff "had had time" he would have gotten them; but since he was at home when called, he went directly to the blocked street, appraised the situation, and decided that the best course was to get the tree out of the street as quickly as possible, rather than go, get and place the barricades. If getting the barricades first was a wiser and safer alternative—not just for the plaintiff, but the public, as well, a necessary consideration, since his purpose in being there in the first place was to remove a hazard from a public road—the evidence does not show it. There was no evidence as to the distance from the plaintiff's house to the shop, or from the shop to the accident scene; nor was there any evidence as to how long it would have taken to get the barricades and place them, and thus how much longer the tree would have remained an unlighted hazard to travel, as it then was. Without some such information, the jury would have had no basis for deciding that it was negligence not to get the barricades first and could have only conjectured or sur-

mised that that was the case, which our law does not permit. *Poovey v. International Sugar Feed Number Two Co.*, 191 N.C. 722, 133 S.E. 12 (1926).

But, apart from that, failing to get the barricades first would not be negligence in any event if plaintiff warned the public of his and the obstacle's presence in some equally efficacious way—barricades and flares not being the only means by which motorists can be warned that something is in or wrong with a street or highway. The evidence shows that placing the two vehicles with their headlights shining at the tree from opposite directions did, in fact, warn the motoring public and defendant that something was amiss equally as well as barricades or flares would have. All other motorists that used that part of Sycamore Street during the time involved, upon seeing the lighted vehicles, either turned back or slowed down and went around the tree in safety, and defendant himself testified on direct examination, not cross, that: "After I got over the hill I saw a truck parked on the side of the road and a jeep was parked in front of the truck. I knew something was in the road . . . ." He could have learned no more than that from a barricade in the street. If the message of the lighted vehicles had been less informative, this contention would have more substance—but then it would be a different case from the one presented.

Leaving the headlights of the vehicle facing him on bright is also pointed to by defendant as a violation of G.S. 20-161.1, which prohibits bright lights on standing vehicles at night. But that statute, by virtue of G.S. 20-168(b), does not apply to street maintenance workers actually performing their duties, as plaintiff and his helper were doing here. Though not a violation of the statute, if placing the vehicle where it was and leaving the headlights on bright was inappropriate or unnecessary under the circumstances, it would be evidence of contributory negligence. But no evidence that plaintiff's course was unnecessary or inappropriate is recorded. Light was certainly needed; not just to warn approaching motorists of the hazardous obstacle and the workmen's presence in the street, but also for their work, since nobody can be expected to saw a tree up in the dark. If any other light was available to plaintiff, or if the work on the tree could have safely been done or the public adequately warned with the vehicle lights on low beam, or with the vehicle placed at a dif-

ferent angle, the evidence does not show it. The only possible evidence on this point is defendant's testimony that he was blinded by the lights; not, however, when he first came in sight about 200 feet away and noticed both lighted vehicles and "knew something was in the road," but only after traveling on until he was right on plaintiff and the tree. That, of course, if it tends to show anything, tends to show only that that system of lighting had one undesirable side effect; it does not tend to show that other, better methods of lighting were available to plaintiff and should have been used.

The third evidentiary circumstance relied upon by defendant to establish contributory negligence is that plaintiff admittedly was not looking in the direction defendant's car was coming from, and did not see it until an instant before it hit him. Though this was manifestly an inadequate lookout for an ordinary pedestrian, under the peculiar circumstances of this case, we cannot say that it constituted a failure to use due care. Plaintiff had a power chain saw in his hand, requiring much, if not all, of his attention; he and the area were illuminated by the bright headlights of two vehicles; other motorists that had approached the scene had avoided both him and the tree without difficulty. To hold that under these circumstances failing to notice defendant's approach showed a want of due care would, it seems to us, require the unreasonable and unobtainable of those doing perilous, attention-demanding, emergency work necessary for the safety of the public. Furthermore, the evidence does not indicate that if he had seen defendant's car approaching during the few seconds it was in view, and after it became manifest to him that it was not going to stop or go around the end of the tree, as the other cars had, he could have avoided being hit by it.

As stated, no reported decision involving circumstances similar to those in this case has been found. The case most strongly relied upon by defendant, *Northwestern Distributors, Inc. v. N. C. Department of Transportation*, 41 N.C. App. 548, 255 S.E. 2d 203, *cert. denied*, 298 N.C. 567, 261 S.E. 2d 123 (1979), is illustrative of our lack of a precedent. In that case plaintiff's truck was damaged when, after passing a sharp curve in the highway, the driver, with no advance warning, came upon defendant's truck in the middle of the road dumping dirt; no signs were posted, no barricades were placed, and no flagman was employed. The hold-

ing was that notwithstanding that the defendant's workmen were engaged in repairing the highway, the evidence showed a breach of their common law duty to use due care. Though that ruling is clearly correct, it is no analogy for us to follow here because the circumstances of the two cases are different in every material respect. In that case the hazard was created by the party that had the duty to place warning devices; in this one, of course, nature created the hazard and plaintiff was trying to remove it. There, no emergency existed, ordinary, routine highway construction work was being done during daylight hours, and defendant not only had plenty of time to place barricades, post flagmen, or do anything else that needed to be done for the safety of the public, but had plenty of employees on hand to do them. Here, on the other hand, on a dark and dangerous night, the motoring public was already in peril from a hazardous obstacle in the street, and plaintiff's job, with one assistant, was to remove it as quickly and expediently as possible. In undertaking to do so, the recorded evidence does not tend to show any failure on his part to use due care commensurate with the exigencies of the situation. "A defendant who asserts plaintiff's contributory negligence as a defense has the burden of proving it, and a contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred." *Atkins v. Moye*, 277 N.C. 179, 184, 176 S.E. 2d 789, 793 (1970).

No error.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I believe the evidence that the plaintiff did not place warning devices on the street but relied on the headlights of vehicles is sufficient evidence so that the issue of contributory negligence should have been submitted to the jury.

ERNEST L. BUMGARNER AND GEORGE GRIFFIN v. A. CLYDE TOMBLIN AND WIFE, JANET L. TOMBLIN

No. 8229SC550

(Filed 6 September 1983)

1. **Contracts § 25.1; Frauds, Statute of § 6.1— breach of contract—mismanagement of duty to finance land purchase—summary judgment improper—statute of frauds not applying**

In a breach of contract action where plaintiffs alleged lost profits from potential sales of a parcel of land, jointly owned by plaintiffs and one defendant, due to the defendant's mismanagement of his alleged duty to finance the land purchase, the trial court erred in granting summary judgment for defendant since defendant denied ever having such a contractual duty and since there was another genuine issue as to who was responsible for the lost profits. The statute of frauds, G.S. 22-2, does not defeat plaintiffs' claim for contract damages since they did not seek to enforce an oral contract by defendant to sell them land, instead, they sought to enforce an alleged promise by defendant to take care of debt payments and to achieve a profitable resale.

2. **Fraud § 12— forecast of evidence—sufficient to survive summary judgment motion**

Plaintiffs forecast sufficient evidence of constructive fraud to survive a motion for summary judgment where the evidence tended to show that defendant had legal title to land basically owned, in part, by plaintiffs; defendant promised to take care of the financing until they could turn a profit; defendant and plaintiffs agreed to hold the land for resale; because of defendant's legal skills, proximity to the land, and knowledge of real estate, the plaintiffs reposed a special confidence in him; and plaintiffs alleged he turned away prospective buyers, resulting in eventual foreclosure and loss of profits.

3. **Contracts § 4.1; Fraud § 12— breach of contract action—failure to share profits—valuable consideration supplied**

In a breach of contract action where plaintiffs alleged defendant failed to share the profits from sale of a parcel of land equally owned by defendant and plaintiffs, the trial court erred in entering summary judgment for defendant since there was a genuine issue as to whether full payment had been paid and since plaintiff's allegation that he devoted his time and knowledge as a real estate entrepreneur in seeking out prospective buyers was consideration enough to support any promise by defendant to manage and help sell the property.

4. **Accord and Satisfaction § 1— insufficiency of evidence—summary judgment improper**

Where defendant and plaintiff jointly owned a piece of property and where defendant stated that his deed of 43 acres of the property to plaintiff served as an accord and satisfaction but plaintiff specifically denied agreeing to take the 43 acres in lieu of his share of the profits, his denial created a gen-

uine issue of material fact as to whether an accord or modification or novation occurred, and summary judgment was improperly entered for defendant.

5. **Fraud § 13— summary judgment on claim for punitive damages improperly entered**

In an action in which plaintiffs alleged constructive fraud in that defendant abused a fiduciary responsibility in the sale of land, the trial court erred in entering summary judgment for defendant on plaintiffs' cause of action asking for punitive damages.

6. **Limitation of Actions § 4.6; Quasi Contracts and Restitution § 5— quasi contract— sufficiency of evidence—statute of limitations**

Defendant alleged sufficient evidence to raise a jury question in quasi contract where defendant made payments totaling around $20,000.00 on a $44,619.00 note which was made only in defendant's name although it was a refinancing of notes both one of the plaintiffs and defendant had been liable on. However, as to the payments made more that three years before defendant filed his counterclaim seeking reimbursement, the statute of limitations, G.S. 1-52(1), applied.

APPEAL by plaintiffs from *Owens, Judge.* Order entered 21 December 1981 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 15 April 1983.

Plaintiffs brought this action seeking damages for breach of contract and fraud. Defendants counterclaimed for contribution from plaintiff Griffin on a note for which they were jointly liable. The pleadings and depositions tended to show the following allegations and facts.

On 9 July 1973 the two plaintiffs and the defendant A. Clyde Tomblin each contributed $5,611.50 to the down payment on property located in Duncan's Creek Township. Title to the land was put in the name of the defendants, but defendant Tomblins agree that each of the plaintiffs owned an undivided one-third share. The land was bought for the purpose of reselling it at a profit, and title was placed in defendants to facilitate sales. Plaintiffs allege that defendants also agreed to handle all payments and financing on the land and the indebtedness until the land could be sold or developed. The parties formulated their oral contractual agreement in vague terms during several conversations in different places.

The plaintiffs and defendants executed a deed of trust to Foy and Mae Biggerstaff in 1973 when they purchased the land from the Biggerstaffs. They subsequently executed new deeds of trust

to the Federal Land Bank for about $54,000 and to Foy and Mae Biggerstaff for $37,000, and the previous deed of trust was cancelled. On 16 April 1976 defendants deeded a one-third undivided interest in the land to each of the plaintiffs. By 10 February 1978 neither plaintiffs nor defendants had made any payments, so the trustee of the deed of trust to the Biggerstaffs commenced foreclosure. In April of 1978 the land was sold at Tomblin's suggestion to Compass Corporation, wholly owned by Bumgarner, which executed a deed of trust to the Biggerstaffs for $47,362.12. One year later Compass Corporation conveyed the land to George Holland. None of the parties realized a profit from the Duncan's Creek Township land; both sides blamed the other for failure to sell the land.

The plaintiffs and defendants orally agreed to purchase another parcel of land located in Morgan Township, based on the same understanding they had regarding the Duncan's Creek Township land. They acquired the deed on 9 August 1973, and title was once again solely in the defendants' name to facilitate sales. A bank loan provided the purchase price of $18,389.43. Soon thereafter, 118 acres of the Morgan Township land were sold to Scott Peek, representing Florilina Corporation, for $59,350.02. The plaintiffs and the defendant A. Clyde Tomblin listed their profit for tax purposes as $13,653.53 apiece from the sale to Peek. Plaintiff Bumgarner received $6,920.24 from defendants for his share of the proceeds. Plaintiff Griffin denies receiving any share of the sale proceeds, although he did get $6,180.60 from Tomblin.

On 30 October 1978, defendants deeded 43 acres of the remaining Morgan Township land to plaintiff Bumgarner. Bumgarner needed money to pay a pressing debt, so he had asked Tomblin to encumber part of the land to raise the necessary sum. Tomblin conveyed the 43 acres to Bumgarner, thereby permitting Bumgarner to obtain a deed of trust on the land conveyed. Because Bumgarner was out of town and his wife handled the transaction through a power of attorney without knowing what was happening, he claims he did not learn for months that the 43 acres belonged to him and he denies accepting the deed for the allegedly inferior land. Defendants maintain that the deed to Bumgarner disposed of his remaining interest in the Morgan Township land.

Early in 1979 the plaintiffs discovered that the defendants had conveyed parts of the remaining land to various individuals. The plaintiffs claim these sales were made without their knowledge or approval, and that the sales disproportionately reduced the value of the remaining land. Defendants used the proceeds to pay Monroe Green for the costs of surveying the land, and to make payments on a deed of trust executed to secure loans to Gricon, Inc.

Gricon, Inc. had borrowed funds to begin operations on the basis of notes signed together by plaintiff Griffin and defendant A. Clyde Tomblin. In 1973 Gricon, Inc. ceased doing business. Griffin and Tomblin agreed in 1975 to consolidate the Gricon notes into a single $44,619 note in the Tomblins' name only. The defendants have been making payments on this note and refuse to give Griffin his share of the remaining Morgan Township land until Griffin pays them his share of the note.

Both sides moved for summary judgment after depositions were taken. The trial court granted defendant Janet L. Tomblin's motion for summary judgment as to all claims against her. Defendant A. Clyde Tomblin's motion for summary judgment was granted with respect to plaintiffs' first and third causes of action. The first cause of action alleged breach of contract and fraud damages concerning the Duncan's Creek Township land. The third cause of action asked for punitive damages. The trial court also granted A. Clyde Tomblin's motion for summary judgment as to the second cause of action by plaintiff Bumgarner, but denied summary judgment against plaintiff Griffin on the second cause of action. The second cause of action alleged breach of contract and fraud concerning the Morgan Township property. Finally, plaintiff Griffin's motion for summary judgment on the defendants' counterclaim was denied. Plaintiffs appealed the summary judgment involving defendant A. Clyde Tomblin, and subsequent references to "defendant" in this opinion shall mean only A. Clyde Tomblin.

Yelton, Farfour & McCartney, by Charles E. McCartney, Jr., for plaintiff appellants.

Robert W. Wolf and Hamrick, Bowen, Nanney & Dalton, by Louis W. Nanney, Jr., for defendant appellees.

PHILLIPS, Judge.

A final judgment on all the claims of all the parties has not been entered. Nor will the plaintiffs suffer loss of a substantial right without an immediate appeal. Therefore, plaintiffs' appeal is interlocutory and premature under Rule 54(b), N.C. Rules of Civ. Proc. But in our view the administration of justice will be served by us treating the appeal as a writ of certiorari in accordance with Rule 21(a), N.C. Rules App. Proc.

[1] Plaintiffs contend the trial court erred in granting defendant's summary judgment motion on the claims involving the Duncan's Creek Township land. Summary judgment lies where a claim can be resolved as a matter of law and no genuine issue of material fact exists. Plaintiffs claim that the defendant agreed to take care of the remaining indebtedness on the land through long term financing, negotiations with the sellers, and sales of timber from the property until it could be developed. Defendant maintains that the parties agreed to share the liabilities as well as the profits of the land. The basis for a breach of contract recovery is plaintiff's lost profits from potential sales of the land due to defendant's mismanagement of his alleged duty to finance the land purchase. Since defendant denies ever having such a contractual duty, a genuine issue of material fact exists. Moreover, each side accuses the other of stymieing sales to potential buyers. These accusations raise a genuine issue as to the material fact of who was responsible for the lost profits. The plaintiffs' first cause of action depends on the terms of a disputed oral contract and whether either party frustrated performance of the contract. These issues of credibility should be resolved by a jury.

Nor does the statute of frauds, G.S. 22-2, defeat plaintiffs' claim for contract damages regarding the Duncan's Creek Township land. Plaintiffs do not seek to enforce an oral contract by defendant to sell them land; instead, they seek to enforce an alleged promise by defendant to take care of debt payments and to achieve a profitable resale. The North Carolina Supreme Court has declared that "the statute [of frauds] has no application to those contracts whereby two persons agreed to purchase land, either generally or as a single venture, for the purpose of reselling the same at a profit and sharing the same between them."

Newby v. Atlantic Coast Realty Co., 182 N.C. 34, 38, 108 S.E. 323, 325 (1921).

For the same reason, the statute of frauds does not bar the claim for contract damages regarding the Morgan Township land. The breach of contract alleged in the second cause of action relates to defendant's failure to divide the profits as agreed. The statute of frauds clearly does not apply to an oral contract to divide profits from the sale of land. *Whitley v. O'Neal*, 5 N.C. App. 136, 168 S.E. 2d 6 (1969).

[2] The plaintiffs' claims for fraud in their first and second causes of action are not barred by the statute of frauds. *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

The pleadings and depositions forecast enough evidence of constructive fraud to survive a summary judgment motion. Constructive fraud may arise where the plaintiffs have reposed a special confidence in the defendant which creates a fiduciary relationship. *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951). Constructive fraud is presumed from the breach of a fiduciary duty; it does not require intentional deception as an essential element. *Miller v. First National Bank of Catawba County*, 234 N.C. 309, 67 S.E. 2d 362 (1951).

From 1973 to 1976 the defendant had legal title to land beneficially owned, in part, by the plaintiffs. According to plaintiffs: Defendant promised to take care of the financing until they could turn a profit; defendant and plaintiffs agreed to hold the land for resale; because of the defendant's legal skills, proximity to the land, and knowledge of real estate, the plaintiffs reposed a special confidence in him. Thus, sufficient evidence of a fiduciary relationship exists to create a jury issue. Furthermore, there is a genuine issue of material fact as to whether defendant breached any fiduciary duty since plaintiffs allege he turned away prospective buyers, resulting in eventual foreclosure and loss of profits. The facts that defendant did not benefit from the deals on the land and that he no longer has an interest in the land are no barrier to a constructive fraud claim. Plaintiffs have shown enough facts supporting a constructive fraud claim to defeat a summary judgment motion.

Defendant argues that plaintiffs' first cause of action amounts to a collateral attack on the foreclosure sale and should

be barred by laches; however, the foreclosure sale was merely the consequence of defendant's actions. Plaintiffs' suit charges the defendant's actions, not the foreclosure, as being a breach of contractual or fiduciary duties.

[3] Plaintiff Bumgarner contends the trial court erred in ordering summary judgment against his second cause of action, based upon allegations that defendant used some of the profits from the sale of the Morgan Township land for his own benefit rather than sharing the profits equally with the plaintiffs.

Both sides admit to an agreement to divide the profits three ways. Defendant argues that plaintiffs' failure to put any money into purchasing the land constituted a lack of valuable consideration to support their agreement, thereby justifying any nonperformance on his part; but valuable consideration need not be money. Any benefit to the promisor or any loss to the promisee, including the promisee doing something he is not bound to do or refraining from exercising a right, suffices as consideration for a promise. *Carolina Helicopter Corp. v. Cutter Realty Co., Inc.*, 263 N.C. 139, 147, 139 S.E. 2d 362, 368 (1964). Plaintiff Bumgarner allegedly devoted his time and knowledge as a real estate entrepreneur in seeking out prospective buyers; if so, his efforts were consideration enough to support any promise by defendant to manage and help sell the property.

Defendant informed plaintiff Bumgarner that his profit from the sale to Peek should be listed as $13,653.53 for tax purposes; yet defendant, who handled the transaction, paid only $6,920.24 to plaintiff Bumgarner as his share of the proceeds. This discrepancy raises a genuine issue of material fact which should have overcome defendant's motion for summary judgment as to plaintiff Bumgarner's contract and fraud claims.

[4] Defendant states that his deed of 43 acres to plaintiffs served as an accord and satisfaction. An accord and satisfaction requires an agreement, which is the accord, and performance of the agreement, which is the satisfaction. *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23 (1954). Similarly, a compromise and settlement, a modification, and a novation all require a new agreement between the parties. Plaintiff Bumgarner specifically denies agreeing to take the 43 acres in lieu of his share of the profits. His denial creates a genuine issue of material fact as to whether

an accord or modification or novation occurred, so summary judgment was improper.

[5] Both plaintiffs contend the trial court erred in granting summary judgment against their third cause of action asking for punitive damages. Though, generally, punitive damages were not recoverable in fraud actions at one time, that is no longer the case. *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Kleinfelter v. Northwest Builders and Developers, Inc.*, 44 N.C. App. 561, 261 S.E. 2d 498 (1980). Which is as it always should have been, it seems to us, since the calculated deceit of others, to their detriment, inherent in all frauds, merits punishment if any civil wrong does. While intentional deceit is not a necessary element for constructive fraud, an abuse of fiduciary responsibility can be just as gross and aggravating. Thus, to the extent that plaintiffs have stated fraud claims that should be submitted to a jury, so also have they stated a basis for punitive damages.

[6] Finally, plaintiff Griffin contends the trial court erred in denying his summary judgment motion as to defendant's counterclaim. We hold that a genuine issue of material fact exists, but that the statute of limitations bars part of the counterclaim.

Defendant's counterclaim asks for reimbursement of the payments totaling around $20,000 that he made on his $44,619 note. Only the defendant's name is on the note, although it was a refinancing of notes both Griffin and defendant had been liable on. A claim for equitable contribution depends on one party paying more than his share of a common obligation on which both (or all) parties are liable. *Nebel v. Nebel*, 223 N.C. 676, 28 S.E. 2d 207 (1943). Since Griffin was not liable on the note involved in the counterclaim, defendant cannot seek contribution from him. Nor is there any evidence of a contract of indemnity. Yet defendant has stated evidence sufficient to raise a jury issue in *quasi* contract. An implied or *quasi* contract rests upon the equitable principle that a person may not unjustly enrich himself at the expense of another. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968).

G.S. 1-52(1) sets a three-year limit on bringing implied contract actions. Plaintiff Griffin argues that the statute of limitations bars the counterclaim since defendant executed the deed of

trust on 17 June 1975 and did not file his counterclaim until 11 July 1980. But the limitations period does not begin to run, of course, until the injured party is at liberty to sue. *Wheeless v. St. Paul Fire and Marine Insurance Co.*, 11 N.C. App. 348, 181 S.E. 2d 144 (1971). Defendant could not sue for reimbursement until he had paid out something. When all of defendants' payments were made and their amount is not clearly shown by the record, but it does appear that some payments were made before 11 July 1977. As to those payments, summary judgment based on the statute of limitations should have been entered for plaintiff Griffin. But as to subsequent payments, the counterclaim presents a triable issue.

Thus, the order granting defendant A. Clyde Tomblin's motions for summary judgment is reversed; and the order denying plaintiff Griffin's motion for summary judgment against defendants' counterclaim is reversed, but only to the payments made before 11 July 1977.

Reversed in part; affirmed in part.

Judges HILL and JOHNSON concur.

MARY F. WALKER, PLAINTIFF v. CHARLES F. WALKER, DEFENDANT, AND UNITED STATES OF AMERICA, GARNISHEE

No. 8214DC884

(Filed 6 September 1983)

1. Divorce and Alimony § 24.11— when child support order is res judicata

A prior action concerning child support is *res judicata* only as long as the circumstances existing at the time of the prior action have remained the same.

2. Divorce and Alimony § 24.3— child support—increase in amount required by separation agreement—burden of proof

Plaintiff was not required to show a substantial change in circumstances from the time of a separation agreement as justification for an increase in child support over the amount required by the separation agreement but was required to show only the amount reasonably required for support of the child at the present time.

3. **Divorce and Alimony § 24.1; Evidence § 3.5— judicial notice of inflation**

The trial court did not err in taking judicial notice of the general effect of inflation on the cost of raising a child in determining the amount of child support to be awarded to plaintiff.

4. **Divorce and Alimony § 24.8— sale of house—no evidence of increased child support costs**

Plaintiff's mere assertion that she "had to" sell a house which defendant deeded to her under the terms of a separation agreement did not establish an increase in child support costs and did not provide a basis for ordering an increase in child support payments.

5. **Divorce and Alimony § 24.1— monthly expenses of child—finding not supported by evidence**

The trial court's finding that a child had reasonable monthly expenses of $645.00 was not supported by the evidence where the court attributed to the child one-half of the mother's monthly expenses for rent, electricity, telephone, home repairs, and transportation, but there was no evidence in the record to support such an allocation of expenses, and where the trial court's finding included a patently unreasonable amount of $43.49 per month for Christmas and birthday gifts for the child.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by defendant from *LaBarre, Judge.* Judgment entered 24 June 1982 in District Court, DURHAM County. Heard in the Court of Appeals 8 June 1983.

Plaintiff and defendant were married 20 July 1968. One child, Tiffany Antoinette Walker, was born of that marriage. The parties subsequently separated, entering into a separation agreement on 23 June 1975. Under the terms of the separation agreement, defendant agreed to pay $175.00 monthly as child support and to increase that amount by $10.00 per month each year he received a pay increase. Defendant later obtained a divorce decree in Wake County.

On 16 February 1978, plaintiff brought an action against defendant requesting that the court order the defendant to make payments according to the separation agreement. For reasons not pertinent to this appeal, that action was dismissed with prejudice on 19 July 1978.

On 4 March 1982, plaintiff filed a second action requesting *inter alia* an increase in child support payments. On 21 May 1982 defendant made a motion to dismiss which was denied. After hearing the testimony of both parties and reviewing the separa-

tion agreement, the support payment chart and the affidavits of financial standing of both parties, the court made extensive findings of fact and concluded, as a matter of law, that there was a need for an increase in defendant's child support payments to $387.00 monthly.

From the order entered pursuant to those findings of fact and conclusions of law, defendant appeals.

Law firm of Eric C. Michaux, by Eric C. Michaux and Robert Brown, Jr., for plaintiff-appellee.

Powe, Porter & Alphin, by N. A. Ciompi and William E. Freeman, for defendant-appellant.

EAGLES, Judge.

[1] The defendant first assigns as error the denial of defendant's 21 May 1982 motion to dismiss. He alleges that the action filed by plaintiff on 16 February 1978, and its subsequent dismissal with prejudice on 19 July 1978, acted as *res judicata* in the later action filed by plaintiff on 4 March 1982. A prior action concerning child support is *res judicata* only as long as the circumstances existing at the time of the prior action have remained the same. *See Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). "[N]either agreements nor adjudications for the custody or support of a minor child are ever final." *McLeod v. McLeod*, 266 N.C. 144, 153, 146 S.E. 2d 65, 71 (1966). We reject defendant's argument that the doctrine of *res judicata* applies. We find no error in the denial of defendant's motion to dismiss.

[2] Defendant next contends that the trial court erred in concluding, as a matter of law, "that the plaintiff is not required to show a substantial change in circumstances in order to modify the separation [sic] but rather, the plaintiff must show the amount reasonably required for the support of the child at the time of this hearing." The situation here is similar to that dealt with in *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964). In both cases, prior to the entry of the order appealed from, the defendant's child support payments were made under the terms of a separation agreement. *Williams* held that in such a case "plaintiff's only burden was to show the amount reasonably required for the support of the children at the time of the hearing.

The amount which the parties fixed on June 8, 1962 was merely evidence for the judge to consider, along with all the evidence in the case, in determining a reasonable amount for support of the children." *Id.* at 59, 134 S.E. 2d at 235. Plaintiff need not show and the trial court need not make findings concerning the needs of the child at the time the separation agreement was signed. *Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449, *rev. denied*, 292 N.C. 730, 235 S.E. 2d 784 (1977). We, therefore, hold that plaintiff was not required to show a substantial change in circumstances from the time of the separation agreement as justification for an increase in child support payments.

Defendant's final assignments of error in effect challenge the basis on which the court ordered an increase in defendant's child support payments. The trial court found as fact that:

> 11. That at the time of the Separation Agreement, the parties owned a house located at 5500 Old Well Street, Durham, North Carolina. That simultaneously with the execution of the Separation Agreement, Charles F. Walker conveyed his interest in that home to Mary F. Walker. That thereafter, Mary F. Walker was forced to sell the home and now resides in an apartment.
>
> . . . .
>
> 16. The plaintiff has the following reasonable monthly expenses necessary for the support of one minor child:

Rent	—	$150.00
Electricity	—	32.50
Telephone	—	15.00
Cable TV	—	8.33
Home Repairs	—	2.50
Newspapers & Magazines	—	1.25
Drycleaning & Laundry	—	10.00
Education	—	5.00
Church	—	2.00
Transportation		146.98
Groceries (Home)	—	125.00
Food (Away)	—	5.00
School Lunches	—	13.00
Clothing	—	40.00

Personal Items	—	5.00
Recreation	—	20.00
Medical & Dental	—	20.00
Gifts (Christmas & Birthdays)	—	43.49
Total		$645.00

17. That the defendant has submitted to the Court an affidavit showing his monthly expenses, which he alleges total $2,252.12. These expenses include a mortgage payment of $622.19 for a four bedroom house in which he is the sole occupant; a payment of $100.00 per month for an insert for his fireplace; an average monthly electricity bill of $108.00; and NCNB Bank Americard Bill of $100.00 monthly. The Court finds that the defendant Walker has voluntarily undertaken unreasonable expenses to the detriment of his ability to support his minor child.

18. That the plaintiff has a net monthly income of $836.00 and reasonable monthly expenses of $645.00. Plaintiff is employed by the Durham County Schools in the capacity of teach [*sic*] of Physical Education.

19. That based on parties income and reasonable expenses, and the needs of the child for health, education and maintenance in the accustomed standard of living of the child and the parties, the homemaker contribution of the plaintiff, this Court determines that the defendant should pay 60% of the reasonable needs of the child or $387.00 and the plaintiff should bear the remaining 40%.

20. That the plaintiff provides the following homemaking services for the minor child:

Activity	Hours
Cooking	13.5
Cleaning	10.0
Laundry	5.9
Shopping	4.0
Tutoring	2.0
Nurse	3.5
Chauffeur	3.5
Dietitian	1.2

Dishwasher	5
Child Care	128
Family Counseling	3.5
Seamstress	1.0

21. The defendant provides no homemaking contribution for the minor child.

. . . .

23. The Court takes judicial notice of the substantial increase in the costs of raising a child caused by inflation.

. . . .

25. The Court finds as a fact that the plaintiff is in need of financial assistance from defendant father for the partial support of the child. And that he is capable of providing such support.

The Court then concluded as a matter of law that:

4. The Court has taken the terms of the Separation Agreement into consideration but finds as a matter of law that this agreement does not operate to remove the child, Tiffany Walker, from the supervision of the Court in regards to the matter of support and that the Court is not bound by the terms of the agreement. The Court finds that as a matter of law there has been a showing of need by the plaintiff which requires the change of the provision of the separation agreement relating to support. The Court determines that the welfare of the child and the estates of the parties require that the defendant pay 60% of the child's reasonable needs or $387.00. This amount is exclusive of any amount the defendant is required to pay as alimony. The Court finds as a matter of law that the plaintiff is not required to show a substantial change in circumstances in order to modify the separation [sic] but rather, the plaintiff must show the amount reasonably required for the support of the child at the time of this hearing. Nevertheless, this Court finds that as a matter of law there has been a material change of circumstances in that the plaintiff no longer resides in the marital home which she was forced to sell; that the needs of the child for support of the minor from defendant clearly exceed

the $175.00 per month payment required in the separation agreement; and that the income of the defendant has increased from $25,000.00 per year to $32,000.00 per year.

These findings of fact and conclusions of law must be supported by competent evidence. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977). The trial court's order increasing the amount of child support which defendant must pay can be disturbed only upon a showing of a gross abuse of discretion. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700 (1963); *Wyatt v. Wyatt, supra.*

[3] The trial court took judicial notice of the general effect of inflation on the cost of raising a child without making findings as to its particular effect upon the amount necessary to provide reasonable support for the child in the case *sub judice*. We hold that the trial court did not abuse its discretion by taking judicial notice of the current inflationary economic trend. Our Supreme Court has previously taken judicial notice of the general effect of inflation, stating that "[i]t is a matter of common knowledge that the value of the dollar has depreciated during the past several years, resulting in a higher price for commodities, including real estate." *In re Pine Raleigh Corp.*, 258 N.C. 398, 402, 128 S.E. 2d 855, 858 (1963).

[4] We next consider whether the trial court erred in basing its order increasing defendant's support payments in part upon the finding of fact and conclusion of law that plaintiff "was forced to sell the home" which defendant had deeded to her under the terms of the separation agreement. The only evidence in the record directly on this point was the response of plaintiff when asked if she had sold the home: "Yes, I had to." Her testimony further revealed that she was currently renting an apartment in which she and her daughter resided. There was no evidence in the record indicating that plaintiff's costs had increased as a result of the sale of the home and the renting of an apartment. Plaintiff's mere assertion that she "had to" sell the house does not establish an increase in child support costs and does not provide a basis for ordering an increase in child support payments.

[5] Defendant also assigns as error the trial court's consideration of his increased income as a factor in determining the amount reasonably necessary to support his child. "[T]he court upon mo-

tion for an increase in such allowance, is not warranted in ordering an increase [in support] in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). Only upon a determination that the reasonable needs of the child require an increase in child support payments, could the trial court properly consider defendant's increased income as a factor in determining the amount of that increase. We must therefore address defendant's contention that there was no competent evidence supporting the findings of fact and conclusions of law that the child's reasonable expenses exceeded defendant's present monthly child support payment.

The trial court found that the child had reasonable monthly expenses of $645.00. Included in this total were several expenditures for essentials which plaintiff would have made even if her daughter had not been residing with her. These fixed expenses included rent, electricity, telephone, home repairs, and transportation. Defendant's brief asserts that the trial court arrived at these amounts simply by allocating one-half of each of the fixed expenses to the minor child. There is certainly no evidence to support an assumption that one-half of the cost in each of these categories should be attributed to the minor child. While some portion of each of these expenditures might be attributable to the child, there was no evidence in the record proper supporting the trial court's assumption that the particular amount allocated to each of these categories should be attributed to the minor child.

In addition, the trial court found as a reasonable monthly expense a $43.49 expenditure for Christmas and birthday gifts. Over a twelve-month period this would amount to $521.88 for gifts alone. We hold this expense to be patently unreasonable in light of the fact that significant expenditures for the benefit of the child were already being made monthly for Cable TV, newspapers and magazines, food away from home, clothing, personal items and recreation.

For the foregoing reasons we hold that, because of the lack of competent supporting evidence, the court erred in concluding as a matter of law that the child's reasonable monthly expenses totalled $645.00.

We reverse and remand for further findings of fact and conclusions of law in accordance with this opinion.

Reversed and remanded.

Judge WEBB concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I fully concur with the majority's disposition of defendant's assignments of error relating to his motion to dismiss, whether the plaintiff need show a substantial change in circumstances from the time of the separation agreement as justification for an increase in child support payments, and the basis on which the court ordered an increase in defendant's child support payments. In addition, I agree with the deletion of the $43.49 expenditure for Christmas and birthday gifts from the list of reasonable monthly expenses for the child. Clearly these are not regular *monthly* expenditures. However, I must respectfully dissent from that portion of the opinion which holds that the trial court erred in its determination of the child's monthly expenses.

In my opinion, the trial court committed no error by allocating to the minor child one-half of the cost of each of the fixed expenses listed by the plaintiff mother. To require the District Court judge to determine as a matter of law the actual amount of rent, electricity, telephone, home repairs, and transportation used by the parties' child with any greater precision than this would be to impose a nearly impossible and needlessly time-consuming burden on the court. In the absence of evidence to the contrary, it is entirely proper for the court to allocate one-half of the fixed living expenses to the minor child who resides with her mother in determining the amount to be paid by defendant for the child's monthly support.

PAULETTE CORDA, ADMINISTRATRIX OF THE ESTATE OF MICHAEL CORDA, DECEASED v. BROOK VALLEY ENTERPRISES, INC. AND TROY E. ROBERSON

No. 823SC823

(Filed 6 September 1983)

1. **Death § 3.6— pool drowning—summary judgment improperly entered in wrongful death action**

In a wrongful death action, the trial judge erred in entering summary judgment for both defendants where the evidence was sufficient for a jury to find the lifeguard did not observe the pool for swimmers in distress as a reasonably prudent man serving as a lifeguard would have done when he left his lifeguard station and went to fold up chairs and umbrellas, and where it was a jury question as to whether the corporate defendant acted as a reasonable man operating a swimming pool would have acted in not having two lifeguards on duty when the lifeguard was responsible for maintaining the area around the pool.

2. **Evidence § 36— wrongful death action—lifeguard's statements concerning corporate defendant—properly excluded**

In a wrongful death action arising from a possible pool drowning, the trial court properly excluded statements made by the lifeguard concerning safety provisions which were not provided by the corporate defendant since the testimony was not made by an agent of the corporation as it concerned an act then being done in his representative capacity but rather was a narrative of a past occurrence.

3. **Evidence § 33.2— answers to interrogatories based on information and beliefs—properly excluded**

The trial court properly excluded answers to interrogatories which were based on information and belief rather than on personal knowledge.

4. **Evidence § 50.3— pathologist's opinion as to cause of death—improperly excluded**

In a wrongful death action stemming from a possible pool drowning, the trial court erred in excluding a pathologist's answer as to whether or not the victim could have been successfully resuscitated had a lifeguard gotten to him within thirty seconds of the beginning of the inhalation of water since the witness was better qualified than the jury to form an opinion as to the cause of death and what might have prevented it.

5. **Evidence § 18— wrongful death action—results of experiment conducted by lifeguard properly admitted**

In a wrongful death action stemming from a possible pool drowning, the trial court properly admitted into evidence testimony by a lifeguard that using a stopwatch he had repeated from six to eight times his actions at the time of the alleged drowning.

6. Evidence § 29.3— emergency room reports—improperly excluded

In a wrongful death action, it was error for the trial court to exclude an emergency room report in regard to the victim where the parties stipulated to its authenticity.

7. Evidence § 44— wrongful death action—testimony concerning observation of victim prior to death—properly admitted

In a wrongful death action in which the victim allegedly drowned in a swimming pool, the trial court properly allowed a lifeguard to testify as to his observation of the victim at times prior to the date of the drowning when the victim was in the swimming pool since the testimony was not excluded under G.S. 8-51 as testimony concerning a personal transaction with the deceased.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 28 January 1982 in Superior Court, PITT County. Heard in the Court of Appeals 19 May 1983.

This is an action for wrongful death. The plaintiff's evidence showed that on 1 August 1980 the plaintiff's intestate Michael Corda, a member of the Brook Valley Country Club, was using the swimming pool at the country club which was owned by the defendant Brook Valley Enterprises, Inc. The defendant Troy E. Roberson was on duty as a lifeguard at the time. At approximately 5:30 p.m., Mr. Roberson left his lifeguard station and went to move some chairs and to take down several umbrellas in anticipation of an approaching storm. Before going to move the chairs and umbrellas, Mr. Roberson saw Michael Corda standing at the side of the pool in approximately four feet of water. After Mr. Roberson had moved the chairs and umbrellas he started to "rescue a ring buoy." As he reached the ring buoy he saw a bluish-gray object under the water and heard someone say "This gentleman has been under water longer than I think he should have." Mr. Roberson removed Michael Corda from the swimming pool and administered mouth-to-mouth resuscitation but was unable to revive him. Mr. Corda was carried to Pitt Memorial Hospital where further efforts to revive him were to no avail. Mr. Roberson testified on direct examination that it took him less than 2½ minutes to move the chairs and roll down the umbrellas. On cross-examination he testified that it was approximately 1½ minutes from the time at which he left the lifeguard station to move the chairs until he was at the side of Mr. Corda.

Dr. Ray H. Martinez, who was qualified as an expert in water safety, testified that in his opinion if there were 12 to 15 people

in the pool and swimmers were allowed to use the diving area and the shallow part of the pool, it would be very difficult for one person to guard the entire pool and the lifeguard "would have to be in the lifeguard stand." There was evidence that more than 15 people were in all areas of the pool at the time Mr. Corda allegedly drowned.

At the end of the plaintiff's evidence the court granted the defendants' motion for directed verdict. The plaintiff appealed.

Gaylord, Singleton, McNally and Strickland, by Danny D. McNally; and McLawhorn and Mitchell, by Charles L. McLawhorn, Jr. and Elizabeth R. Warren, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Ronald C. Dilthey and Robert W. Sumner, for defendant appellees.

WEBB, Judge.

[1] We believe that Michael Corda was an invitee on the premises of Brook Valley Enterprises, Inc. at the time he allegedly drowned and the lifeguard owed him the duty to exercise the care that a reasonably prudent person who was serving as a lifeguard at the Brook Valley Country Club at the time would have exercised. *See Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965). We believe a reasonably prudent person acting as a lifeguard would have observed the pool for swimmers in distress and would have been alert to aid swimmers in distress. We hold that there was sufficient evidence for a jury to find (but not compel them to find) that the defendant Roberson did not observe the pool for swimmers in distress as a reasonably prudent man serving as a lifeguard would have done when he left his lifeguard station and went to fold up the chairs and umbrellas. We also believe it was a jury question as to whether the corporate defendant acted as a reasonable man operating a swimming pool would have acted in not having two lifeguards on duty when the lifeguard was responsible for maintaining the area around the pool. For these reasons, we hold it was error to grant the defendants' motion for directed verdict.

The defendants argue that under *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977) they were responsible

not only for the safety of the swimming pool but for the surrounding area and it was not negligent for Mr. Roberson to leave the lifeguard stand to secure the chairs and umbrellas when it appeared there would be a storm. As we have said, we believe it is a jury question as to the responsibility of the defendants for the safety of the surrounding area, whether the corporate defendant provided adequate personnel to meet its responsibilities, and whether Mr. Roberson acted as a reasonable man in leaving the lifeguard stand under the circumstances then existing.

There was some evidence that Mr. Corda died as the result of cardiac arrest. Defendants argue that if this was the case, the fact that he was not sooner removed from the pool would not be a proximate cause of his death. We believe this is a question for the jury. There was also some evidence that Mr. Corda died from a dry drowning. The evidence showed that in a dry drowning, as distinguished from a wet drowning, there is a laryngospasm which causes an obstruction in the voice box which prevents water and air from entering the lungs. The defendants contend that if there was a dry drowning, mouth-to-mouth resuscitation would have been ineffective and the failure to remove Mr. Corda from the pool would not have been a proximate cause of his death. We believe this should be decided by the jury.

[2] The plaintiff makes other assignments of error which we shall discuss because the questions raised may recur at a new trial. The plaintiff assigns error to the exclusion of her testimony as to statements she made to the defendant Roberson. Plaintiff would have testified if allowed to do so that Mr. Roberson told her sometime after the accident (1) "He couldn't blame me if I sued Brook Valley Country Club because of the drowning and that he would probably do the same thing himself"; (2) "He felt two lifeguards were needed on the day my husband drowned because of the large number of people using the pool"; (3) "Troy stated that he had asked Mr. Thomas many times for a private phone but Mr. Thomas never agreed to get one"; and (4) "Troy also stated that he had been asking Mr. Thomas for about three years for a board to use in case of spinal injury but never got one."

This testimony was not admissible against the corporate defendant. It was not made by an agent of the corporation as it

concerned an act then being done in his representative capacity. It was narrative of a past occurrence. *See Pearce v. Telegraph Co.*, 299 N.C. 64, 261 S.E. 2d 176 (1980). It may be an admission against the defendant Troy Roberson but it is not relevant to any of the acts of negligence alleged against him. It could be very prejudicial to the corporate defendant even with a limiting instruction. We hold it was properly excluded.

[3] The plaintiff contends it was error for the court to exclude the answers to interrogatories addressed to the president of the corporate defendant. These interrogatories dealt with the number of persons who were swimming in the pool at the time of the accident and the names and addresses of witnesses to the accident. The president was not at the pool at the time of the accident. He answered the interrogatories on information and belief. Clearly he did not have personal knowledge of the matters contained in his answers. This evidence was properly excluded.

[4] The plaintiff assigns error to the exclusion of certain testimony from Dr. Lawrence Harris, the pathologist who performed the autopsy on Michael Corda. During the direct examination of Dr. Harris the following colloquy occurred:

> "Q. Dr. Harris, if a lifeguard had gotten to Mr. Corda within one minute of the beginning of the inhalation of water, in your opinion could there have been a successful resuscitation of Mr. Corda?
>
> Mr. Dilthey: Objection.
>
> Court: Overruled.
>
> A. Yes. I think it's possible.
>
> Mr. Dilthey: Objection and move to strike on what is possible.
>
> Court: Well, sustained as to possible. Don't consider that, ladies and gentlemen. Don't consider that question and answer."

The jury was then excused and the following colloquy occurred:

> "Q. Dr. Harris, do you have an opinion satisfactory to yourself based upon a reasonable medical certainty, as to whether or not Michael Corda could have been successfully

resuscitated had a lifeguard gotten to him within 30 seconds of the beginning of the inhalation of water?

. . . .

A. Yes, I do.

Q. What is that opinion?

A. That in all probability he could have survived. Yes."

The court refused to let the witness answer this question before the jury.

We hold it was error to exclude the testimony of Dr. Harris in answer to these two questions. We believe the rule as established by *Mann v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973) and *Walters v. Tire Sales and Service*, 51 N.C. App. 378, 276 S.E. 2d 729 (1981) is that an expert witness may conform his answer to his true opinion. Dr. Harris was an expert. As a pathologist he was better qualified than the jury to form an opinion as to the cause of death and what might have prevented it.

The defendant, relying on *Fisher v. Rogers*, 251 N.C. 610, 112 S.E. 2d 76 (1960) and *Garland v. Shull*, 41 N.C. App. 143, 254 S.E. 2d 221 (1979) argues that the answer to the first question quoted above was properly excluded because it was sheer speculation and conjecture. These two cases dealt with expert medical testimony as to the consequences of personal injury. They hold that in testifying to the consequences of a personal injury an expert may not testify as to possibilities but only in terms of the certain or probable consequences.

We believe that in light of *Mann*, both answers of Dr. Harris should have been admitted on the facts of this case. When both answers are considered together, Dr. Harris' testimony is to the effect that there is only a possibility that Mr. Corda could have been saved if the lifeguard had reached him within one minute of the time he went under water but there was a probability he could have been saved if a lifeguard had reached him within 30 seconds of the time he went under water. We believe this is testimony the jury should have in reaching its decision. If the only testimony had been as to possibility it may be that it should have been excluded pursuant to *Fisher* and *Garland*.

[5] Troy Roberson testified that using a stopwatch he had repeated from six to eight times his actions at the time of the alleged drowning. He testified that he left the lifeguard station each time and folded the chairs and the umbrellas and then went to the edge of the pool. He testified that based on this experiment it was his opinion that approximately 1½ minutes elapsed from the time he left his chair until he reached the edge of the pool and saw Mr. Corda. The plaintiff contends it was error to admit this testimony. She argues that the court admitted testimony as to the results of an experiment which did not correspond in all substantial particulars with those existing at the time of the disputed event. *See Green v. Wellons, Inc.*, 52 N.C. App. 529, 279 S.E. 2d 37 (1981). The plaintiff contends the weather conditions were not the same and there were not the same number of people in the pool. We believe these are factors which go to the weight to be given this testimony by the jury. This assignment of error is overruled.

[6] The plaintiff next assigns error to the exclusion of the emergency room report in regard to Mr. Corda. The parties stipulated to its authenticity and we believe it was error under *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962) to exclude it. We believe it was harmless error as the information contained in the report was received into evidence through testimony of witnesses. We pass on this assignment of error since there must be a new trial.

[7] The plaintiff also assigns error to the testimony of the defendant Troy Roberson as to his observation of Mr. Corda at times prior to 1 August 1980 when Mr. Corda was in the swimming pool. The plaintiff contends this testimony should have been excluded under G.S. 8-51 as testimony concerning a personal transaction with the deceased. We believe Mr. Roberson's observation of Mr. Corda while Mr. Corda was in the swimming pool was an act done while observing the deceased person and not done with the deceased person. It was not a personal transaction with the deceased. *See Brown v. Whitley*, 12 N.C. App. 306, 183 S.E. 2d 258 (1971). We hold this testimony was properly admitted. This assignment of error is overruled.

We do not discuss the plaintiff's other assignments of error as the questions they raise may not recur at a new trial.

New trial.

Judges ARNOLD and BRASWELL concur.

GOODMAN TOYOTA, INC. v. CITY OF RALEIGH

No. 8210SC366

(Filed 6 September 1983)

1. **Municipal Corporations § 30.13— sign control ordinance—prohibiting use of windblown signs—valid exercise of police power**

A city sign control ordinance, including provisions preventing the use of blimps and other windblown signs except under specified circumstances, constitutes a valid exercise of the city's police power and does not violate the due process rights of an automobile dealer who has been using a blimp for advertising purposes.

2. **Municipal Corporations § 30.18— sign control ordinance—amortization period for nonconforming signs—equal protection**

The 90-day period provided by a city sign control ordinance for the amortization of nonconforming windblown and portable signs bears a reasonable relationship to the legitimate purposes of the ordinance and does not violate the equal protection rights of an automobile dealer who has been using a blimp for advertising purposes.

3. **Municipal Corporations § 30.13— sign control ordinance—temporary permits for "special events"—due process**

A provision of a city sign control ordinance allowing temporary permits to be issued for windblown signs only for "special events" and defining "special events" was not so vague as to violate due process.

APPEAL by plaintiff from *Brannon, Judge.* Judgment entered 20 November 1981, amended 1 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 15 February 1983.

This appeal concerns the validity and enforcement of portions of Raleigh Sign Control Ordinance Number 982TC96.

Blanchard, Tucker, Twiggs, Denson & Earls, P.A., by Charles F. Blanchard and Douglas B. Abrams, for plaintiff appellant.

City Attorney Thomas A. McCormick, Jr., by Ira J. Botvinick, Associate City Attorney, for defendant appellee.

BECTON, Judge.

I

Plaintiff, Goodman Toyota (Goodman), is a large automobile dealership located adjacent to a major Raleigh, North Carolina thoroughfare. In addition to its several stationary, on-premises identification signs, Goodman has, since 1977, owned and displayed a white fabric balloon or blimp. The blimp is approximately fourteen feet long, weighs thirty pounds in its unfilled state, and is filled with helium when displayed. It has the words "Goodman Toyota" printed in large red letters on both sides, and is displayed during sales and at other events at the end of a long rope attached to one of plaintiff's buildings.

The ordinance at issue, Number 982TC96, was enacted by defendant City of Raleigh (City) on 2 January 1979 and became effective on 31 January 1979. On 2 May 1979, Goodman filed suit against the City challenging the ordinance on statutory and constitutional grounds. Because that ordinance prohibited Goodman from using its blimp, and because "serious questions under . . . the [City] ordinances . . . state and federal law and . . . the state and federal constitutions [were raised] as to the legality of the ordinance . . .", Goodman also moved for, and Judge James H. Pou Bailey entered, an order in May of 1979, restraining the City from interfering with Goodman's use of its blimp until a hearing on the merits could be held. The City appealed from that order, and ultimately our Supreme Court affirmed by reversing the order of this Court that reversed Judge Bailey's order. *See, Goodman Toyota v. City of Raleigh*, 47 N.C. App. 628, 267 S.E. 2d 714, *rev'd*, 301 N.C. 84, 277 S.E. 2d 690 (1980). In the interim, Goodman amended its Complaint, and the City filed an Answer in response.

Ordinance 982TC96 was amended by ordinance number 448TC128, passed on 2 September 1980. The amended ordinance includes an additional type of sign within its restrictions: "Windblown signs." Ordinance number 448TC128 defines "windblown signs" as "any banner, flag, pennant, spinner, streamer, moored blimp or gas balloon," and provides that the once unlimited display thereof is now prohibited, in the absence of a temporary sign permit. A sign permit allows a user a maximum of 30 days to maintain his sign.

The ordinance also provides that temporary permits can properly be issued only for "special events": "Any activity or circumstance of a business or organization which is not part of its daily activities. [Those] include, without limitation, grand openings, closeout sales . . . and fund raising membership drives or events of civic, philanthropic, educational or religious organizations."

A trial on the merits was held before Superior Court Judge Anthony Brannon beginning 17 December 1980. Evidence was presented by both parties. At the conclusion of the evidence the trial judge made extensive factual findings and legal conclusions, and adjudged, *inter alia*, that: Ordinance Number 982TC986 and all subsequent amendments thereto are constitutional; Goodman was to conform to the ordinance, cease all violations thereof, and comply with a Permanent Prohibitory Injunction and Order of Abatement issued pursuant to statute; the preliminary restraining order issued in 1979 was dissolved; and the plaintiff's action was dismissed with prejudice.

Later, on Goodman's motion, the trial court amended its judgment to include an injunction restraining the City from enforcing the ordinance concerning use of the blimp during any *bona fide* sales event during the pending appeal.

II

Goodman brings forth forty assignments of error and makes five arguments on appeal. The City brings forth four cross-assignments of error and makes one argument on its cross appeal. We will first address Goodman's contentions.

[1] Goodman first argues that the Sign Control Ordinance, as it relates to blimps and other windblown signs, is arbitrary and capricious and thus violates due process as guaranteed by the United States and North Carolina Constitutions because it represents an illegitimate use of the police power and bears no reasonable or substantial relationship to the health, safety, or welfare of the public. Goodman further argues that while the ordinance has as its stated purposes the promotion of traffic safety and fire protection, it cannot reasonably facilitate the achievement of those purposes.

The general rule is that zoning regulations, like all forms of regulations pursuant to the police power, must pass a two-pronged test in order to comply with substantive due process. First, the regulation must be designed to achieve objectives within the scope of the police power. Second, it must seek to achieve those objectives by reasonable means. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). Whether the means are reasonable depends on their promotion of the public good and their reasonably minimal interference with the property owner's right to use his property as he deems appropriate. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E. 2d 444, 449 (1979).

Applying those rules in the case *sub judice* and assuming, as Goodman asserts, that the challenged ordinance has, as its primary goal, the control of community appearance, we nevertheless reject Goodman's contention that aesthetics-based regulations are invalid *per se*. As our Supreme Court held in *State v. Jones*, 305 N.C. 520, 530-31, 290 S.E. 2d 675, 681 (1982): "[R]egulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case." *A fortiori*, when other worthwhile objectives are also realized, for example, improvement of traffic safety and the protection of property values, the challenged regulation will be deemed to be within the scope of permissible purposes properly achieved through use of the police power. *State v. Jones* supports our finding that an ordinance is a reasonable use of the police power if the aesthetic purpose to which the regulation is related outweighs the burdens imposed on the private property owner. Since: (i) the trial court found that Goodman failed to introduce any evidence which revealed a correlation between sales and the display of the blimp; (ii) Goodman does not dispute that finding; and (iii) there was a basis for that finding of the trial court, we hold that the burden, if any, imposed on Goodman by restrictions on its use of the blimp are negligible. Consequently, the benefits derived from the objectives achieved by the statute outweigh any burdens imposed upon Goodman, and the enactment and enforcement of this ordinance, despite its emphasis on aesthetic values, are properly within the City's police power. That aesthetic considerations are key to efficacious zoning regulations should be obvious. Indeed, as one poet observed, tongue not so firmly in cheek:

I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all.

Ogden Nash, *quoted in Metromedia Inc. v. City of San Diego*, 23 Cal. 3d 762, 592 P. 2d 728, 748, 154 Cal. Rptr. 212, 232 (1979), *reversed*, 26 Cal. 3d 848, 610 P. 2d 407, 164 Cal. Rptr. 510 (1980).

Having determined that the ordinance was enacted to achieve legitimate purposes, we must next determine whether it achieves those purposes by reasonable means or, as the test is sometimes stated, whether the ordinance bears a substantial relationship to the purposes it is designed to achieve. It is important to note that any exercise by a municipality of its police power is presumed valid, and when the reasonableness of an ordinance is debatable, judicial discretion gives way to legislative judgment. Consequently, the party challenging the regulation has the burden of showing its unreasonableness. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed*, 422 U.S. 1002, 45 L.Ed. 2d 666, 95 S.Ct. 2618 (1975). It has even been said that a municipality need ensure only that several plausible grounds for the ordinance are stated therein and that the ordinance arguably accomplish a public good and avoid excessive limitations of property interests. *See, e.g.*, Note, *Zoning—Stronger Than Dirt: Aesthetics-Based Municipal Regulations May Be a Proper Exercise of the Police Power*, 18 Wake Forest L. Rev. 1167 (1982). Although we express no opinion as to the wisdom of that sentiment, we nevertheless summarily rule that an ordinance which limits the number of signs in a municipality and prevents the use of temporary and windblown signs except under certain specified circumstances is reasonable, and effects little interference, if any, to the business operations of Raleigh area merchants.

For the foregoing reasons, we reject Goodman's first assignment.

IV

[2] Goodman next attacks the ordinance on equal protection grounds, contending that (i) the ninety (90) day period provided for the amortization of non-conforming on-premises windblown and portable signs, is unreasonably short; (ii) the ninety (90) day

provision invidiously discriminates between temporary and permanent on-premises signs; and (iii) the ninety (90) day period creates an unfair distinction between on-premises and off-premises signs.

Generally, when, as here, a governmental act classifies persons or entities in a manner that does not involve a suspect class or fundamental right,[1] equal protection requirements are not violated so long as the classification bears some rational relationship to a conceivable, legitimate public interest. *Texfi Industries, Inc. v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). Because we have already found that the ordinance is designed to achieve legitimate public interests and because amortization requirements are presumed valid if reasonable, *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975), we now determine if the distinction recognized in the ordinance bears a rational relationship to the achievement of those ends.

An amortization provision in a zoning regulation represents a tacit recognition that owners of properties that do not comply with the subsequent law cannot immediately conform to the change without great personal and economic hardship. An amortization period allows those owners time to recoup the losses inherent in compliance changes while at the same time permitting the governing body to achieve the purposes of the enactment. Further, ninety (90) days is sufficient, in our view, to permit Goodman to cease using its blimp. That conclusion is bolstered by the facts that (i) Goodman took the sign down each day as a matter of course and thus cannot now be heard to say that removal imposes an extra hardship on its operations, and that (ii) Goodman has actually had the four (4) years since the inception of this action, because of the injunction against the City, to bring its on-premises signs into compliance with the ordinance. The actual costs to Goodman to remove the blimp is minimal.[2]

The answer, then, to the question whether the amoritzation provision of the ordinance bears a reasonable relationship to the

1. Goodman does not assert that the ordinance infringes upon one of its fundamental rights or involves a suspect classification.

2. Goodman failed to produce evidence that the absence of the blimp adversely affected its sales in any way.

legitimate ends of controlling sign proliferation, reducing the confusion caused by that proliferation, and limiting distractions to motorists within the city in a manner likely to wreak the least havoc on affected landowners, is yes. We therefore reject Goodman's second argument and hold that the challenged ordinance passes constitutional scrutiny on equal protection grounds.

V

> (98) *Special event.* Any activity or circumstance of a business or organization which is not part of its daily activities. Such activities may include, without limitation, grand openings, closeout sales (pursuant to Article 17 of Chapter 66 of the General Statutes), and fund raising membership drives or events of civic, philanthropic, educational, or religious organizations.

[3] Goodman contends that the above quoted section of the ordinance is so vague that it is constitutionally void. An enactment is void so as to violate Due Process requirements if it either forbids or requires the doing of acts with such imprecision that persons of common intelligence must guess at its meaning. *State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972). The requirements of this section of the ordinance are clear enough to permit those affected by it to know that they are so situated. *State v. Dorsett*, 3 N.C. App. 331, 164 S.E. 2d 607 (1968). We therefore find this argument to be without merit. Because of our resolution of this portion of Goodman's appeal, we need not address its fourth argument.

VI

By its assignments of error one (1), ten (10), fourteen (14), and fifteen (15), Goodman contends that the evidence adduced at trial was insufficient to support certain of the trial court's factual findings. In view of the foregoing discussion, we conclude that error in the findings, if any, was harmless.

VII

We accordingly affirm the judgment of the trial court. Because of our disposition of Goodman's appeal, we need not discuss the City's cross assignments of error.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

GEORGIA SHEPARD v. DRUCKER & FALK, A PARTNERSHIP; FAIRWAY CO., A LIMITED PARTNERSHIP; DAVID FALK, INDIVIDUALLY AND AS A GENERAL PARTNER IN FAIRWAY CO., A LIMITED PARTNERSHIP, AND AS A PARTNER IN DRUCKER & FALK, A PARTNERSHIP; BERNARD KAYDEN, INDIVIDUALLY AND AS A GENERAL PARTNER IN FAIRWAY CO., A LIMITED PARTNERSHIP; E. E. FALK AND ERWIN B. DRUCKER, INDIVIDUALLY AND AS PARTNERS IN DRUCKER & FALK, A PARTNERSHIP

No. 8210SC992

(Filed 6 September 1983)

1. **Evidence § 19.2— assault in parking lot—evidence of prior crimes properly excluded**

In an action by a tenant of an apartment complex owned and operated by defendants to recover for personal injuries suffered when she was sexually assaulted at gunpoint, the trial court properly excluded evidence of prior crimes committed at the apartment complex since in the other crimes the criminals used a passkey to break into apartments which had nothing to do with the way plaintiff was attacked in a parking lot.

2. **Evidence § 48.1— failure to qualify as expert—exclusion of testimony proper**

The trial court properly prohibited a witness from testifying about the relationship between crimes against property and violent crime since the witness was never qualified as an expert by the trial judge.

3. **Evidence § 19.1— assault in parking lot—evidence of lighting at other times properly admitted**

In an action by a tenant of an apartment complex owned and operated by defendants to recover for personal injuries suffered when she was sexually assaulted at gunpoint, the trial court did not err in admitting evidence about the lighting at the apartment complex at times other than when she was attacked and to compare the apartment lighting with that of other complexes.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 23 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 25 August 1983.

This is an action by a tenant in an apartment complex owned and operated by the defendants to recover for personal injuries suffered when she was sexually assaulted at gunpoint. The assaults occurred in the parking lot and her apartment at Fairway Apartments in Raleigh.

The complaint alleged that the defendants were negligent in failing to warn the plaintiff of dangerous conditions in the parking lot, in failing to light it adequately, and in failing to provide adequate security.

The plaintiff testified that she returned home from work about 1:45 a.m. on 5 May 1979. After she got out of her car, a man with a gun grabbed her. He raped her first in her car and then in her apartment. The man was convicted in a criminal action of first-degree rape, kidnapping, and crime against nature.

Five employees of the Wake County Sheriff's Department testified for the plaintiff. They described the crimes that they had investigated which occurred at Fairway Apartments. The crimes included larceny, breaking and entering, and sex offenses. When they investigated crimes at Fairway, they would notify the management that they were on the premises and the type of crime that had occurred.

A number of witnesses described the lighting at the complex as inadequate, with a former employee at the complex testifying that she received a number of complaints from tenants about the lighting.

The plaintiff's final witness was Dr. William Bopp, who testified as an expert in the fields of crime prevention and security criminology. He stated that adequate lighting has a dampening effect on intruder-related crime and that if the only lighting at the complex illuminating the parking lot were lights on the ends of the buildings, additional lighting would have been necessary to provide minimum security for tenants.

Some former managers of Fairway Apartments testified for the defendants. They said that they remembered some property crimes, but no assaults.

A number of the defense witnesses testified that lighting at the complex was adequate and compared favorably with other complexes. Three witnesses said that it was not the custom in Raleigh and North Carolina apartment complexes to hire security guards.

Bruce Marshburn, Deputy Director of the Governor's Crime Commission, testified that there was no correlation between

crimes which might be displaced by lighting, like vandalism of cars, and rape. In his opinion, the rape in this case was not predictable.

The jury decided that the plaintiff was not injured as a result of the defendant's negligence. From that decision, the plaintiff appealed.

Thorp & Slifkin, by William L. Thorp and Anne R. Slifkin, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Sanford W. Thompson, IV, for defendant-appellee.

ARNOLD, Judge.

A landlord is under a duty to its tenant to inspect and repair the common areas of the premises. W. Prosser, Handbook of the Law of Torts § 63 (4th ed. 1971). A tenant is normally seen as an invitee and the liability of a landlord for physical harm to its tenant depends on if it knows of the danger. *See* Restatement (Second) of Torts § 344 (1965), especially comment f:

> f. *Duty to police premises.* [The possessor of land] is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. . . . If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it. . . .

As was stated in *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 640, 281 S.E. 2d 36, 39 (1981): "[U]nder both the Restatement . . . and the prior decisions of this Court, foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons." *Foster* held that a shopping center has a duty to protect its business invitees from the criminal acts of third persons on its premises, specifically, in its parking lot. *See also, Urbano v. Days Inn*, 58 N.C. App. 795, 295 S.E. 2d 240 (1982) (extended the *Foster* rule to a motel parking lot).

Both *Foster* and *Urbano* reversed summary judgment for a defendant and held that the negligence issue was for the jury. The plaintiff in each case introduced evidence of prior third-party crimes that were recent in time.

In *Foster*, there were thirty-six criminal incidents, including four or five assaults, at the shopping center within a one-year period immediately preceding the plaintiff's assault. In *Urbano*, the defendant knew of forty-two criminal incidents on the motel premises within the three years before the plaintiff's injury, with twelve of them within three and one-half months before the injury. None of the incidents in *Urbano* involved an assault on a guest, but there was one armed robbery and seven illegal entries into motel rooms.

The parties here agree with the duty as stated above. They do not agree, however, on a number of the trial judge's rulings on whether testimony and evidence were admissible and on his instructions to the jury.

[1] The plaintiff first contends that the trial judge should not have excluded evidence of prior crimes that she attempted to offer. The four incidents that she raises on appeal were irrelevant and properly excluded.

Evidence about crimes committed at Fairway Apartments when the criminals used a passkey to break into apartments had nothing to do with this attack in the parking lot. Even if it did show that crimes occurred at Fairway, evidence about the passkeys and that the defendants knew that there was a security problem was admitted on a number of occasions, making this one denial harmless error. *U.S. Indus., Inc. v. Tharpe*, 47 N.C. App. 754, 764, 268 S.E. 2d 824, 830, *rev. denied*, 301 N.C. 90, 273 S.E. 2d 311 (1980).

A rape which occurred at Montecito, another complex managed by the defendants, was also irrelevant. It involved the use of a passkey and had nothing to do with the rape in this case. The defendants had sufficient notice that crimes occurred at Fairway without evidence of the Montecito attack.

[2] It was also not error to prohibit Lieutenant Benson from testifying about the relationship between crimes against property and violent crimes. The record shows that Benson was never

qualified as an expert by the trial judge. Absent such a ruling, we will not review exclusion of his testimony on appeal. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). 1 Brandis, N.C. Evidence § 133 (2d rev. ed. 1982). In any case, similar evidence came in through the testimony of other witnesses.

Finally, the alleged rape that occurred in March 1976 in an apartment at Fairway was not probative here because of fact differences. It occurred inside an apartment after someone using a passkey broke in. No one was ever caught or prosecuted for it. In any case, other witnesses referred to it in their testimony.

[3] The plaintiff next argues that it was error to admit evidence about the lighting at Fairway at times other than when she was attacked and to compare the Fairway lighting to that at other complexes. We disagree.

The best method to prove lighting conditions at the time of a crime is to present evidence about lighting at that time. Although much of the defendants' evidence about lighting was at times other than the attack on the plaintiff, this is not reversible error.

The defendants were responding to the plaintiff's witness Dr. Bopp. His testimony about lighting at Fairway was based on observations made over two years after the attack on the plaintiff.

With Bopp's testimony in evidence, it was not error to allow the defendants' witnesses to testify about lighting at times other than when the plaintiff was raped. We note that the defendants' witness Marshburn did not take light readings at Fairway until he "recreate[d] the scene the way it was without those pole lamps [which were added after the attack on the plaintiff]."

It was not error to allow testimony comparing lighting at Fairway with that at other complexes. This was a proper attempt by the defendants to show the common practice among apartment complexes to determine if reasonable care had been exercised in this case. "[I]t does not furnish a test which is conclusive or controlling, and negligence may exist notwithstanding the means and methods adopted in accordance with those customary in the business." *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E. 2d 809, 813 (1962). 1 Brandis, *supra*, at § 95.

A similar rationale applies to the defendants' evidence on the use of security guards by apartment complexes. This was evi-

dence on an industry standard of care for the jury to consider and was not conclusive.

We note that the plaintiff's witness Bopp gave his opinion that security guards were helpful. That opinion was based on his expertise in the security field, which included a knowledge of industry standards.

The plaintiff contends that defense witness Marshburn should not have been allowed to testify about lighting on the Fayetteville Street Mall or about security guards at N. C. State University and crime at those two places. This was not error because the examples were part of the basis of Marshburn's opinions that light does not deter crime and that rape can be predictable if it is part of a pattern, like a series of rapes at N. C. State.

We find no prejudice to the plaintiff from this testimony. It is "desirable and proper for an expert witness to give the reasons upon which he based his opinion. . . ." *N.C. State Highway Comm. v. Forest Lawn Cemetery, Inc.*, 15 N.C. App. 727, 729, 190 S.E. 2d 641, 642 (1972).

The plaintiff's fifth argument is that defendants' former employee Donna Crane should have been allowed to testify about the reaction of an agent of the defendants to the report of crimes at Fairway. Although this was probably excluded properly as hearsay, any error in its exclusion was harmless since there was abundant evidence in the record of notice to the defendants of crimes and their reaction to them.

Plaintiff raised other contentions including exceptions to the jury instruction which she abandoned on oral argument. We find plaintiff's trial was free of prejudicial error.

No error.

Judges WEBB and BRASWELL concur.

HERBERT JOHNSON v. RICHARD MANNING AND SAMUEL APPLEBAUM, INDIVIDUALLY AND AS PARTNERS D/B/A THE HIKING POST

No. 8230DC791

(Filed 6 September 1983)

Partnership § 1.2— formation of limited partnership—genuine issue of material fact

A genuine issue of material fact was presented as to whether an "Agreement and Note" executed by the parties substantially complied with the limited partnership requirements of G.S. 59-2(a) so that plaintiff was not a creditor of defendants' business but was a limited partner who could not receive any part of his contribution to the business until all liabilities of the partnership had been paid or sufficient property of the partnership remained to pay all liabilities. G.S. 59-16(a)(1).

Judge WHICHARD dissenting.

APPEAL by defendants from *Snow, Judge.* Judgment entered 25 May 1982 in District Court, JACKSON County. Heard in the Court of Appeals 18 May 1983.

This is a civil action to collect money allegedly due on a note executed by the parties. In March 1979, the parties signed a document titled "AGREEMENT AND NOTE" (hereinafter the "Note") which states as follows, in pertinent part:

> This Agreement and Note made and entered into this 7 day of March, 1979, by and between RICHARD MANNING and SAMUEL APPLEBAUM, subsequently referred to as "Partners" and Herbert Johnson, subsequently referred to as "Investor;"
>
> WITNESSETH:
>
> 1. That the above Partners for the purpose of establishing a retail/rental hiking and Backpacking store adjacent to the Great Smokey Mountain National Park in Cherokee, North Carolina have agreed between themselves to act as partners in such a business.
> 2. That this Agreement and Note is executed by the Partners and the Investor for the purpose of inducing the Investor to contribute working capital for the start-up of the partnership business.
> 3. That proceeds from the Note and Agreement will be used in the purchase of inventory, equipment and leaseholder

improvements for the Partners' business prior to March of 1979.

4. The Investor has by virtue of his/her contribution of working capital to the Partners no security interest in either inventory or business equipment of the business.

5. That the Partners will execute with other investors Agreements and Notes for amounts of $2,000.00 to generate working capital for the business but no more than $30,000.00 will be raised as investment capital, in this manner. The Partners pledge that they will devote themselves full time to the establishment and operation of this business from and after the 15th day of January, 1979.

6. That repayment of the amounts contributed by the Investor as evidenced by the Note below will be as follows:

   (a) An annual percentage rate of 10% of the amount invested shall be paid quarterly to the Investor.

   (b) That the Note terms shall be for a maximum of three (3) years with no pre-payment penalty in whole or in part for the partners at any time after the first year.

   (c) That the Investor shall have no voting rights in the enterprise nor any equivalent function as shareholders and that this Note and Agreement are in no sense understood by the parties to represent a shareholder or security interest in the business of the Partners.

   (d) That as additional rate of potential interest on the investment, for every $2,000.00 invested during the life of the promissory note from the Partners to the Investor of the Investor shall receive (.15)% of the Gross Sales.

It is understood by Partners and the Investor that each Partner shall be liable for ½ of the Note amount. An addendum was attached to the Note in which repayment of plaintiff's investment was discussed in further detail.

In August 1981, plaintiff initiated this action seeking to recover his investment and the accrued interest under the Note.

In their answer, defendants denied liability on the grounds that plaintiff was a limited partner in the business, and as such, had no claim for return of his investment given that the business had lost money and used up all its assets to pay its liabilities. Plaintiff filed a motion for summary judgment which the court granted based on the pleadings. Defendants appealed.

Robert G. Cowen, for defendant appellants.

No brief filed for plaintiff appellee.

JOHNSON, Judge.

Summary judgment is proper only 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 the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). When a motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). The question presented by this appeal is whether there is a genuine issue of material fact as to whether the parties formed a limited partnership by the execution of the Agreement and Note. By alleging that plaintiff was a limited partner, defendants have raised the issue of whether there was a limited partnership agreement between the parties. Since the only document produced by the parties which evidences an agreement between them is the Note, we assume defendants mean to offer the Note itself as a limited partnership agreement.

The requirements for forming a limited partnership are set out in G.S. 59-2(a), which states that two or more persons may form a limited partnership by executing a certificate stating the name of the partnership, the character of the business, its principal location, and the name and residence of each partner, with each partner being designated as a general or limited partner. The certificate must also state the term for which the partnership is to exist, the amount of cash or other property, and its agreed value, contributed by each limited partner, the circumstances under which additinal contributions are to be made, the time, if

agreed upon, when the contribution of each limited partner is to be returned, the share of the profits or other compensation to which each limited partner shall be entitled, and certain other designated rights, if given. Secondly, the certificate must be filed in the office of the register of deeds in the county where the principal place of business is located. A limited partnership is formed if there has been substantial compliance in good faith with these requirements. G.S. 59-2(b).

The Note executed by the parties does not on its face appear to be a limited partnership agreement because it is not so titled and the parties are not designated as being either general or limited partners. But it does contain many of the characteristics of a limited partnership agreement and much of the information required by G.S. 59-2(a). For example, in the Note, plaintiff agreed to invest a stated amount of money in the business, which was to be established and operated by defendants, in return for a share of the profits, which is characteristic of limited partnership agreements. Further, plaintiff is not to perform any services in the business; his contribution is repeatedly limited to, and characterized as an investment. While the Note does not contain all the information required by statute, it arguably does contain sufficient information for it to be considered in substantial compliance with the statute. While it does not appear from the record that the Note was ever filed in the office of the register of deeds, this is not fatal as the failure to record a certificate does not affect the existence of a limited partnership insofar as the parties *inter se* are concerned. 60 Am. Jur. 2d, Partnership, § 376, p. 259 (1972).

If plaintiff was a limited partner in the business, then his right to recover his investment would be governed by G.S. 59-16(a)(1) which provides that a limited partner shall not receive any part of his contribution until all liabilities of the partnership have been paid or there remains sufficient property of the partnership to pay such liabilities. Defendants alleged that their business failed and that there were no assets left to pay off the limited partner. If defendants' allegations are taken as true, as they must be at this point, then plaintiff is not entitled to relief.

In our opinion, when the evidence is considered in the light most favorable to the defendants, there appears to be a material

issue of fact as to whether the parties formed a limited partnership by the execution of the Note. Therefore, summary judgment for plaintiff was improper, and the judgment of the court must be

Reversed.

Judge EAGLES concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

"Limited partnerships were unknown at common law and are purely creatures of statute. Parties seeking the protection of limited liability within the context of a partnership must follow the statutory requirements." *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wash. App. 929, 934, 587 P. 2d 191, 194 (1978); *see also Klein v. Weiss*, 284 Md. 36, 50, 395 A. 2d 126, 135 (1978). Absent substantial compliance with the governing statute, an "understanding and intent" that a limited partnership is to be created does not suffice to raise a genuine issue of fact. *See Dominion Nat'l Bank v. Sundowner Joint Venture*, 50 Md. App. 145, 157, 436 A. 2d 501, 508 (1981).

G.S. 59-2(b) requires, for the formation of a limited partnership, "substantial compliance in good faith with the requirements of [G.S. 59-2](a)." G.S. 59-2(a) requires that persons desiring to form a limited partnership "[s]ign and swear to a certificate . . . ." The record here contains no signed and sworn certificate of limited partnership.

Assuming, *arguendo*, that the document captioned "Agreement and Note" can be considered a certificate of limited partnership for the purpose of passing on plaintiff's motion, it fails to meet the requirements of the governing statute in the following respects:

(1) It is not sworn to, as required by G.S. 59-2(a)(1) (*see Wisniewski v. Johnson*, 223 Va. 141, 286 S.E. 2d 223 (1982), which held this defect alone fatal to the asserted creation of a limited partnership).

(2) It does not contain the name of the partnership, as required by G.S. 59-2(a)(1)(a).

(3) It does not state the residence of each member, as required by G.S. 59-2(a)(1)(d).

(4) Unless the term "investor" is construed to mean "limited partner," it does not designate the general and limited partners, as required by G.S. 59-2(a)(1)(d).

(5) It does not contain the term for which the partnership is to exist, as required by G.S. 59-2(a)(1)(e).

(6) While not fatal, standing alone, insofar as the parties *inter se* are concerned, 60 Am. Jur. 2d, Partnership, § 376, at 259 (1972) (cited in the majority opinion), it was not recorded as required by G.S. 59-2(a)(2).

Where, as here, the record contains no evidence, and the decision must be derived solely from the pleadings, a motion for summary judgment will be considered as though made under G.S. 1A-1, Rule 12(c), for judgment on the pleadings. *Burton v. Kenyon*, 46 N.C. App. 309, 310, 264 S.E. 2d 808, 809 (1980); *Reichler v. Tillman*, 21 N.C. App. 38, 40, 203 S.E. 2d 68, 70 (1974). So treating plaintiff's motion, and in light of the foregoing, I would hold as a matter of law that the parties have neither attempted to comply nor substantially complied in good faith with the statutory requirements for formation of a limited partnership. Defendants' answer raises no other defense to plaintiff's claim. I therefore vote to affirm the judgment for plaintiff.

LUCILLE K. GARDNER v. BUDDY J. GARDNER

No. 8221SC685

(Filed 6 September 1983)

1. Divorce and Alimony § 17— enforcing judgment of community property state—military non-disability retired pay not subject to community property laws

Where plaintiff and defendant were divorced in Louisiana, and where pursuant to the community property law of California where the parties had domiciled, the Louisiana court found plaintiff had a forty percent interest in defendant's non-disability military retired pay, the judgment ordering defendant to make payments in accordance with plaintiff's interest in that pay was error since military non-disability retired pay is a personal entitlement, and is

not a property interest subject to state community property laws. *McCarty v. McCarty*, 453 U.S. 210 (1981).

2. Divorce and Alimony § 19— legal basis for consent judgment no longer existing—consent judgment no longer equitable

Where Louisiana judgments concerning alimony were rendered, settlement terms were negotiated, and a North Carolina consent judgment was entered on the basis of an interpretation of law that has since been expressly and specifically rendered incorrect by the United States Supreme Court, the legal basis for a consent judgment no longer existed, and it was no longer equitable to require defendant's compliance with it.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Beaty, Judge.* Judgment entered 2 March 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 May 1983.

This is a civil action wherein plaintiff seeks to enforce a Consent Judgment which provides for the payment of certain sums to plaintiff by defendant in satisfaction of plaintiff's alleged ownership interest in defendant's non-disability military retired pay.

Plaintiff wife and defendant husband were divorced in Louisiana in November of 1976. Thereafter, in 1977, plaintiff filed suit in Louisiana seeking a judicial division of "the community of acquets and gains." Among those things with respect to which plaintiff sought the division was defendant's military non-disability retired pay. This retired pay was based on defendant's 20 years service in the Navy. During most of defendant's time in the service, he was married to plaintiff and was found, for the purposes of the suit, to have been domiciled in California. Applying California community property law, the Louisiana Court found that plaintiff had a forty percent interest in defendant's retired pay and rendered a judgment dated 16 August 1978, that read, in pertinent part, as follows:

> ORDERED, ADJUDGED AND DECREED that Lucille K. Gardner be and she is hereby recognized as having a forty percent (40%) ownership interest in and to the Naval Retirement pay of Buddy J. Gardner, and it is further
>
> ORDERED, ADJUDGED AND DECREED that defendant, Buddy J. Gardner account and pay to the plaintiff Lucille K. Gardner, the amounts representing her forty percent (40%) ownership

interest retroactively to the date that this suit for partition was filed, February 4, 1977.

A later judgment ordering defendant to make back payments to plaintiff in accordance with the 16 August 1978 judgment, and to continue to comply with its terms, was obtained in Louisiana by plaintiff on 16 October 1979.

The present action was initiated on 2 June 1980 when plaintiff filed a Complaint in Superior Court of Surry County. The Complaint asked the court to recognize and enforce the Louisiana judgments against defendant, who had relocated to North Carolina. Defendant answered, alleging, *inter alia*, a change in circumstances as entitling him to a reduction in his obligations under the Louisiana judgments. On 10 March 1981, plaintiff and defendant entered into a Consent Judgment which provided that defendant pay plaintiff a lump sum of $1,000 and $200 per month thereafter. The Consent Judgment released defendant from any other claims by plaintiff for support and alimony as long as defendant complied with the terms of the Consent Judgment. Defendant has made one payment of $300 but has not made any other payments.

On 8 September 1981, plaintiff filed a motion and the court issued an order pursuant thereto requiring defendant to show cause why he should not be held in contempt of court for failure to comply with the Consent Judgment. The matter was continued on 5 October 1981 and transferred by consent to Forsyth County on 16 November 1981.

On 18 October 1981, defendant filed a motion, pursuant to Rule 60(b)(5) of the North Carolina Rules of Civil Procedure for relief from the operation of the Consent Judgment. As the basis for his motion, defendant cited the United States Supreme Court case of *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728, decided 26 June 1981, for the proposition that military non-disability retired pay was not subject to state community property laws. Continued operation of the Consent Judgment, defendant contended, was therefore inequitable and he was entitled to relief from it.

A hearing on the motions was held on 1 March 1982. The court, on 2 March 1982, entered an order concluding: (1) that pur-

suant to the 10 March 1981 Consent Judgment, defendant was $1,900 in arrears to plaintiff, (2) that *McCarty v. McCarty* was controlling as to plaintiff's alleged ownership interest in defendant's military retired pay, and (3) that prospective operation of the Consent Judgment was no longer equitable as to defendant. Accordingly, the court granted defendant's motion for prospective relief, denied plaintiff's motion for contempt, and directed that defendant make appropriate payments to plaintiff. From this order, plaintiff appealed.

Harper, Wood, and Brown, by Gordon H. Brown, for plaintiff appellant.

Badgett, Callaway, Phillips, Davis, Stephens, Peed, and Brown, by B. Ervin Brown, II, for defendant appellee.

JOHNSON, Judge.

[1] The first question raised by plaintiff's appeal is whether the case of *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981), is controlling with respect to the case before us. We hold that it is. Without reiterating the reasoning in *McCarty*, that case held that military non-disability retired pay was a personal entitlement, not a property interest and that state courts are precluded by federal law from dividing this payment upon dissolution of a marriage. Thus, military non-disability retired pay is not subject to state community property laws.[1] *See Eubanks v. Eubanks*, 54 N.C. App. 363, 283 S.E. 2d 396 (1981).

Plaintiff argues that *McCarty* is distinguishable from the present case in that North Carolina is not a community property jurisdiction. This argument is meritless. *McCarty* involved the application of California's community property law to military non-disability retired pay. The present case involves the same law and the same alleged property interest. The only difference is that in the present case, a North Carolina court is enforcing a Louisiana judgment which applied California law. The interposition here of several judgments and two different states is of no

1. Although it does not affect this decision, we note that, since *McCarty*, Congress has enacted 10 U.S.C. 1408, effective 1 February 1983, which allows state courts to treat military retired pay as a property interest with regard to all final decrees of divorce dated on or after the effective date of the statute.

consequence. The law and the property interests in the cases are identical for all purposes pertinent here and we answer plaintiff's argument accordingly.

[2] The other question raised by plaintiff's appeal is whether defendant's right to relief is affected by the fact that the judgment from which defendant seeks relief is a Consent Judgment. Plaintiff argues that the Consent Judgment is a negotiated monetary settlement between the parties, that it is not a division of property and, therefore, that it is not affected by *McCarty.* In support of her argument, plaintiff points out that the Consent Judgment does not grant the relief requested in the Complaint, to wit: that the court recognize her forty percent property interest in defendant's military retired pay. Rather, the Consent Judgment merely directs the payment of certain sums to plaintiff and releases defendant from any claims by plaintiff for support or alimony.

Plaintiff's argument asks us to ignore completely the very basis of this dispute. The Louisiana judgments that recognize and seek to enforce plaintiff's purported property interest are the grounds for her Complaint. Without these judgments, plaintiff would have no basis for the negotiations that led to the Consent Judgment. The terms of the Consent Judgment represent a negotiated settlement between the parties. The entry of judgment by the court and its order directing defendant to pay certain sums to plaintiff in satisfaction thereof lends legal sanction and judicial enforceability to the settlement. *Walters v. Walters,* 307 N.C. 381, 298 S.E. 2d 338 (1983); *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882 (1961); *see generally,* Lee, N.C. Family Law § 149 (1980).

However, the Louisiana judgments were rendered, the settlement terms negotiated, and the North Carolina Consent Judgment entered on the basis of an interpretation of the law that has since been expressly and specifically rendered incorrect by the highest court in the land. Defendant's motion under Rule 60(b)(5) asks the trial court to recognize that, insofar as the legal basis for the Consent Judgment no longer exists, it is no longer equitable to require his compliance with it. *Theriault v. Smith,* 523 F. 2d 601 (1st Cir. 1975). That the judgment that actually divided the property was rendered in a foreign jurisdiction and that there is an intervening judgment enforcing that division in this state are

of no consequence. The Consent Judgment was rendered in North Carolina and it is the operation of that judgment from which defendant seeks relief. Inasmuch as the interpretation of the law embodied in the Consent Judgment has been rendered incorrect by the United States Supreme Court, the continued operation of that judgment is inequitable with respect to defendant and he is entitled to prospective relief from it. The trial court correctly granted defendant's motion under Rule 60(b)(5).

In so holding, we note that the trial court's grant of defendant's motion and our decision here are necessarily limited in their application to the 10 March 1981 Consent Judgment entered in Surry County and have no affect on the judgments rendered by the Louisiana courts.

In light of the foregoing decision, we need not address the trial court's denial of plaintiff's motion for contempt except to say that under the circumstances of this case the motion was properly denied. The judgment appealed from is

Affirmed.

Judge HILL concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though defendant had successfully avoided his legal obligations to the plaintiff for several years, the legal advantages in her continuing effort to obtain support payments from him were all in her favor in March, 1981, when the consent judgment was entered. Under valid, unappealed Louisiana judgments going back to 1977, she was a forty percent owner of his Naval Retirement Pay and he had been adjudged to be indebted to her in the sum of $6,085, together with costs and interest at seven percent. In March, 1981, after she had sued on her judgments here, defendant got the plaintiff to compromise all of her rights and claims against him, both under the judgments and otherwise, by paying her only $1,000 and promising to pay her $200 a month until his 62nd birthday, or she remarried, whichever occurred first. The settlement so made was incorporated in and solemnized by a con-

sent judgment entered by the Surry County Superior Court. In my view this was a final, binding settlement, fairly bargained for, in nowise contingent upon a future decision of the United States Supreme Court, or any other court, as to the validity of California's or any other state's community property laws as applied to Naval Retirement Pay. The essence of all settlements, as the law has always recognized, is accepting today's reality in lieu of the future's uncertainties. I see nothing in *McCarty v. McCarty* that requires the modification of this salutary principle.

My vote, therefore, is to reverse the order appealed from and to reinstate the consent judgment.

J. D. HANES DUGGINS AND WIFE LUCY TAYLOR DUGGINS v. TOWN OF WALNUT COVE

No. 8217SC544

(Filed 6 September 1983)

1. **Municipal Corporations § 30.12— mobile homes—authority to enact zoning ordinance**

A town was authorized by G.S. 160A-381 to enact a zoning ordinance prohibiting the use of mobile homes on lots zoned R-20 for single-family residential use and permitting mobile homes only in districts zoned R-6 MH, and the ordinance was not an impermissible attempt to regulate construction practices.

2. **Municipal Corporations § 30.12— mobile homes—validity of zoning ordinance**

A town zoning ordinance prohibiting the use of mobile homes on lots zoned R-20 for single-family residential use while permitting the use of modular or site-built homes in such zoning districts does not violate the due process clause of the U.S. Constitution, the law of the land clause of the N.C. Constitution, or the equal protection clauses of the U.S. and N.C. Constitutions and is a valid exercise of the police power, since the classification of mobile homes differently from modular and site-built homes is rationally related to the legitimate governmental objective of protecting the value of other homes in the area. XIV Amendment to the U.S. Constitution; Art. I, § 19 of the N.C. Constitution.

APPEAL by plaintiffs from *Long, Judge.* Judgment entered 23 April 1982 in Superior Court, STOKES County. Heard in the Court of Appeals 14 April 1983.

This is an action brought by plaintiffs against defendant Town of Walnut Cove in which they seek (1) a declaratory judg-

ment that the town's zoning ordinance, to the extent it prohibits the use of mobile homes as permanent residences on individual lots zoned for single-family residential use, is in excess of defendant's statutory authority, or alternatively, is unconstitutional as a denial of substantive due process and equal protection; (2) a permanent injunction against the enforcement of the ordinance; (3) damages; and (4) costs.

The named plaintiffs own a tract of land within the Town of Walnut Cove in an area zoned R-20 for single-family residential use. In May 1981 plaintiffs described to defendant's town clerk/zoning administrator the type of manufactured home they intended to erect on their property and were assured this home complied with local ordinances. Defendant issued a building permit to plaintiffs and accepted their payment of $200 as a water tap fee. Subsequently, plaintiffs purchased a mobile home in the good faith belief that it could legally be located on their land in Walnut Cove. However, when plaintiffs had their two-section home delivered and prepared to install it on their lot, they were informed that the home was a "mobile home" as defined under the town's zoning ordinance and therefore was not permissible in the zoning district.

The zoning ordinance creates three classes of single-family residences: mobile homes, modular homes, and site-built homes. Both mobile and modular homes are constructed in factories and assembled or installed at the site. The ordinance defines a mobile home as follows:

> "A detached residential dwelling unit designed for transportation after fabrication on its own wheels and arriving at the site where it is to be occupied as a dwelling unit complete with necessary service connections and ready for occupancy, except for minor and incidental unpacking and assembly operations including, but not limited to, location on jacks or other temporary or permanent foundation, and connection to utilities. Recreational vehicles and modular homes shall not be considered mobile homes."

By this definition, the home purchased by plaintiffs is a mobile home.

Modular homes are defined by the ordinance as "[a]ny building or closed construction which is made or assembled in

manufacturing facilities on or off the building site for installation or assembly and installation on the building site other than mobile homes or recreational vehicles." Mobile homes are constructed in accordance with federal standards promulgated by the U.S. Department of Housing and Urban Development whereas modulars are constructed in accordance with the N.C. State Building Code. According to the zoning ordinance, modular homes are permitted in any district where site-built homes are allowed.

Defendant's ordinance permits mobile homes in certain districts zoned R-6 MH but prohibits them in the more restrictive residential R-20 districts. The ordinance effects a per se exclusion of all mobile homes in residential districts other than the R-6 MH districts, regardless of the size, dimensions, or appearance of the homes, and regardless of whether they have been constructed according to applicable code requirements, have lost all semblance of mobility by being attached to a permanent foundation or are otherwise indistinguishable from permitted modular or site-built homes.

Defendant filed an answer to the complaint and a motion for judgment on the pleadings. After a hearing, the court granted defendant's motion. From the judgment entered, plaintiffs appealed.

Michael B. Brough for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr., for defendant appellee.

Jordan, Crown, Price and Wall, by R. Frank Gray for amicus curiae North Carolina Manufactured Housing Institute.

WEBB, Judge.

[1] In their first argument, plaintiffs contend that defendant's attempt to "zone out" mobile homes as defined in the ordinance exceeds defendant town's statutory authority both because the zoning enabling act does not authorize defendant to regulate the types of structures used for single-family residential purposes and because defendant's ordinance constitutes a back door attempt to intrude into a field preempted by state and federal law. We disagree.

G.S. 160A-381, which authorizes municipalities to enact zoning ordinances within specified guidelines, provides in relevant part:

> "For the purpose of promoting health, safety, morals, or the general welfare of the community, any city is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Plaintiffs maintain that the only characteristic under the ordinance that differentiates mobile homes from modular and site-built homes is that they are constructed in accordance with different building codes. Because of this, they interpret the zoning ordinance as having the effect of distinguishing between structures used for the same purpose—single-family residences—based solely on the construction methods and materials used. We do not agree with plaintiffs' interpretation of the ordinance. It is obvious from the definitions in the ordinance that the different applicable building codes is not the only factor differentiating mobile homes from modular homes. Therefore, the ordinance does not have the effect suggested by plaintiffs. Defendant is clearly authorized by G.S. 160A-381 to regulate and restrict the location and use of any buildings or structures for residential and other purposes, and that is exactly what defendant has done in restricting the location of mobile homes.

Similarly, plaintiffs attack the ordinance on the grounds it is an impermissible attempt to regulate construction practices. Defendant's ordinance was not intended to and does not have the effect of regulating construction practices in any way. Rather, the ordinance deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiffs' attempt to read more into defendant's enactment of the ordinance is not warranted. Accordingly, we hold both aspects of plaintiffs' first argument are meritless.

[2] The plaintiffs also challenge the constitutionality of the zoning ordinance. They argue that it violates the Fourteenth Amendment to the United States Constitution and Article I, Section 19

of the Constitution of North Carolina. The Fourteenth Amendment provides in part:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 19 provides in part:

> "No person shall be . . . deprived of his . . . property, but by the law of the land. No person shall be denied the equal protection of the laws."

The plaintiffs also contend that the enforcement of the ordinance is not within the police power of defendant Town of Walnut Cove. We believe the test as applied in this case is the same for the due process, law of the land, and equal protection clauses of the United States and North Carolina Constitutions as well as the validity of the exercise of the police power by defendant Town of Walnut Cove. If the enactment and enforcement of the zoning ordinance is rationally related to a legitimate governmental objective, the plaintiff in this case must fail. *See Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed. 2d 784 (1980), and *Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E. 2d 542 (1970).

We upheld a similar zoning ordinance against constitutional attack in *Currituck County v. Willey*, 46 N.C. App. 835, 266 S.E. 2d 52 (1980). The plaintiffs contend *Currituck* does not control. They argue that *Currituck* holds that the property owner in that case did not offer evidence sufficient to overcome the presumption of the constitutionality of the ordinance whereas in this case they make allegations in their complaint which if proven will show that the ordinance is unconstitutional. Assuming plaintiffs are correct in their reading of *Currituck*, we believe their attack on the Walnut Cove ordinance must fail.

If any state of facts can be conceived that will sustain the zoning ordinance, the existence of that state of facts must be assumed. *Mobile Home Sales, Inc. v. Tomlinson, supra* at 669. In this case the ordinance classifies mobile homes differently from modular and site-built homes based on the method of construction. The protection of property values in the zoned area is a legitimate governmental objective. We believe that the method of construction of homes may be determined by a city governing

board as affecting the price of homes. The prohibition of such buildings is rationally related to the protection of the value of other homes in the area. We cannot interfere with this legislative decision.

The plaintiffs argue at length that they can prove, if given the chance, that once mobile homes are in place, they sell at prices comparable to site-built and modular homes. We do not believe we should make this factual determination. This is a matter for the governing body of Walnut Cove. We believe they were rational in their decision.

The North Carolina Manufactured Housing Institute has filed a brief in which they make a very persuasive argument that mobile homes should not be excluded from areas in which site-built homes and modular homes may be placed. We believe this is an argument which should be made to the City Council.

Affirmed.

Judges WHICHARD and BRASWELL concur.

MICHAEL M. NORMILE AND WAWIE KURNIAWAN v. HAZEL ELIZABETH MILLER

LAWRENCE J. SEGAL v. HAZEL ELIZABETH MILLER

No. 8226SC999

(Filed 6 September 1983)

Contracts § 27— two offers to purchase property—counteroffer of one offer not considered option

Where one set of plaintiffs made an offer to purchase defendant's property which contained a provision that the offer must be accepted before 5:00 p.m. on August 5th, where defendant made several changes in the terms of the sale and signed the seller's acceptance portion of the contract for sale, where the sales agent took the counteroffer to the first set of plaintiffs and the plaintiffs indicated that they would be unable to agree to certain portions of the counteroffer, and where the second plaintiff signed an offer which defendant accepted and which the agent took to the first set of plaintiffs indicating that defendant had revoked the counteroffer, the trial court properly found that by accepting the second plaintiff's offer to convey the property, defendant re-

voked her original offer to the first set of plaintiffs. The fact that the counteroffer provided that the offer would remain open until 5:00 p.m. and was signed under seal did not make the offer irrevocable as an option.

APPEAL by plaintiffs from *Sitton, Judge.* Judgment entered 26 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 August 1983.

Parker Whedon for plaintiff appellants, Normile and Kurniawan.

Levine, Goodman & Carr by Miles S. Levine for plaintiff appellee, Lawrence J. Segal.

BRASWELL, Judge.

In these consolidated cases separate plaintiffs, each a would-be buyer of real property, sued defendant-owner for specific performance of identical written contracts to sell the same parcel of real estate on Oakland Avenue in Charlotte. When summary judgment was granted in favor of plaintiff Segal and when plaintiffs Normile and Kurniawan's similar motion was denied, Normile and Kurniawan appealed.

The central issue is whether a counteroffer by defendant Miller to Normile and Kurniawan constituted a binding and enforceable option contract to sell land, or whether the counteroffer was revoked by Miller's intervening separate sale to Segal. Miller gave notice of revocation by sale to Normile and Kurniawan prior to their purported acceptance of the counteroffer. The contract contained the word "Seal" after Miller's signature to the counteroffer. No actual consideration for the counteroffer was given.

The undisputed ultimate facts show that on 4 August 1980 defendant Miller was owner of the Oakland Avenue real property and that she listed it for sale with a realtor, Gladys Hawkins. Richard Byer, a real estate broker with the firm Gallery of Homes, showed the property on the same date to plaintiffs Normile and Kurniawan.

On 4 August 1980 Normile and Kurniawan made a written offer to purchase, prepared with the help of Byer, on certain terms and conditions. A provision of the offer was: "9. OFFER & CLOSING

DATE: Time is of the essence, therefore this offer must be accepted on or before 5:00 p.m. Aug. 5th, 1980. A signed copy shall be promptly returned to the purchaser." Other provisions of the contract were: "This offer and the acceptance thereof shall constitute the entire agreement . . . . This offer, when accepted is legally binding . . . ."

The offer was promptly delivered to defendant Miller who made several changes in the terms of the sale, such as, the amount of the binder ($100 to $500), the amount of the down payment ($875 to $1,000), and the term of the purchase money financing (25 years to 20 years). Miller initialed the changes and signed paragraph 10, the seller's acceptance portion of the document. No change was made to the "Time is of the essence" portion of the form contract.

We now turn to the crucial conversation and action of the parties when Byer delivered the counteroffer to Normile at about 8:00 p.m., 4 August 1980. Byer testified through his deposition that Normile "said that he couldn't get the $500.00 because he was waiting on a 2nd mortgage on his house to go through and he mentioned something like he had only begun to negotiate or something like that." Also, Normile said to Byer, "he told me he didn't have the $500.00 and then he told me that he didn't want to go 25 years because he wanted lower payments." Byer knew Normile's interpretation of the contract from that meeting was that he "had the thing off the market and that he had first option on it . . . [and that] nobody else could put an offer in on it and buy it while he had this counteroffer, so he was going to wait awhile before he decided what to do with it." Byer left one pink copy of the counteroffer with Normile. When he departed, Byer considered the counteroffer as having been rejected.

Early in the morning on 5 August 1980, Byer went to the home of Larry Segal who signed an offer containing almost the identical terms of Miller's counteroffer to Normile and Kurniawan. Later that day, Byer took the Segal offer to Gladys Hawkins advising her of the latest development in the negotiations with Normile and Kurniawan. Subsequently, Miller signed Segal's offer.

Around 2:00 p.m. the same day, after delivering Segal's offer to Hawkins, Byer informed Normile, in less than eloquent terms,

that Miller had revoked the counteroffer by stating, "you snooze, you lose; the property has been sold." Yet, prior to 5:00 p.m., Normile and Kurniawan initialed Miller's counteroffer and delivered it to the office of the Gallery of Homes along with the required $500.00 binder despite their knowledge that Miller had already sold the property. When Miller refused to convey the property to either party, both prospective buyers filed independent actions seeking specific performance. After the trials were consolidated, each plaintiff made a motion for summary judgment. The trial court denied the motion of Normile and Kurniawan but granted Segal's motion for summary judgment, ordering Miller to specifically perform the contract to convey to Segal.

A motion for summary judgment is an attempt by a party to avoid the necessity of trial by exposing a fatal weakness in the claim or defense of his opponent. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The moving party has the burden of establishing that there is no genuine issue as to any material fact, entitling him to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). This motion requires the movant and the opponent to produce a forecast of the evidence he will present at trial. *See* 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Phillips' Supp. 1970). The court may consider evidence consisting of admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, testimony, and documentary materials. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). When there is no genuine issue as to any material fact, and when the law applicable to those facts show that a particular party is entitled to relief, the trial court should give judgment accordingly. *Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982).

To determine which party is entitled to judgment as a matter of law in this case depends on whether an enforceable option contract was formed between Normile and Kurniawan and the property-owner Miller. "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." Restatement (Second) of Contracts § 25 (1981). If no enforceable option was created, then the summary judgment granted in favor of Segal and against Normile and Kurniawan was proper.

The facts indicate that the first attempt to establish a contractual relationship between the parties was made by Normile and Kurniawan through their offer to purchase Miller's property. To constitute an acceptance, the offer "must be accepted in its exact terms." *Dobbs v. Trust Co.*, 205 N.C. 153, 156, 170 S.E. 652, 653 (1933). By making substantial changes in the offer submitted by Normile and Kurniawan, Miller did not accept their offer but made a counteroffer, substituting a different bargain than that proposed by the original offer. *See* Restatement (Second) of Contracts § 39 (1981). The counteroffer provided that the offer would remain open until 5:00 p.m. on 5 August 1980 and was signed under seal by Miller. Normile and Kurniawan contend that as a result of this language within the contract a binding option was formed, making the offer irrevocable and precluding Miller from selling the property to Segal before the expiration of the stated period. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). In order to enforce the option, it must have been based on valid consideration. At common law a seal "imports a consideration or takes the place thereof." 17 C.J.S. *Contracts* § 72 (1963). *See Honey Properties, Inc. v. Gastonia*, 252 N.C. 567, 114 S.E. 2d 344 (1960).

The significance of the seal at the present time varies with each jurisdiction. Restatement (Second) of Contracts § 94, Topic 3, pp. 255-60 (1981). In North Carolina by judicial decision, the seal as it effects consideration has lost much of its importance. In actions seeking equitable relief, it has always been permissible for the court to look behind the seal and refuse to act unless the seal is supported by actual consideration. *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963); *Britton v. Gabriel*, 2 N.C. App. 213, 162 S.E. 2d 686 (1968); *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971). Even in actions traditionally at law, the effect of the seal is not to preclude the court from dealing with the issue of consideration entirely, but the seal merely raises a presumption of consideration which must be rebutted by clear and convincing evidence. *Loman-Garrett Supply Company, Inc. v. Dudney*, 56 N.C. App. 622, 289 S.E. 2d 600 (1982).

In *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E. 2d 721 (1978), *aff'd*, 297 N.C. 32, 253 S.E. 2d 264 (1979), this court faced a similar situation. The plaintiff was seeking specific performance of an option contract which was signed under seal, but appeared to be

supported by no other consideration. The court stated that in cases where equitable relief was sought, the court will go back of the seal and will refuse to act unless actual consideration has been given. Id. at 394, 244 S.E. 2d at 724. The court ordered specific performance of the option contract, holding that the plaintiff's extensive efforts to obtain a buyer for the property constituted valuable consideration.

Looking behind the seal in the present case, the record is devoid of any evidence that any consideration was given which would have made the offer irrevocable as an option. Since the promise to hold the offer open until 5:00 p.m., 5 August 1980, was not supported by consideration, it could be revoked at any time. "An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect." Restatement (Second) of Contracts § 43 (1981). By accepting Segal's offer to convey the property, Miller revoked her offer to Normile and Kurniawan. Once they received notice from Byer that the property had been sold, the revocation became effective and their power to accept Miller's counteroffer was terminated. Thus, their subsequent signing of the counteroffer and its delivery to the realtor's office was an insufficient attempt to bind Miller to the contract. We hold that since only Segal entered into a binding contract to purchase from Miller, the trial court properly granted his motion for summary judgment and properly denied the motion made by Normile and Kurniawan.

Affirmed.

Judges ARNOLD and WEBB concur.

MRS. ALICE McMILLAN BROWN v. ATTORNEY GORDON A. MILLER, AND ATTORNEY JAMES A. BEATY, JR.

No. 8221DC991

(Filed 6 September 1983)

1. Partition § 10.1 — collateral attack on partition sale

Plaintiff's complaint in an action to set aside a commissioners' deed resulting from a judicial partition sale on the ground of fraud by the commis-

sioners was properly dismissed for failure to state a claim for relief since (1) plaintiff's proper remedy was by appeal pursuant to G.S. 1-272 or by motion in the cause before the clerk who had exclusive jurisdiction over the subject matter, and plaintiff's independent action constitutes an impermissible collateral attack on a judicial sale; (2) plaintiff has no right to bring an action to impeach the clerk's confirmation of the sale under the second part of G.S. 46-19 because the statute permits only a motion in the cause, plaintiff failed to set forth any facts showing that the purchaser at the sale was not an innocent purchaser for value, and the statute does not apply to partition sales; and (3) plaintiff cannot maintain the action because of her failure to join the purchaser, a necessary party under G.S. 1A-1, Rule 19. G.S. 1-339.28(a).

2. Limitation of Actions § 8.1— claim based on fraud—statute of limitations

Plaintiff's claim that she is entitled on the basis of fraud to the return of deposits she made on two occasions as highest bidder at a judicial partition sale was barred by the three-year statute of limitations of G.S. 1-52(9).

APPEAL by plaintiff from *Tash, Judge.* Order entered 27 May 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 23 August 1983.

William T. Graham for plaintiff appellant.

Gordon A. Miller, defendant appellee, pro se.

Billy D. Friende, Jr., for defendant appellee, James A. Beaty, Jr.

BRASWELL, Judge.

The plaintiff seeks to have a commissioner's public sale set aside and the commissioner's deed given from the sale declared null and void. The defendants are the co-commissioners who conducted the sale and conveyed the property in question. The property was owned by the plaintiff and her former husband who sought the partition as a result of their divorce. The plaintiff seeks relief on the basis of fraud and other irregularities in the sale allegedly committed by the defendants. The trial judge, upon the defendants' motions dismissed the action for failure to state a claim upon which relief can be granted. G.S. 1A-1, Rule 12(b). The basic issue on appeal is whether the motions to dismiss were properly granted.

Essentially, from the complaint as amended, the facts are as follows. On 28 April 1978, the property of the plaintiff and her former husband was sold at public auction by an Order of Sale

issued by the Clerk of Superior Court. The highest bidder at this sale was the plaintiff who bid $15,025.00 and paid a deposit of $751.25 on the property as directed by the defendants. A report of this sale was filed by the defendants with the Clerk on 9 May 1978.

An upset bid was filed by the plaintiff's former spouse, Robert Lindsay Brown, on 11 May 1978. The property was resold on 21 June 1978 and the plaintiff again became the highest bidder, depositing $273.75 with the defendants.

On 5 July 1978, the plaintiff offered to pay directly to Robert Lindsay Brown his one-half share of her bid. This offer was rejected by Brown and his attorney who insisted that the plaintiff pay the full amount of her bid. When the plaintiff refused, she was determined to be in default, and the property was again sold on 10 November 1978. Walter Jack Davis became the highest bidder for $26,000.00.

Upon expiration of the upset bid period and upon the request by the defendants, the sale was confirmed by the assistant clerk of court on 12 December 1978. A commissioner's deed to Davis was recorded on 19 December 1978. The plaintiff filed this action on 19 April 1982.

To determine whether the trial court properly granted the Rule 12(b)(6) motion, the accepted rule provides that " 'a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Sutton v. Duke,* 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970), quoting 2A J. Moore Federal Practice ¶ 12.08 (2d ed. 1968). Therefore, if the complaint discloses an unconditional affirmative defense which defeats the claim asserted, it will be dismissed. *Id.* at 102, 176 S.E. 2d at 166. We hold the trial judge was correct in granting the motion because affirmative defenses on the face of the complaint prevent the plaintiff from stating a claim upon which relief may be granted.

[1] First of all, the plaintiff in bringing an independent action in district court is attempting to avoid the judicial sale by collateral attack. On the face of the complaint, the plaintiff indicates that the nature of this case is a partition sale. G.S. 46-28 states that

partition sales are to be governed by Chapter 1, Article 29A which sets out the procedure for judicial sales. The method of attacking the sale by the plaintiff should then be direct, either by motion in the cause or by appeal pursuant to G.S. 1-272. In *Baggett v. Lanier*, 178 N.C. 129, 131, 100 S.E. 254, 255 (1919), the court stated that "[i]f the proceeding was irregular, the proper remedy is not by attacking it collaterally but by a motion in the original cause to have the same set aside."

G.S. 1-339.28(a) provides in part that "No public sale of real property may be consummated until confirmed as follows: . . . (3) If a public sale is ordered by a clerk of court, it may thereafter be confirmed by clerk of court so ordering." This provision gives the clerk of superior court original jurisdiction over sales ordered by the clerk. Because plaintiff's claim is based on fraud committed in a special proceeding, the plaintiff was required to make a motion in the cause to the clerk who had exclusive jurisdiction over the subject matter.

The plaintiff also had an avenue of appeal from the clerk of which she did not avail herself pursuant to G.S. 1-272. This appeal must be taken within ten days after the clerk's judgment to entitle the plaintiff to a review in the superior court. *Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E. 2d 501 (1980). A judgment of confirmation of a judicial sale is a final judgment. *Menzel v. Menzel*, 254 N.C. 353, 119 S.E. 2d 147 (1961). So, the plaintiff in the present case could have appealed the sale within ten days after its confirmation on 12 December 1978. On the face of the complaint, it is clear that the plaintiff made no attempt to appeal the confirmation to the superior court, but waited until 19 April 1982, more than three years later, to bring an independent action contesting the sale of her property.

Secondly, the plaintiff in her amended complaint states she is entitled to impeach the clerk's confirmation of the sale of her property pursuant to G.S. 46-19. This point was abandoned in oral argument, but because it remains in the pleadings we must examine it. G.S. 46-19 essentially governs two situations. First of all, in partition proceedings where there is no mistake, fraud, or collusion alleged, a party has ten days from the filing of the commissioner's report to file an exception to the proposed partition. If no exception is filed, the report is confirmed. Clearly, the plaintiff,

by filing no exception within the statutory time, cannot claim that this part of G.S. 46-19 provides any method upon which relief might be granted. The second part of G.S. 46-19 covers situations where a party is claiming that mistake, fraud, or collusion has occurred. In this instance, a party even after confirmation may impeach the proceedings. The plaintiff asserts that this statute gives her the right to bring this action. Yet, G.S. 46-19 specifically requires that the party impeach the proceedings by a "petition in the cause" and only when no innocent purchaser for full value and without notice will be affected. The plaintiff has not attempted to impeach the confirmation through a petition in the cause, and even if the plaintiff had been procedurally correct, there are no facts set forth that indicate that the buyer at the final public sale, Walter Jack Davis, was not an innocent purchaser for value.

In addition, it is the opinion of this Court that G.S. 46-19 does not apply to partition sales. This statute is found within Chapter 46, Article 1 concerning the actual partition in kind of real property. Yet, the division of the property in this action was accomplished by a partition sale governed by the statutory requirements of a judicial sale. G.S. 46-28; G.S. 1-339.1, *et seq.* Art. 29A. There is no comparable statute to G.S. 46-19 within Article 29A of Chapter 1 of the General Statutes, but case law indicates that "[i]t has long been the rule in North Carolina that after confirmation of a judicial sale . . . the sale then may be set aside only for 'mistake, fraud or collusion.' " *In re Green*, 27 N.C. App. 555, 557, 219 S.E. 2d 552, 553 (1975).

Nevertheless, the plaintiff is still precluded from collaterally attacking the confirmation of the sale because of the intervention of an innocent purchaser for value at the final sale of the property. The complaint asks that the sale be declared void. However, after confirmation of a judicial sale, the purchaser becomes the equitable owner of the property. *Id.* Therefore, the sale, as it affects the bona fide purchaser, can only be set aside for mistake, fraud, or collusion established on petition regularly filed in the cause, or in accordance with Rule 60(b)(3) of the Rules of Civil Procedure. *See Page v. Miller*, 252 N.C. 23, 113 S.E. 2d 52 (1960). *See also Upchurch v. Upchurch*, 173 N.C. 88, 91 S.E. 702 (1917).

In any event, the plaintiff cannot maintain her present action due to her failure to join Walter Jack Davis, a necessary party

pursuant to G.S. 1A-1, Rule 19. The major relief sought by the plaintiff is to have the deed declared null and void. To do so, the court would have to have jurisdiction over the parties necessary to convey good title. Davis, as equitable owner, would naturally be such a party. "A 'necessary' party is one whose presence is required for a complete determination of the claim, [citation omitted] and is one whose interest is such that no decree can be rendered without affecting the party." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E. 2d 370, 375 (1981). Since the deed cannot be set aside without the presence of Davis, the trial court could not grant the relief plaintiff sought. The motion to dismiss was therefore properly granted. *See Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978).

[2] Finally, the other claims for relief in the amended complaint must also be dismissed. The plaintiff asserts that she is entitled to the return of the deposits she made as high bidder on the first two sales of the property in the amounts of $751.25 and $273.75, plus interest at the rate of 8% per annum from 20 April 1979. The plaintiff fails to state a claim upon which relief may be granted because both claims are barred by the applicable statute of limitations. From the face of the complaint, the thrust of the plaintiff's claim is one of fraud. G.S. 1-52(9) requires that in order to obtain relief on the ground of fraud or mistake, the action must be brought "within three years" of the discovery of the facts constituting the fraud or mistake. Although plaintiff asserts that this statute did not begin to run until 20 April 1979, the complaint indicates that she knew at the latest on 10 November 1978 that she was not the highest bidder in the final sale and that her previous deposits should be returned. Therefore, because she filed her action on 19 April 1982, more than three years from the discovery of the alleged fraud, the statute of limitations has run, barring the assertion of these claims.

Due to the unconditional, affirmative defenses present on the face of the complaint, we hold that the trial judge correctly allowed the defendants' motions to dismiss in that the plaintiff has stated no claim upon which relief may be granted.

Affirmed.

Judges ARNOLD and WEBB concur.

ERASTUS JONES DURHAM v. QUINCY MUTUAL FIRE INSURANCE COMPANY

No. 8221SC958

(Filed 6 September 1983)

Insurance § 122— fire insurance—exclusion of evidence relating to possible motive for plaintiff burning home—error

In an action in which plaintiff sought damages from loss by fire to premises covered by an insurance policy written by the defendant, the trial court erred in excluding certain evidence relating to motive for plaintiff to burn his home and the court erred in trying to interpret for the jury testimony in which the defendant tried to establish motive in its instructions to the jury.

APPEAL by defendant from *Albright, Judge.* Judgment entered 22 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 August 1983.

Plaintiff seeks damages from loss by fire to premises covered by an insurance policy written by the defendant. Defendant denied liability. The parties stipulated the amount of damages and tried the case only on the question of liability. Defendant appeals a judgment entered on the issue rendered by the jury in plaintiff's favor.

Morrow and Reavis, by John F. Morrow for plaintiff-appellee.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and Richard T. Rice, for defendant-appellant.

HILL, Judge.

Plaintiff and his wife were the owners of a house and lot located at 1750 Reynolda Road in Winston-Salem. Defendant had issued a homeowner's insurance policy on the property. On 13 January 1977 the house was destroyed by fire. At the time of the fire, plaintiff and his wife were separated. Plaintiff lived alone in the house except for a tenant occupying a basement apartment. Plaintiff brought suit in his name alone against the defendant seeking recovery of the full policy limits. Defendant answered plaintiff's complaint, admitting the policy but denying liability on two grounds. First, the plaintiff failed to submit to an examination under oath as required thus constituting a material breach of

the policy which should relieve the insurer of its liability to pay. Secondly, plaintiff by willfully and intentionally setting fire to the house had increased the hazard by means within his control, violating the insurance policy. Plaintiff asserted that he submitted to an examination under oath and that the fire was accidental.

A jury found in favor of the plaintiff on the issue of liability. Defendant's timely motion for a new trial was denied, and he appeals to this court.

Thereafter, the parties agreed to the amount of liability in the event the liability judgment was upheld, and a "Final Judgment" was entered.

Included within defendant's numerous assignments of error is its contention that the court erred in excluding certain evidence relating to motive for plaintiff to burn his house and evidence that showed a common pattern, design, or scheme on plaintiff's part. We hold the court did not err in excluding the evidence relating to a common pattern, design or scheme as this evidence was too conjectural to have any probative value in the case. But we agree it was error for the court to exclude the evidence relating to motive, and hold that its exclusion was sufficiently prejudicial as to warrant a new trial.

Evidence of motive in a case such as this is clearly admissible. As stated in 1 Brandis on N.C. Evidence § 83 (2d ed. 1982):

> The motive which prompts a person to do a particular act is seldom an essential element of a cause of action or defense, and therefore it need not ordinarily be proved. The existence of a motive is, however, a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute. The point arises most often in prosecutions for homicide, arson and other crimes, but is occasionally presented in civil cases as well. Motive may be proved by declarations and other conduct of the person himself, or by evidence of facts which would naturally give rise to a relevant motive and from which such a motive may therefore reasonably be inferred.

There have been several cases in this state involving the felonious burning of property in which evidence of motive was

held to be admissible. *See State v. Harrell*, 20 N.C. App. 352, 201 S.E. 2d 716, *cert. denied*, 284 N.C. 619, 202 S.E. 2d 275 (1974); *State v. Brackett*, 55 N.C. App. 410, 285 S.E. 2d 852, *reversed on other grounds*, 306 N.C. 138, 291 S.E. 2d 660 (1982); *State v. Grant*, 19 N.C. App. 401, 199 S.E. 2d 14, *app. dismissed*, 284 N.C. 256, 200 S.E. 2d 656 (1973); *State v. Sargent*, 22 N.C. App. 148, 205 S.E. 2d 768 (1974). In *Harrell*, testimony concerning the defendant's financial obligations and lawsuits pending against him was held competent to show motive. In *Brackett*, testimony showing there was fire insurance on the property burned was held admissible to show motive on defendant's part.

In the present case, defendant attempted to present evidence tending to show that plaintiff and his wife were having marital difficulties; that Mrs. Durham wanted the house on Reynolda Road for herself and her daughter; and that plaintiff did not want her to have the house. These efforts were largely unsuccessful because of rulings of the court. Plaintiff testified that his wife said she did not want the house and that he had been told this by a mutual friend. He admitted though that he "did find something later on where she did ask for the house, after the fire."

To rebut this testimony defendant called Mrs. Durham as a witness who testified as follows in the presence of the jury:

> Q. (By Mr. Gitter, continuing) Have you, at any time prior to the fire that occurred on January 13, 1977, made a demand upon Mr. Durham for possession of the house on Reynolda Road so that you could live in—separate and apart from him?
>
> THE COURT: You can answer that.
>
> THE WITNESS: I had not made a demand in Court yet; but—
>
> MR. MORROW: Objection.
>
> THE COURT: Objection sustained. I don't know what she meant.
>
> . . . .
>
> Q. Did you ever have any conversation with Mr. Durham about possession of the house prior to the fire?
>
> A. No.

Defendant then attempted to question Mrs. Durham as to whether she had ever informed plaintiff that she wanted possession of the home prior to the fire. Plaintiff objected to the question which objection was sustained. A hearing in the absence of the jury was then held at which Mrs. Durham testified:

> Q. And in connection with the action that your attorneys then filed in 1976 after your second separation, did you inform your attorneys that you wanted possession of the house?
>
> A. Yes. I wanted possession of the house because I had a minor child.
>
> Q. And that's the reason that you wanted to have possession of the house here on Reynolda Road?
>
> A. (The witness nods her head up and down.)

Later, during the voir dire hearing the following colloquy occurred:

> MR. GITTER: But, Mr. Durham did testify, I believe, Your Honor, when he was being examined, that his wife did not want the possession of the house and never said to him that she wanted possession and had told somebody else that she didn't want possession of the house, and I think it's competent to show that that (sic) certainly was not her intention at the time, that she did in fact want possession of it.
>
> THE COURT: When she first answered, she said she didn't; so I'm going to move on.
>
> Objection sustained.

Other evidence was brought out on voir dire which indicated that Mrs. Durham had made demand for possession of the house prior to the fire in an action filed by her against plaintiff, but Mrs. Durham testified she could not recall whether she had made such a demand. The court further excluded other testimony concerning Mrs. Durham's desire to live in the house and her denial that she ever told anyone otherwise on the basis that the witness was bound by her prior answer.

Apparently, the court misinterpreted Mrs. Durham's testimony as meaning she did not want possession of the house when,

in fact, she did not so testify. Further, the court related its misunderstanding of the testimony in its charge to the jury wherein the court stated, in pertinent part:

> COURT: I'll say now, Mr.—the parties that had marital difficulties and Mr. Morrow is contending that she was not seeking possession of the house, just had the one child, they said that she was seeking alimony and possession of the house; they were having marital difficulties, that's sure, so you will consider all—and I'm probably in error if I said she was seeking possession of the house directly because *her first statement on the stand was that she was not seeking possession of the house at that time,* as I recall—or somebody asked—
>
> I'll look at her testimony one more time—never had any conversations about possession prior to the fire. That was what she said. Now, what that meant, *I assume that meant possession of the house.* (Emphasis added.)

The court erred in its charge to the jury both by misstating the substance of Mrs. Durham's testimony and by relaying its assumption as to what was meant by the testimony. It is the function of the jury, not the judge, to interpret testimony and it is error for the court to state its assumptions as to the meaning of testimony.

Having not heard the excluded evidence, the jury may have been left with the impression that plaintiff had no motive to burn his house other than to recover the insurance proceeds. In a case such as this, the defendant must as a matter of practical necessity rely primarily on circumstantial evidence which tends to implicate the plaintiff. *See Fowler-Barham Ford v. Insurance Co.*, 45 N.C. App. 625, 263 S.E. 2d 825, *cert. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980); 5 Am. Jur. 2d Arson § 47 (1962). When such evidence is excluded, the effect may be highly prejudicial. We hold the exclusion of the proffered evidence of motive in this case and the improper jury charge were sufficiently prejudicial as to entitle defendant to a new trial.

We have carefully considered defendant's other assignments of error and find them to be without merit.

New trial.

Chief Judge VAUGHN and Judge BECTON concur.

IN THE MATTER OF: RALPH CLAPP ROGERS, RESPONDENT

No. 829DC1139

(Filed 6 September 1983)

Insane Persons § 11— commitment of criminal defendant—hearing before release—constitutionality of statute

The statute requiring a hearing before release from a mental health facility of a person who was committed after having being charged with a violent crime and found incompetent to stand trial or not guilty by reason of insanity while permitting others to be released from such a facility at the time the chief of medical services determines they no longer need hospitalization, G.S. 122-58.13, is rationally related to the protection of the public from violent crimes and does not violate equal protection of the laws. Furthermore, the statute does not constitute an ex post facto law since the procedures set forth therein do not comprise punishment for a crime. XIV Amendment to the U.S. Constitution; Art. I, § 10 of the U.S. Constitution; Art. I, §§ 16 and 19 of the N.C. Constitution.

APPEAL by respondent Ralph Clapp Rogers from *Allen (Claude), Judge.* Order entered 19 August 1982 in District Court, GRANVILLE County. Heard in the Court of Appeals 14 April 1983.

In this appeal the respondent challenges the constitutionality of the procedure for his release from commitment to a mental institution. The respondent was indicted in 1976 for murder and a crime against nature. On 6 November 1978 the respondent was found to be incompetent to stand trial by Judge Hobgood. The respondent was committed to John Umstead Hospital. The respondent has had periodic hearings as to his mental condition and has remained committed to John Umstead Hospital since his original commitment.

A hearing was held in June 1982 and Judge Allen found that respondent was dangerous to himself and others and ordered that respondent be committed for a further "period of 365 days or until such time as he is discharged according to law." Upon motion of the State, Judge Allen amended his order to indicate that

respondent was within the scope of Article 5A of Chapter 122 of the General Statutes dealing with involuntary commitments. The respondent appealed from the amended order.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Special Counsel Stephen D. Kaylor for respondent appellant.

WEBB, Judge.

In 1981 the General Assembly revised G.S. 122-58.13 so that it now provides that the chief of medical services of a mental health facility shall discharge a committed respondent unconditionally at any time he determines the patient is no longer in need of hospitalization unless the patient was initially committed as the result of conduct resulting in his being charged with a violent crime for which he was found not guilty by reason of insanity or incapable of standing trial. For all persons in the latter categories, the chief of medical services must notify the Clerk of Superior Court in the county in which the facility is located 15 days before the respondent's discharge. The clerk must then schedule a rehearing to determine the appropriateness of the respondent's release under the standards of commitment set forth in G.S. 122-58.8.

The respondent argues that this section of the statute violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. He contends there is no rational basis for putting him in a class of which the clerk has to be notified and a hearing conducted before he may be released from an institution when others similarly situated may be released at the time the chief of medical services determines they no longer need hospitalization. If a state, by statute, creates a class which is rationally related to a legitimate interest of the state, those placed in the class have not been deprived of the equal protection of the laws. *See Hohn v. Slate,* 48 N.C. App. 624, 269 S.E. 2d 307 (1980). We believe the State has a legitimate interest in protecting persons from violent crimes. We also believe that requiring those for whom a magistrate or a grand jury has found probable cause that they have committed crimes of violence to be subject to a hearing before release from involuntary commitment

is rationally related to the protection of persons from violent crimes.

The respondent argues that the amendment to the statute is not rationally related to the protection from those who pose a threat to the community. He says that he will be required under any circumstances to remain committed until the chief of medical services determines that he is no longer dangerous to himself or others. He further argues that to require a hearing after this has been determined for him but not for others confined for the same reasons does not bear a rational relationship to the protection of society. He points out that there are other protections, such as his reincarceration to await trial, which are adequate to protect society. The legislature does not have to be perfect in its classification. We believe there is a substantial difference between those who have been judicially charged with a crime of violence and those who have not so that the legislature can make the procedure more stringent for the release from a mental institution for this class of persons.

We do not believe *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed. 2d 435 (1972), relied on by respondent, governs. In that case a mentally retarded person was charged with robbery. He was committed by the trial court which found he "lacked comprehension sufficient to make his defense" until the Indiana Department of Mental Health should certify that "the defendant was sane." Since the evidence showed there was little likelihood the defendant's condition would improve, he had in effect been sentenced to confinement for life without being convicted of the crime. He argued in the United States Supreme Court that he did not receive equal protection of the laws by being confined in an Indiana mental institution without a similar hearing as those who were not charged with violating the law. The United States Supreme Court said:

> "We hold that by subjecting Jackson to a commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-1209 and § 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment."

Id. at 730, 92 S.Ct. at 1854, 32 L.Ed. 2d at 446. This case differs from *Jackson* in that respondent is not confined indefinitely. He was committed under a procedure similar to those not charged with a crime and he may be released when he is found not dangerous to himself or others. We do not think requiring a hearing before his release deprives him of equal protection of the laws.

The respondent argues that the revision of G.S. 122-58.13 was not intended to have retroactive effect and we agree with him. It was not intended to apply to the past releases of patients from mental hospitals. It is intended to apply to the procedure for the release of patients after its effective date and we believe it applies to any discharge of respondent after 1 July 1981.

The respondent also contends this is an ex post facto law and in violation of Article I, Section 10 of the United States Constitution, and Article I, Section 16 of the North Carolina Constitution. If the revision of G.S. 122-58.13 increases the punishment for a crime over the punishment which was applicable at the time the crime was committed, it is an ex post facto law. *See Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). We do not believe the procedures required by the revision of G.S. 122-58.13 comprise punishment for a crime. They are procedures which must be followed for the discharge of a patient from a mental institution and we believe the State may lawfully enforce them.

Affirmed.

Judges WHICHARD and BRASWELL concur.

JAROSLAV J. KABATNIK v. WESTMINSTER COMPANY

No. 8218SC553

(Filed 6 September 1983)

Judgments § 37— res judicata inapplicable where neither identity of issues nor parties

In an action by an architect against a real estate developer, where the architect had previously entered into a voluntary dismissal with prejudice in a suit against the original developer, the trial court erred in finding that defend-

ant was entitled to a directed verdict as a matter of law "on the grounds of *res judicata* and collateral estoppel in consequence of the dismissal with prejudice in the prior action" since, even assuming that there was privity or even identity between the original developer and the defendant, the claim asserted by plaintiff here arose under a separate state of facts from those that gave rise to the counterclaim in the prior action.

APPEAL by plaintiff from *Morgan, Judge.* Order entered 12 February 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 April 1983.

This is a civil action wherein plaintiff seeks to recover from defendant certain fees due under a contract between plaintiff and defendant for architectural services.

Plaintiff is an architect and defendant is a real estate developer. These parties entered into an agreement in June of 1976 whereby plaintiff was to provide architectural services to defendant in connection with the development of a 100 unit residential rental project. Plaintiff's total fees under this contract amounted to $60,307 when the project was completed in 1979. Defendant has paid plaintiff all but $7,700 of the amount owing under the contract. Defendant has withheld the $7,700 in order to reimburse Dr. George Simkins for advancements allegedly made by Simkins to Kabatnik. Simkins is the original developer of the project and Kabatnik previously had worked for him on the project.

In withholding the $7,700, defendant is relying on a clause in its contract with Kabatnik that reads as follows:

> From design, engineering and supervisory fees earned and received, architect agrees to reimburse Dr. George Simkins for architectural advances.

Plaintiff brought this action against defendant on 1 December 1980 to recover the $7,700 allegedly owed him by defendant. Dr. Simkins has not been made a party to this action.

While not a party here, Dr. Simkins was the plaintiff in a 1978 action against Kabatnik. This prior action (*Simkins v. Kabatnik*) involved reimbursement for advances on architectural fees in connection with the same project. Simkins sued Kabatnik for $1,500 allegedly owed him as reimbursement for advancements made to Kabatnik under an agreement with him. Kabatnik coun-

terclaimed against Simkins alleging that Simkins owed him a balance of $14,800 on a total bill of $22,500 for services rendered under the agreement between June 1972 and June 1975. Simkins responded, asserting as an affirmative defense payment of $7,700 to Kabatnik as complete accord and satisfaction of the counterclaim. The affirmative defense was later amended to say that the counterclaim had been satisfied by compensation paid by Westminster for the same services. On 1 December 1980, the same day as the filing of the complaint in this action, Simkins and Kabatnik took voluntary dismissals with prejudice with respect to their claims in the prior action, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

This action came to trial before a jury at the 8 February 1982 Session of Guilford County Superior Court. Evidence at the trial tended to show that plaintiff was under contract with defendant and that he had previously worked for Simkins on the same project. Plaintiff testified that in connection with this earlier work, he had received an advancement of $7,700 from Simkins, but that this amount had been applied against the amount owed to plaintiff by Simkins under their agreement. Plaintiff also testified that he had demanded payment by defendant of the $7,700 but that defendant had refused. Submitted into evidence was plaintiff's invoice to Dr. Simkins in the amount of $22,500 for work performed by plaintiff from June 1972 to June 1975.

At the conclusion of plaintiff's evidence, defendant moved under Rule 50(a), N.C. Rules Civ. Proc., for a directed verdict. The trial judge concluded that defendant was entitled to a directed verdict as a matter of law "on the grounds of *res judicata* and collateral estoppel in consequence of the dismissal with prejudice in the prior action of *George C. Simkins, Jr. v. Jaroslav J. Kabatnik.*" From this order, plaintiff appealed.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff appellant.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, for defendant appellee.

JOHNSON, Judge.

The question presented by this appeal is whether the trial court's grant of defendant's motion for directed verdict on the

grounds of *res judicata* and collateral estoppel was proper. The court's ruling was based on the prior action of *Simkins v. Kabatnik*, which involved an agreement that was similar to the contract in this case in several respects: (1) it involved the rendering of architectural services by Kabatnik; (2) it involved the same construction project; (3) it contained a provision for the reimbursement of Simkins by Kabatnik for architectural advancements. *Simkins v. Kabatnik* involved work done by Kabatnik from June 1972 until June 1975. While the *Simkins v. Kabatnik* action was never tried, it was conclusively settled by the voluntary dismissal with prejudice of all claims involved in the action.

The present action involves a written contract between Kabatnik and Westminster Company. The work that is the basis of Kabatnik's claim was begun in 1975 and completed in 1979. Plaintiff argues that neither *res judicata* nor collateral estoppel apply in this case. Plaintiff contends that neither the issue nor the parties in the prior action are sufficiently identical with the issue and parties in the present case to bar plaintiff's assertion of his claim. Defendant argues that the voluntary dismissal with prejudice of Kabatnik's counterclaim in the prior action bars Kabatnik from asserting his present claim. Defendant contends that the claim asserted here by Kabatnik could and should have been asserted in the prior action and that Kabatnik's failure to do so estops him from asserting it here.

Although it is not clear from either the briefs or the records, the $7,700 amount in controversy here is apparently derived from the $7,700 paid by Simkins to Kabatnik in satisfaction of Kabatnik's counterclaim, as alleged in Simkins' initial affirmative defense in the prior action. Although again it is not clear from the records or briefs, defendant apparently interprets this payment as an advancement by Simkins to Kabatnik for which Simkins is entitled to reimbursement under the contract between Kabatnik and Westminster. In addition, defendant apparently interprets the dismissal of the prior action as conclusive of the rights of the parties to this action with regard to the contract in this action and asserts it as a bar to plaintiff's present claim.

The principles of law that control the question raised by this appeal are well established in North Carolina. A final judgment, rendered on the merits by a court of competent jurisdiction, is

conclusive as to the issues raised therein with respect to the parties and those in privity with them and constitutes a bar to all subsequent actions involving the same issues and parties. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962); *Gaithers Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909 (1955). In order for *res judicata* to apply, there must have been a prior adjudication on the merits of an action involving the same parties and issues as the action in which the defense of *res judicata* is asserted. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Teague v. Alexander*, 38 N.C. App. 332, 247 S.E. 2d 775 (1978), *disc. rev. denied*, 296 N.C. 414, 251 S.E. 2d 473 (1979). Strict identity of issues, however, is not absolutely required and the doctrine of *res judicata* has been accordingly expanded to apply to those issues which could have been raised in the prior action, but were not. *Gaithers Corp. v. Skinner, supra. Res judicata* will apply regardless of any differences in the manner in which the claims are asserted.

> [U]nder application of the rule precluding subsequent litigation of the same cause of action, a party defendant who interposes only a part of a claim by way of recoupment, setoff, or counterclaim is ordinarily barred from recovering the balance in a subsequent action.

Id. at 536, 85 S.E. 2d at 911. For purposes of *res judicata*, a voluntary dismissal with prejudice is an adjudication on the merits in favor of the opposing party. *Barnes v. McGee*, 21 N.C. App. 287, 204 S.E. 2d 203 (1974).

Applying these principles to the case before us, it is clear that there is not sufficient identity of issues for *res judicata* to apply. Assuming that there is privity or even identity between Simkins and Westminster, the claim asserted by Kabatnik here arises under a separate state of facts from those that gave rise to the counterclaim in the prior action. The only effect that the prior action could reasonably have on the present one is merely that of a case law interpretation of the contract, but that question was never reached in the prior action. Rather, the prior action determined only that Simkins' claim for reimbursement had no merit and that Kabatnik's counterclaim for compensation had no merit. *See Barnes v. McGee, supra.* The agreement in the prior action and the contract here, while similar, are not the same. Work

under the former was completed and the prior claim mature before work under the latter had even begun. The present claim did not mature until 1979, almost four years after the first claim.

Moreover, there is no evidence in the record that Simkins had made any claim for an offset against the amount allegedly owed to Kabatnik under the contract. While the evidence does show that Kabatnik received $7,700 from Simkins, there is no evidence that this amount is an advancement to be offset against plaintiff's present claim against defendant. We fail to see how the prior claim is *res judicata* or collateral estoppel with respect to any of the questions or issues in the present case. The order appealed from must, therefore, be reversed and the cause remanded for appropriate further proceedings in the trial court.

Reversed and remanded.

Judges HILL and PHILLIPS concur.

EDWARD G. MICHAEL, D/B/A MICHAEL'S GOLD FASHIONS v. BOBBY GREENE, D/B/A SEMOR CREATIONS, D/B/A VEREDE GOLD LTD. AND SEMOR CREATIONS, INC.

No. 8226SC778

(Filed 6 September 1983)

1. Courts § 21.6— fraud and unfair trade practices—what law governs

The law of Texas governed an action for fraud and unfair trade practices in the sale of gold jewelry to plaintiff where the alleged misrepresentations by defendant were made in Texas; plaintiff decided to go into the jewelry business and placed his first order with defendant while in that state; and all orders were filled in Texas with the jewelry being delivered from Texas to North Carolina.

2. Unfair Competition § 1— unfair trade practices—inapplicability of statutes to Texas transaction

The statutes relating to unfair trade practices, G.S. Ch. 75, have no application to Texas transactions.

3. Fraud § 12— opinion or puffing—insufficient basis for action for fraud

Applying Texas law, defendant's statements to plaintiff that he had "unbelievable connections," that he would sell gold jewelry to plaintiff at a "very, very low percentage" over his cost, and that plaintiff could not buy gold

jewelry from anyone else in the country for less than defendant would sell to him were merely statments of opinion or puffing which could not constitute a basis for an action for fraud.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 9 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 May 1983.

This is a civil action wherein plaintiff seeks to recover from the defendants for the sale of gold jewelry by defendants to plaintiff. The plaintiff alleged he is entitled to damages for fraud and unfair trade practices under Chapter 75 of the General Statutes. Plaintiff's action for damages was consolidated with an action brought by Semor Creations, Inc. in which it seeks to collect money due for merchandise delivered to plaintiff for which payment was not made. A partial summary judgment was entered in the action brought by Semor Creations, Inc. in its favor in the amount of $30,106.66. Counsel in the present action stipulated that the partial summary judgment was subject only to set-off by a verdict in Michael's favor on his fraud or unfair trade practices claim.

Plaintiff testified that in November 1979 he traveled to defendant Bobby Greene's residence in Dallas, Texas at Greene's request to discuss the possibility of plaintiff's entry into the gold jewelry business. Plaintiff, who knew nothing about the jewelry business at that time, was told that Greene was doing very well in this line of business. A major reason given for Greene's success was that he had "unbelievable" connections from whom he bought the jewelry. Greene allegedly stated that if plaintiff was interested in investing in the jewelry business, Greene would sell jewelry to him at a very, very low percentage over his costs. Greene further stated that plaintiff could buy gold jewelry from him for less than he could anywhere else in the country. Subsequently, plaintiff made several large purchases of gold jewelry from defendants and opened a retail jewelry business in Charlotte, North Carolina. In July 1980 the plaintiff attended a major jewelry show in Atlanta, Georgia at which he purchased some jewelry similar to the jewelry he had been buying from defendants. After comparing the prices charged by defendants with the prices charged at the Atlanta show, plaintiff concluded he had been "drastically overcharged" by defendants in the amount of $26,945.31.

John Rist, who was found by the court to be an expert jeweler, examined samples of the merchandise sold by defendants to plaintiff, and testified that in his opinion, defendants had charged plaintiff $20,000.00 above the average wholesale price for comparable gold chains and $5,000.00 above the average wholesale price for comparable gold charms.

At the conclusion of plaintiff's evidence, the court directed a verdict in favor of defendants and entered judgment in favor of defendant Semor Creations, Inc. in the amount of $30,106.66. Plaintiff appealed.

Tucker, Hicks, Sentelle, Moon and Hodge, by Travis W. Moon and John E. Hodge, Jr., for plaintiff appellant.

Fairley, Hamrick, Monteith and Cobb, by Laurence A. Cobb and F. Lane Williamson, for defendant appellees.

WEBB, Judge.

[1] The first question raised by this appeal is whether the rights of plaintiff are governed by the law of North Carolina or the law of Texas. The evidence indicates that the relationship between the parties was created and is centered in Texas. The discussions between the parties concerning the possibility of plaintiff's entry into the jewelry business took place in Texas. The alleged misrepresentations which are the basis for the plaintiff's fraud action were made by Greene while in Texas. Plaintiff decided to go into the jewelry business and placed his first order with defendant while in that state. All the orders were filled in Texas with the jewelry being delivered from Texas to North Carolina. We believe that Texas is the state with the most significant relationship to the transaction between the parties. We hold the transaction is governed by Texas law. *See Lowe's North Wilkesboro Hardware v. Fidelity Life Ins. Co.*, 319 F. 2d 469 (4th Cir. 1963) and *Santana, Inc. v. Levi Strauss & Co.*, 674 F. 2d 269 (4th Cir. 1982).

[2] Chapter 75 of the General Statutes has no application to Texas transactions and the claim brought pursuant to this chapter was properly dismissed.

[3] The only aspect of plaintiff's action which we need to discuss is his fraud claim. The elements of actionable fraud in Texas are as follows:

> "(1) that a material representation was made; (2) that it was false; (3) that when the speaker made it, he knew it was false, or made it recklessly without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that the party thereby suffered injury."

Wilson v. Jones, 45 S.W. 2d 572, 574 (Tex. Comm. App. 1932); *Trenholm v. Ratcliff*, 646 S.W. 2d 927 (Texas 1983).

Plaintiff argues that all of the required elements for fraud are present in this action. We disagree. Plaintiff contends the statements made by defendant Greene at their meeting in Texas in November 1979 were material misrepresentations. We believe Greene's statements were either statements of his opinion, or puffing.

It is a well-settled rule that a representation which is expressed and understood as nothing more than a statement of opinion, or which cannot be reasonably understood to be anything else, cannot constitute fraud and form a basis for recovery. *See Wilson*, 45 S.W. 2d at 574; 37 Am. Jur. 2d *Fraud and Deceit* § 45 (1968). The Texas courts have stated:

> "It is sometimes difficult to determine whether a given statement is one of opinion or one of fact but as a general rule distinction between fact and an opinion is broadly indicated by the statement that what was susceptible of exact knowledge when the statement was made is usually considered as a matter of fact and representations in regard to matters not susceptible of personal knowledge are generally to be regarded as mere expressions of opinion."

Ramsey v. Polk County, 256 S.W. 2d 425, 428 (Tex. Civ. App. 1953).

Clearly, Greene's statements that he had "unbelievable" connections, and that he would sell to plaintiff at a "very, very low percentage" over his costs were merely statements of opinion.

Greene's statement that plaintiff could not buy gold jewelry from anyone else in the country for less than Greene would sell it to him is also an opinion or mere puffing. Applying the test set out in *Ramsey*, we find that it was probably impossible for Greene to have had personal, exact knowledge of the prices at which everyone else in the country would sell jewelry to buyers in plaintiff's position.

If plaintiff did interpret Greene's statements as misrepresentations rather than as opinions or puffing, he was unreasonable in doing so. Furthermore, plaintiff was in no way prevented from taking the precautionary step of comparing prices before deciding to buy from defendants. It has been held that "[a party complaining of fraud] . . . must not have failed to exercise reasonable care to protect himself—in other words, in a 'caveat emptor' situation he must not have shut his eyes and ears to matters equally open and available to him upon reasonable inquiry and investigation." *Moore & Moore Drilling Co. v. White*, 345 S.W. 2d 550, 555 (Tex. Civ. App. 1961). Because plaintiff failed to present evidence of all the necessary elements for fraud, a directed verdict for defendants was proper. As a verdict in plaintiff's favor has not been rendered, plaintiff does not have a right to a set-off of any amount against the partial summary judgment entered for Semor Creations, Inc.

The judgment of the trial court is

Affirmed.

Judges ARNOLD and BRASWELL concur.

JEANETTE HILTON, FORMERLY JEANETTE HOWINGTON v. JIMMY EARL HOWINGTON

No. 8210SC692

(Filed 6 September 1983)

1. Divorce and Alimony § 24.4— child support—finding of willful refusal to comply with order—supported by evidence

In a civil action to collect arrearages in child support, the trial court erred in finding defendant in contempt for willful refusal to comply with an order to

pay support since there was no evidence to show that defendant or his attorney were ever made aware of the order in which defendant was required to pay child support.

2. **Rules of Civil Procedure § 60— relief from dismissal of previous action—entry of new order proper**

Where an action for child support was dismissed because of the failure of plaintiff's attorney to draft an order within the time required by the trial judge, and not because either party made a Rule 41 motion, and where an order for child support was not entered until after the court had set aside the dismissal of the previous action, the order for child support was valid. There was no evidence that the trial judge abused his discretion by setting aside the dismissal pursuant to G.S. 1A-1, Rule 60(b).

APPEAL by defendant from *Bullock, Judge.* Order entered 8 March 1982 in District Court, WAKE County. Heard in the Court of Appeals 11 May 1983.

This is a civil action wherein plaintiff wife seeks to collect arrearages in child support due her from the defendant husband. The parties, who are now divorced, signed a consent order in 1974 in which they agreed upon the custody of the four minor children born of the marriage and the amount of child support to be paid by defendant to plaintiff for the children in her custody.

In July 1980, plaintiff filed a motion in the cause seeking arrearages and a modification of the consent order with respect to custody and child support. Subsequently, defendant filed a motion in the cause requesting his own modification of the consent order. A hearing was held on 29 December 1980 on both motions with the parties and their counsel present. No order or judgment was entered on that date. On 17 February 1981, Judge Bullock mailed a notice to plaintiff's attorney informing him that the order in the case had been due 5 January 1981, and inquiring as to why the order had not yet been entered. On 12 March 1981, Judge Bullock signed an order of dismissal of the action because of the failure of plaintiff's attorney to draft an order within the time required.

On 11 June 1981 at a hearing before Judge Bullock, plaintiff's attorney orally moved that the court set aside the dismissal. Judge Bullock granted the motion and signed an order modifying the award of custody and the amount of child support to be paid by defendant. On 29 June 1981, Judge Bullock ordered that the dismissal of the action be set aside and that the 11 June 1981 order be entered.

On 1 February 1982, plaintiff filed a motion and affidavit requesting that the court issue an order requiring the defendant to appear and show cause why he should not be held in contempt for failure to comply with the 11 June 1981 order. The defendant was duly served and appeared at a hearing on the matter at which he admitted he had not made the child support payments per the order of 11 June 1981. On 8 March 1982, Judge Bullock found defendant to be in contempt and ordered him into custody for 30 days and until he purged himself of contempt by paying the child support arrearages of $2,885.72. From the order dated 8 March 1982, defendant appealed.

Brenton D. Adams, for defendant appellant.

Farris, Thomas & Farris, by Thomas J. Farris, for plaintiff appellee.

JOHNSON, Judge.

[1] Defendant presents four assignments of error to support his contentions that the court erred in finding him in contempt for violating the 11 June 1981 order, and that the order of 8 March 1982 should be reversed. First, defendant argues the findings of fact and conclusions of law of the 8 March 1982 order were not supported by sufficient evidence. More specifically, defendant claims finding of fact number 8 which states, "that the Defendant's failure to make his payments are ordered by this Court has been willful and without legal justification," is not supported by the evidence. For the reasons that follow, we agree with defendant.

It appears from the record that following the hearing on 29 December 1980, the court took the matter under advisement. Sometime after the hearing but presumably before 5 January 1981, the court rendered a decision and instructed plaintiff's attorney to draft an order to be entered by 5 January. There is nothing in the record to indicate that the court rendered an oral judgment at the hearing or that defendant or his attorney were ever notified as to whether defendant was to pay child support, in what amount, or under what circumstances. In fact, the record is devoid of any indication as to exactly when the court rendered its decision. Defendant testified that he later learned from his at-

torney that the court had modified the award of custody but claims nothing was said about child support.

Next, it appears defendant's attorney was notified that the action had been dismissed for the failure of plaintiff's attorney to draft an order within the time required. The evidence tends to show that defendant was not aware that any orders were issued by the court in the case until he was served with the order to show cause in February 1982. There is no evidence to show that defendant or his attorney were ever notified of plaintiff's motion to set aside the dismissal or the court orders of 11 June and 29 June 1981. Defendant could not willfully refuse to comply with an order of which he was not aware. Therefore, the court erred in making finding of fact number 8 and in finding defendant in contempt. Thus, the court's order must be reversed.

Although defendant could not be held in contempt until he received notice of the June 1981 order, the order itself is still valid and defendant is still obligated to make the payments from the date ordered by the court. In the 11 June 1981 order, the court decreed that the defendant must pay $460 per month for child support beginning 1 January 1981 and on the first day of every month thereafter. Therefore, defendant must pay the child support that was due on 1 January 1981 and every month thereafter. If he has not yet done so, the appropriate remedy for plaintiff is to file a new motion in the cause seeking these arrearages.

[2] Defendant also assigns as error the court's issuance of the 11 June 1981 order when the action had previously been dismissed. He mistakenly argues that since plaintiff's action had been dismissed pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, no valid order could be made thereafter in the case. *See Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). To begin with, plaintiff's action was not dismissed pursuant to Rule 41, rather it was dismissed pursuant to the court's inherent power to perform its judicial functions. As the terms of the order clearly indicate, the action was dismissed because of the failure of plaintiff's attorney to draft the order within the time required, and not because either party made a Rule 41 motion.[1]

1. In our opinion, the court may have unnecessarily dismissed the action. The more appropriate remedy for the court in a situation such as this, would be for the court to exercise its contempt powers relative to the attorney to secure compliance

Furthermore, the order dated 11 June 1981 was not based on a dismissed action. This order was not entered until after the court set aside the dismissal on 29 June 1981. Once the dismissal was set aside, a valid order could again be entered in the action. Thus, the 11 June 1981 order is valid. It is also clear Judge Bullock had the power to set aside the dismissal as G.S. 1A-1, Rule 60(b) authorizes the court to relieve a party from a final judgment, order or proceeding for any reason justifying relief from the operation of the judgment. G.S. 1A-1, Rule 60(b)(6). A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). There is no evidence that Judge Bullock abused his discretion in this matter, thus, we must uphold his decision.

We have considered defendant's remaining assignments of error and found them to be without merit. Because of this and the fact that it appears unlikely that the alleged errors will occur again, we do not feel it is necessary to discuss them. The order of the court below dated 8 March 1982 is

Reversed.

Judges HILL and PHILLIPS concur.

TIMOTHY ELLENBERGER v. CAROL ELLENBERGER

No. 8229DC976

(Filed 6 September 1983)

Divorce and Alimony § 25.10— modification of child custody—changed circumstances not shown

The custody of a child under a court order could be modified only upon a finding of a substantial change of circumstances affecting the welfare of the child, and the court's finding that the child had lost "the sparkle in his eyes"

---

with the court's order directing counsel to draft and present the order. Litigants should not be so drastically and summarily penalized for the easily correctable oversight of their lawyers.

was insufficient to support a conclusion that there had been a substantial change in circumstances justifying modification of a custody order.

APPEAL by defendant from *Gash, Judge.* Judgment entered 30 June 1982 in District Court, TRANSLYVANIA County. Heard in the Court of Appeals 23 August 1983.

On 22 July 1981, plaintiff, husband filed a complaint seeking an absolute divorce from his wife and temporary and permanent custody of the two minor children born of the marriage. From the date of the separation of the parties, the minor child, Mark, born 7 May 1972, lived with the defendant, mother, and their older child, Timothy, born 25 July 1969, lived with the plaintiff. On 6 August 1981, after a hearing on the issue of custody, the trial judge entered an order awarding "temporary care, custody, and control" of Mark to the defendant and "temporary care, custody, and control" of Timothy to the plaintiff. This order made no provision for support of either child.

By motions filed 5 February and 12 March 1982, defendant sought an order for support of Mark and reimbursement for expenses she incurred on his behalf since the 6 August 1981 order. On 3 March 1982, after receiving notice of defendant's motion, plaintiff filed a motion seeking to regain custody of Mark. All three motions were heard on 18 May 1982. From an order awarding custody of Mark to the plaintiff, defendant appealed.

Potts & Welch, by Paul B. Welch, III for the plaintiff, appellee.

Margaret McDermott Hunt for the defendant, appellant.

HEDRICK, Judge.

Defendant assigns as error the court's "modification of a custody decree without finding that there had been a substantial change of circumstances that adversely affected the welfare of the child." She contends that under N.C. Gen. Stat. Sec. 50-13.7(a) the previous order awarding her custody of the child could be modified only upon a showing of changed circumstances and that there was no such showing.

N.C. Gen. Stat. Sec. 50-13.7(a) states that "[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. . . ." In *Harris v. Harris*, 56 N.C. App. 122, 286 S.E. 2d 859 (1982) this court reiterated the rule that "the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances." *Id.* at 124, 286 S.E. 2d at 860 (citations omitted).

Plaintiff contends that the order of 6 August 1981 was interlocutory in nature, and that the requirement of a substantial change of circumstances is inapplicable to such an order. He argues that the "initial custody order . . . is clearly denominated 'temporary.' " While it is true that the 6 August 1981 order has some characteristics of a "temporary" order, we note that all orders awarding custody are in a sense "temporary." It is well-established that a court decree awarding custody of a minor child is never final in nature. "Such a decree determines only the *present rights* with respect to such custody. . . ." *Neighbors v. Neighbors*, 236 N.C. 531, 533, 73 S.E. 2d 153, 154 (1952) (emphasis added) (citations omitted).

The evidence in the present case tends to show that Mark, the minor child, remained with defendant when she and her husband first separated, and that this arrangement was continued by the order of 6 August 1981. Plaintiff made no contribution to Mark's support after defendant was awarded custody of the child, according to the record, and plaintiff sought modification of the custody order only after defendant sought child support. The court found as a fact that both parents were "fit and proper persons to exercise custody." The court also found, however, that "prior to August of 1981, Mark was a friendly outgoing child with a 'sparkle in his eyes.' That from August of 1981 until the hearing on May 18, 1982, Mark has become somewhat subdued and was more quiet and reserved than he had been prior to leaving Transylvania County. That the 'sparkle' is gone."

Plaintiff contends in his brief that the court's finding of fact, set out above, that "the sparkle is gone" is sufficient support for a conclusion that there had been substantial change in circumstances, justifying modification of the custody order. We note

that the trial judge failed to make a finding or conclusion regarding the presence or absence of a substantial change in circumstances. Moreover, we find little evidentiary support in the record for any such finding or conclusion. Plaintiff seemed satisfied with the arrangement that allowed Mark to remain in the defendant's custody so long as he was not required to contribute to the child's support. Furthermore, only six months elapsed between the first order that gave custody of Mark to the defendant and her motion in the cause seeking support for the child from the plaintiff. The trial court's finding of fact regarding "the sparkle in Mark's eyes" is insufficient to establish the substantial change in circumstances contemplated by the law. The requirement of substantial change is an effort to lend "such stability as would end the vicious litigation so often accompanying such contests. . . ." *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E. 2d 357, 361 (1968). To permit modification of the original order based on the findings and conclusions in the present case would defeat that purpose and contravene the law. We therefore vacate that portion of the order entered 30 June 1982 awarding custody of Mark to the father, and reinstate that portion of the original order awarding custody of Mark to the mother. That portion of the order entered 30 June 1982 requiring plaintiff to reimburse defendant in the amount of $1,405.75, requiring him to pay child support in the amount of $150.00 per month, and requiring him to pay $500.00 as partial attorney's fees is hereby affirmed.

Vacated in part, affirmed in part.

Judges WELLS and PHILLIPS concur.

CABARRUS BANK & TRUST COMPANY v. GERALD R. CHANDLER

No. 8220DC960

(Filed 6 September 1983)

Guaranty § 2; Principal and Agent § 1; Uniform Commercial Code § 32— unregistered power of attorney not invalidating promissory note to plaintiff

Where defendant executed a Loan Guaranty Agreement on behalf of a husband and wife to enable them to obtain a loan from plaintiff, where the husband signed the promissory note as attorney-in-fact for his wife pursuant to a

written power of attorney which was not registered, and where plaintiff demanded payment from defendant under the agreement once the husband and wife petitioned for bankruptcy, the trial court properly entered an order granting plaintiff's motion for summary judgment and ordering defendant to pay plaintiff pursuant to the agreement since the recording provision of G.S. 47-115.1 applies only in cases where a competent principal later becomes incompetent, and the wife was competent when she signed the power of attorney and when the guaranty was given. G.S. 25-3-401 and G.S. 25-3-416.

APPEAL by defendant from *Huffman, Judge.* Judgment entered 20 May 1982 in District Court, STANLY County. Heard in the Court of Appeals 22 August 1983.

This action concerns defendant's liability as guarantor of a joint debt where the original promissory note was signed by one of the debtors for himself and for his wife, pursuant to a written, but unrecorded power of attorney. Defendant asserts he is not liable on the debt since the power of attorney, executed pursuant to G.S. 47-115.1 was not recorded.

The facts, which are not in dispute, are as follows: On 6 June 1980, defendant executed a Loan Guaranty Agreement on behalf of Ronald and Melanie Burris to enable them to obtain a loan from plaintiff not to exceed $12,000.00. Defendant also agreed to pay all costs, expenses, and reasonable attorney's fees incurred by plaintiff in collecting its debt and enforcing the Loan Guaranty Agreement. The Agreement further provided that in case of bankruptcy of the debtor, the entire indebtedness, to the extent of the amount of the guaranty, could, at the option of plaintiff, become immediately due and payable by the defendant-guarantor.

Also, on June 6, 1980, Burris executed a promissory note payable to plaintiff in the principal amount of $11,800.00, plus interest at the rate of twelve percent (12%) per annum. Burris executed the note on behalf of himself and his wife, as her attorney-in-fact.

Burris was attorney-in-fact for his wife pursuant to a written power of attorney executed by Melanie Burris on March 23, 1979. The power of attorney specifically incorporated G.S. 47-115.1. In the instrument, Melanie Burris authorized her husband to borrow funds on her behalf and in her name. Melanie Burris was competent when the power of attorney was executed and when the loan from plaintiff occurred. The power of attorney was never recorded in the Office of the Register of Deeds.

On March 5, 1981, Ronald and Melanie Burris filed a petition under Chapter Seven of the Bankruptcy Act, and on March 20, 1981, plaintiff demanded payment from defendant under the Loan Guaranty Agreement. Defendant did not pay, and on June 2, 1981, plaintiff instituted action on the Loan Guaranty Agreement executed by defendant.

The Court entered an order on 20 May 1982 granting plaintiff's motion for summary judgment and ordering defendant to pay plaintiff $12,000.00 with interest thereon from March 20, 1981, and costs of litigation, including plaintiff's attorney's fees.

Hartsell, Hartsell, & Mills, P.A. by W. Erwin Spainhour for plaintiff-appellee.

Grant & Hastings, P.A., by Randell F. Hastings for defendant-appellant.

VAUGHN, Chief Judge.

The sole issue on appeal is whether the lack of registration of Burris' power of attorney invalidates his authority to sign his wife's name on the promissory note to plaintiff. If such signature was unauthorized, defendant contends that Melanie Burris is not liable on the debt, and that defendant, therefore, as guarantor of a joint debt, is not liable either. We affirm the trial court order granting plaintiff summary judgment. We hold that Burris had authority to sign his wife's name on the note, and that, therefore, defendant is liable for the full amount of the debt.

A power of attorney is an instrument in writing granting power in an agent to transact business for his principal. *NCNB v. Hammond*, 298 N.C. 703, 260 S.E. 2d 617 (1979); *Howard v. Boyce*, 266 N.C. 572, 146 S.E. 2d 828 (1966). Melanie Burris executed a written power of attorney in 1979 which gave her husband authority to sign her name on the June 6, 1980, promissory note to plaintiff.

Although G.S. 47-115.1(d) states that "no power of attorney executed pursuant to the provisions of this section shall be valid but from the time of registration thereof in the office of the register of deeds . . ." and although Melanie Burris' power of attorney specifically incorporated G.S. 47-115.1, we interpret the recording provision to apply only in cases where a competent

principal later becomes incompetent. If the principal is competent, as was Melanie Burris, then a power of attorney, if in writing, is effective without the necessity of recordation. *NCNB v. Hammond, supra; see O'Grady v. First Union National Bank,* 35 N.C. App. 315, 241 S.E. 2d 375, *reversed,* 296 N.C. 212, 250 S.E. 2d 587 (1978). In *Hammond,* the Supreme Court stated: "G.S. 47-115.1 codifies a particular subset of powers of attorney—those powers of attorney which may be continued in effect in the event of incapacity or mental incompetence of the principal . . ." 298 N.C. at 713, 260 S.E. 2d at 624, 625. The purpose of G.S. 47-115.1 is to render a power of attorney, executed by a competent principal, effective, notwithstanding the later incompetence of the principal. *See* Act of May 3, 1961, ch. 341, 1961 N.C. Laws 501.

G.S. 47-115 states: "Any instrument, in writing, executed by an attorney-in-fact, shall be good and valid as the instrument of the principal . . ." Since the power of attorney, executed in 1979, was in writing, and since Melanie Burris was competent in 1979 and in 1980, when the promissory note was executed, Melanie Burris is liable for the debt as if she had signed the note herself.

Pursuant to G.S. 25-3-401, individuals are liable on an instrument if their signatures appear thereon. The Burris' signatures appeared on the promissory note, and, thus, they were jointly liable for the debt when they filed for bankruptcy on March 5, 1981.

Defendant contracted to pay the full amount of the debt in the event of bankruptcy of the primary debtor. Pursuant to his contract and pursuant to G.S. 25-3-416, which provides that a guarantor becomes absolutely liable upon default, defendant is liable to plaintiff for the full amount of the debt. We therefore affirm the order entering summary judgment in favor of plaintiff.

Affirmed.

Judges HILL and BECTON concur.

DONALD H. AHERN v. JANET F. AHERN

No. 8226DC637

(Filed 6 September 1983)

Divorce and Alimony § 16.9— amount of alimony—supporting evidence

The trial court's order requiring plaintiff to pay defendant alimony of $25,000.00 per year was supported by the record, although plaintiff's designated salary from a drug company which he owns is only $31,500.00 per year, where plaintiff stipulated that he is able to support defendant at the same level to which she had been accustomed during the marriage; the evidence showed that plaintiff's real income greatly exceeded his designated salary and that the standard of living of the parties during the marriage was much higher than that permitted by a salary of $31,500.00; and the evidence supported the court's finding that no restrictions existed to prevent plaintiff from setting his salary at a higher level.

APPEAL by plaintiff and cross-appeal by defendant from *Saunders, Judge.* Orders entered 1 February 1982 and 10 June 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 22 April 1983.

Plaintiff and defendant married in 1951, separated in July, 1979, and have three children, all of whom are now emancipated. In September, 1980, plaintiff sued for absolute divorce on the grounds of one year's separation; the defendant answered, admitting the separation, but alleged the plaintiff's abandonment and counterclaimed for permanent alimony. By stipulation, the divorce action was heard separately and the decree was entered 1 May 1981. Later, after the court's leave was obtained, defendant filed an amended answer and counterclaim that added two claims for monies allegedly due her from the plaintiff because of the purchase and sale of certain assets during the marriage.

After defendant's alimony claim was heard, an order was entered requiring plaintiff to pay $2,141 a month and provide her with a car and medical insurance. From that order plaintiff appealed. Defendant moved to dismiss the appeal as premature and interlocutory and appealed the denial of her motion.

Walker, Palmer & Miller, by James E. Walker, and June E. Jensen, for plaintiff appellant.

Tucker, Hicks, Sentelle, Moon and Hodge, by Fred A. Hicks and Gretchen C. F. Shappert, for defendant appellee.

PHILLIPS, Judge.

Defendant's contention that plaintiff's appeal should be dismissed as premature since her other counterclaims have yet to be decided is without merit. The trial court determined that there was no just reason for delay, and we agree. "By making the express determination in the judgment that there is 'no just reason for delay,' the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal." *Arnold v. Howard,* 24 N.C. App. 255, 258, 210 S.E. 2d 492, 494 (1974).

Plaintiff's appeal is of no more substance. The only question of consequence presented is whether the order requiring him to pay alimony and provide other benefits for defendant amounting to about $25,000 a year is supported by the record. Plaintiff contends, in short, that the award is incompatible with his salary of $31,500 a year and that the finding that the drug company he owns and works for could increase his salary if plaintiff chose is not supported by evidence. The question presented is affirmatively answered by the record not once, but twice.

First and foremost, before plaintiff's divorce was obtained and the alimony hearings were conducted, in addition to stipulating that he is the supporting spouse and she is entitled to permanent alimony, all of which had been admitted in replying to her counterclaim, plaintiff further testified that: *"he is an able-bodied man, capable of earning substantial amounts of money, and earning substantial amounts of money, and has the ability to provide ample support for the defendant."* (Emphasis supplied.) Since proof is not required for that which has been judicially admitted—*Clapp v. Clapp,* 241 N.C. 281, 85 S.E. 2d 153 (1954); 2 Brandis N.C. Evidence § 166 (2d ed. 1982)—this set at rest the plaintiff's ability to support the defendant at the same level that she had become accustomed to during the marriage, which is obviously what the words "ample support" were intended and understood to mean. Used against the background of their life together, the words "ample support for the defendant" certainly do not mean support at the very highest level or, for that matter, any level higher than they had ever enjoyed; nor can the words be perverted to mean at a level that can be paid for by a fair portion of the $31,500 salary that he set for himself five years ago. An award based only on his designated salary, as the record in-

disputably shows, would not support the defendant at the level that the parties had long lived, and plaintiff does not contend that it would. The record also shows that the alimony awarded defendant will not enable her to live above the standard heretofore maintained, and again plaintiff does not argue that it would. Having formally stipulated to support and maintain her as before, plaintiff is not at liberty to now contend to the contrary. *Rural Plumbing and Heating, Inc. v. H. C. Jones Construction Co., Inc.*, 268 N.C. 23, 149 S.E. 2d 625 (1966).

Even so, the amount of alimony ordered is also justified by the evidence, which clearly shows that plaintiff's real earnings and income greatly exceed his designated salary. Findings not excepted to show that: The parties acquired and lived in a house worth around $175,000; he acquired marketable securities worth $110,000; his company owes him $125,000 in retained earnings; his equity in his company has an appraised worth of $412,000; he drives and maintains a Cadillac Coupe DeVille automobile; she was provided an automobile, all expenses of which were paid; she had various credit cards and used them as she saw fit; she had access to their joint bank account and wrote checks whenever she wanted to; they were members of, and frequently entertained at, several exclusive and expensive social clubs, including the Charlotte Country Club, the Charlotte City Club, and the Palmetto Club of Columbia, South Carolina; they took trips at considerable expense to New York, San Francisco, Las Vegas, Miami and other American cities and to London, Paris and Rome, always staying at plaintiff's insistence at the nicest hotels; and he contributed about $11,000 a year to the living and educational expenses of their grown, emancipated children, one of whom was 28 years old. Though many of these and other living expenses were paid for by his company, under some accounting or legal theory not understood by us, they nevertheless bespeak, beyond question, real income far beyond the salary received, which fully justifies the award made.

Plaintiff's contentions that the award is based on potential, rather than actual, earnings and that the court's finding that no restrictions exist to prevent him from setting his salary at a higher level is not supported by evidence both miss the point. That his actual income, as distinguished from his mere salary, justifies the award is too obvious for debate; and as to the

absence of any restrictions to raising his salary, the only finding excepted to, the evidence does not show that there is any. The evidence does show, though, that he is the sole owner of that profitable business, which clearly imports control; and though plaintiff testified in vague terms about it not being good business or accounting practice to draw a higher salary, he did not testify that any restrictions had been imposed on either him or the company with respect to his salary. And, certainly, his mode of living through the years, largely at the company's expense, indicates that the company had little or no restrictions as to outlays that could be made for him.

The orders appealed from are therefore

Affirmed.

Judges HILL and JOHNSON concur.

BILLY WAYNE DAWSON v. THOMAS A. RADEWICZ

No. 825SC611

(Filed 6 September 1983)

Contracts § 34— tortious interference with employment contract—insufficiency of evidence

Plaintiff's evidence was insufficient to support an action for tortious interference with an employment contract where the evidence tended to show that plaintiff had been tentatively hired as an ABC law enforcement officer when defendant sheriff told the ABC Board administrator and chairman of the ABC Board he might have difficulty working with plaintiff, a former deputy sheriff, if plaintiff were hired and where the evidence showed that subsequent to the meeting with defendant the ABC Board decided to postpone hiring anyone for the law enforcement officer position giving the reason that the board members felt that there would not be a good working relationship between the ABC law enforcement division and the sheriff's department if plaintiff were hired.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 19 April 1982 in Superior Court, PENDER County. Heard in the Court of Appeals 21 April 1983.

This appeal arises from an action for tortious interference with plaintiff's employment contract with the New Hanover County Alcoholic Beverage Control Board (hereinafter ABC Board). The plaintiff's evidence showed that in 1978, defendant was elected Sheriff of New Hanover County. Plaintiff, a deputy sheriff at the time, had actively supported candidates other than defendant in both the primary and general elections. After the election, defendant notified five deputies, including plaintiff, that they would not be rehired. Plaintiff's employment with the Sheriff's Department was terminated on 4 December 1978. He thereafter began seeking a job with other law enforcement agencies. He applied for a position with the ABC Board as an ABC Law Enforcement Officer, and on 22 February 1979 he met with Chief ABC Officer George McLean and ABC Board Administrator George Tally. McLean and Tally advised plaintiff to report to work on 1 March 1979.

The following day, 23 February 1979, defendant "dropped by" Tally's office to congratulate him on his appointment as ABC Board Administrator. Defendant also told Tally that he understood the ABC Board was considering employing some of the former deputies that defendant had not rehired when he took office. He advised Tally that should this occur, he did not believe the Sheriff's Department could have a harmonious relationship with the ABC Board.

When William Rehder, Chairman of the ABC Board, came by Tally's office later that day, Tally told him of defendant's sentiments. Rehder asked Tally to set up a meeting with defendant to discuss the situation. At the meeting, Rehder asked defendant why the Sheriff's Department would have difficulty working with the ABC Board should plaintiff, whom he said had been tentatively hired, start working with the ABC Board. Defendant told Rehder and Tally that plaintiff was one of a group of men involved in making a threat on defendant's life. Defendant further told them about an incident in which plaintiff had accidentally discharged a gun while in his patrol car. Then defendant called one of his deputies into the meeting, who told Rehder and Tally that he and the other men in the department felt they could not work with plaintiff.

Following the meeting, the ABC Board decided to postpone hiring anyone for the ABC Law Enforcement Officer position, and

plaintiff was informed of this decision on 28 February 1979. The reason given for the Board's decision was the Board members felt there would not be a good working relationship between the ABC Law Enforcement Division and the Sheriff's Department if plaintiff were hired. Plaintiff eventually obtained employment elsewhere in May 1979.

At the close of plaintiff's evidence the court granted defendant's motion for directed verdict. Plaintiff appealed.

Sperry, Scott and Cobb, by Herbert P. Scott and John P. Swart, for plaintiff appellant.

Crossley and Johnson, by Robert White Johnson; and James J. Wall, for defendant appellee.

WEBB, Judge.

A cause of action for the tortious interference with a contract is recognized in this jurisdiction. *See Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976); *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954); *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647 (1945); and *Fitzgerald v. Wolf*, 40 N.C. App. 197, 252 S.E. 2d 523 (1979). We believe these cases establish the rule that a person may be liable for intentionally interfering with another's contractual rights or his right to contract. Some of the cases say that to be liable the interferer must be an outsider. An outsider is one who is not a party to the contract and has no legitimate interest in the subject matter thereof. *Smith v. Ford Motor Co., supra*, holds that a non-outsider may be liable if he brings about a termination for some reason other than a legitimate business reason. Other factors to be considered are the nature of the interference and the interest sought to be advanced by the interferer. *See* Restatement of Torts § 767 (1954).

We believe that applying these principles to this case requires us to affirm the judgment of the Superior Court. The defendant, as chief law enforcement officer of New Hanover County, had a legitimate interest in who other law enforcement officers in the county would be. He was not an outsider. Whether his difficulty with plaintiff was based on personal or professional reasons, he had a legitimate right to make this known to the New

Hanover County ABC Board. All the evidence shows he informed the Board of the difficulty he might have working with plaintiff if plaintiff were hired. The nature of this action was not coercive, as in many of the cases, but was a statement of the facts as the defendant understood them. We believe that on the facts of this case, defendant was privileged to convey this information to the ABC Board.

The plaintiff also assigns error to the exclusion of certain evidence. We do not believe the excluded evidence would affect the outcome of the case and we do not discuss these assignments of error.

Affirmed.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. MARY WHITE

No. 823SC929

(Filed 6 September 1983)

Homicide § 16— dying declarations—decedent's belief that he was dying

Decedent's statements to a deputy sheriff that defendant shot him and that he was dying were properly admitted as dying declarations where the court found that decedent believed he was dying when the statements were made, notwithstanding the doctors attending decedent believed that he was in no danger of dying and had assured him that he would recover.

APPEAL by defendant from *Reid, Judge.* Judgment entered 20 May 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 March 1983.

The defendant, tried for the second-degree murder of Edward Sawyer, was convicted of voluntary manslaughter. The State's evidence tended to show that: The deceased, partially blind and elderly, was living in defendant's home, for which she received payments under a Social Services program; on the night in question they had been arguing because he wanted to go out and she did not want him to; defendant's son, residing nearby, heard two shots and found his mother holding a pistol in her hand

and Sawyer wounded, sitting on the living room sofa; one of the bullets lodged in the wall of the house, the other adjacent to his lower fourth rib after entering his right neck and going through the windpipe, esophagus and left lung, which collapsed. Sawyer, conscious all the while, was immediately taken to the hospital where he was examined and in a relatively simple procedure, taking only a few minutes, the doctors drained the internal bleeding and other fluids out of his chest cavity, enabling the collapsed lung to reinflate. Before, during and after that procedure, the doctors and nurses attending him assured Sawyer he was going to be all right.

While still in the emergency room, a few minutes after the procedure was completed, his condition stablilized and Deputy Sheriff Hamilton was allowed to question him briefly. Upon the Deputy Sheriff asking him what happened, Sawyer said several times, "Mary White shot me, I'm dying." And upon the Deputy Sheriff asking him why Mary White shot him, Sawyer said that she was mad at him because he had been out all day. The doctors who treated him were then of the opinion that he would recover and, so far as the record indicates, no one told him that the wound might be fatal. Sawyer's condition remained stable for approximately thirty-eight hours, but after that a massive, uncontrolled infection developed from the mouth germs that were discharged into the chest cavity from the ruptured esophagus, which was neither detected nor repaired in the initial examination and treatment, and he died eight days after the shooting.

Defendant testified that: Sawyer fired a pistol in the living room while she was in the kitchen; she ran into the living room, grabbed the gun from him, and it went off.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III, for defendant appellant.

PHILLIPS, Judge.

Three of defendant's assignments of error, the only ones requiring discussion, relate to receiving the officer's testimony that the decedent told him he was dying and the defendant shot him.

She contends that Sawyer's statement was inadmissible hearsay, rather than a qualified dying declaration, in that Sawyer was not then in any real danger of dying and no doctor or medical attendant had told him that he was. The record certainly supports the defendant's contention that at the time Sawyer's statement was made the doctors who had examined and treated him believed that he would recover and was in no imminent danger of dying. Their belief was admittedly contingent, however, since they knew the bullet had entered one side of his body, lodged near the other side, and in the process had passed through "a very important area of the body," but did not then know whether any important structures or vessels had been damaged; and because of the unknown conditions, the doctors put him under the constant observation and care of nurses trained to detect internal injury from trauma. Nevertheless, their opinion, such as it was, was that the wound was not fatal and Sawyer would recover.

Though the opinions of the doctors that decedent was in no danger of dying when the statements were made are relevant to the question before us, they are not conclusive. The mental state that is decisive in determining whether an out-of-court statement qualifies as a dying declaration, of course, is that of the declarant, not his doctor. Before permitting the officer to testify as to Sawyer's statement, the judge conducted a thorough *voir dire* out of the jury's presence and made extensive findings of fact, the most pertinent of which, for the purposes of this appeal, was that: ". . . at the time the deceased made those statements or declaration, to Sheriff Hamilton the deceased in his own mind was conscious of approaching death and believed at the time that he was dying." Whether decedent's hearsay statement qualifies as a dying declaration is a decision for the trial judge in the first instance; a finding that such a statement was a dying declaration and thus admissible into evidence as an exception to the rule against hearsay, if supported by evidence, will not be disturbed on appeal. *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978).

That the decedent said he was dying is certainly some proof he believed he was. *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981). Had he just said it once would have sufficed, but according to the officer and the judge's findings, he said it several times, even after the officer told him the doctors were taking care of him. Nor were his words unsupported; a bullet had been pro-

pelled diagonally through vital parts of his body, and that he was in considerable danger of dying was self-evident, the optimism of the doctors notwithstanding; and being conscious, he knew the immediate reactions of his body and mind to his injury as no one else then did or could. That he chose to make his own assessment of his injury is understandable; that his belief was neither founded upon nor corroborated by professional knowledge and experience does not render it inoperative. *State v. Layton*, 204 N.C. 704, 169 S.E. 650 (1933). What renders a dying declaration worthy of belief is not that the conviction of impending death was scientifically arrived at, but that it was sincerely and steadfastly held. Having found that Sawyer, indeed, believed that he was dying when the statements were made, and that he died a few days later, the trial judge properly admitted the statements into evidence. *State v. Stevens, supra.*

Defendant's other assignments of error have been carefully considered, and in our opinion her trial was without prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. LARRY KORNEGAY EDWARDS

No. 8226SC1075

(Filed 6 September 1983)

1. **Rape and Allied Offenses § 4— doctor's testimony concerning results of test for gonorrhea—substantive evidence—improperly admitted**

The trial court erred in admitting the testimony of a doctor that test results for gonorrhea made on defendant were positive since his answer that the test results were positive was substantive evidence which proved the defendant had gonorrhea. The trial court, however, properly admitted the testimony of another doctor who testified that in his opinion the prosecuting witness had been exposed to gonorrhea, and he could testify to the results of a laboratory test for gonorrhea as the basis for his opinion.

2. **Criminal Law § 42.6— culture smears—no chain of custody necessary**

Where culture smears were used in laboratory tests from which tests testimony was given, the culture smears were not real evidence and a chain of custody need not have been established.

3. Rape and Allied Offenses § 6.1— instructions on lesser degrees of crime properly omitted

In a prosecution for second degree rape, the trial court properly failed to submit to the jury charges of attempted second degree rape and assault on a female since all of the evidence for the State showed that the defendant had intercourse with the prosecuting witness with force and against her will, and defendant's evidence showed that he neither had intercourse nor touched the prosecuting witness against her will.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 9 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 April 1983.

The defendant appealed from an active prison sentence imposed after he was convicted of second degree rape.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

WEBB, Judge.

[1] In his first assignment of error the defendant argues that the court erred in admitting the testimony of two doctors.

Dr. William Guest who examined the defendant testified as follows:

"Q. And as a result of your examination, did you order any laboratory tests be made?

A. Yes, sir, my preliminary diagnosis at this time was either gonorrhea or non-specific urethritis.

Q. Did you give him any treatment?

A. Yes, sir, I did. Following obtainment of two preliminary tests—one was a culture for gonorrhea and the second was 'VDRL' which was for syphilis.

Q. Did you have an opportunity to examine the test results from those tests?

A. Yes, sir, I have.

Q. What did they show?

A. The 'VDRL' was negative and the gonorrhea was positive."

Dr. Philip DeHauf who treated the prosecuting witness testified that he ordered a test for gonorrhea, that he examined the results of the chemical test and the culture was positive for gonorrhea. He testified that in his opinion the prosecuting witness had been exposed to gonorrhea in the recent past.

The defendant argues that the testimony of both doctors violates the hearsay rule because each of them relied on a hospital record showing a positive result in a test for gonorrhea. We believe that the law as applied to this case is that the two doctors could have given their expert opinion on information gained from others, including laboratory tests, if it is inherently reliable and could have testified as to the information upon which they relied to form their opinions. Neither of them could offer as substantive evidence information supplied by others. *See State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982) and *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). Under this rule the testimony of Dr. Guest should have been excluded while the testimony of Dr. DeHauf was admissible. Dr. Guest's testimony that the test for gonorrhea was positive was substantive evidence which proved the defendant had gonorrhea. Dr. Guest did not use it to form a preliminary diagnosis of possible gonorrhea. Dr. DeHauf testified that in his opinion the prosecuting witness had been exposed to gonorrhea. This opinion was based in part on the laboratory test which was positive for gonorrhea. He could testify to the results of this test as the basis for his opinion.

We believe it was prejudicial error to admit the testimony of Dr. Guest. There was conflicting testimony as to whether defendant had intercourse with the prosecuting witness. The evidence that both parties had gonorrhea was substantial evidence to bolster the testimony of the prosecuting witness. We believe there is a reasonable possibility a different result would have been reached at trial had this evidence not been received. For this error we hold there must be a new trial.

We shall discuss some of the defendant's other assignments of error as the questions they pose may recur at the next trial.

[2] In his second assignment of error defendant, relying on *State v. Karbas*, 28 N.C. App. 372, 221 S.E. 2d 98 (1976), argues that the State did not establish a chain of custody for the culture smears which the two doctors had taken for laboratory tests. A chain of custody must be established for real evidence which cannot otherwise be identified. The culture smears were not real evidence. They were used in laboratory tests from which tests the testimony was given. We do not believe we should extend the rule by requiring proof of a chain of custody for types of evidence other than real evidence. The language of *Karbas* may support the defendant's position but we believe it is dictum. In that case the results of a blood test were received in evidence. The State proved a chain of custody so the testimony of the witness was admissible whether or not the State was offering real evidence. We have not found a case in which evidence other than real evidence has been excluded from evidence for failure to prove a chain of custody.

[3] The defendant also assigns error to the failure of the court to submit to the jury a charge of attempted second degree rape and assault on a female. All the evidence of the State showed that the defendant had intercourse with the prosecuting witness with force and against her will. The defendant's evidence showed that he did not have intercourse with the prosecuting witness and did not touch her against her will. Neither the State nor the defendant presented evidence of a lesser included offense. The defendant's evidence showed that he was not guilty of any offense. It was proper not to submit attempted second degree rape or assault on a female to the jury. *See State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977).

We do not discuss the defendant's other assignment of error as the question it raises may not recur at a subsequent trial.

New trial.

Judges WHICHARD and BRASWELL concur.

YUEN WU HONG AND JOSEPHINE Y. W. HONG v. GEORGE GOODYEAR COMPANY

No. 8226SC1038

(Filed 6 September 1983)

Specific Performance § 2; Vendor and Purchaser § 5.1— construction and sale of house—plaintiffs not entitled to specific performance

Plaintiffs were not entitled to specific performance of a contract for the construction and sale of a house where plaintiffs' evidence showed a conditional willingness on their part to perform only after the matters in dispute were corrected, and where plaintiffs' evidence showed that defendant no longer had the ability to perform the disputed parts of the contract in that the wrong color brick was used because the desired brick was no longer produced or available, the driveway could not be constructed to the contracted width without going over the property line, and a concrete patio could not be built because the grade level of the house was too low.

APPEAL by plaintiffs from *Ferrell, Judge.* Judgment entered 17 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 August 1983.

Walker, Palmer & Miller by Douglas M. Martin for plaintiff appellants.

Parham, Helms & Kellam by Ralph C. Harris, Jr., for defendant appellee.

BRASWELL, Judge.

The plaintiffs instituted this action seeking specific performance of a contract for the purchase and sale of a house and lot. The plaintiffs have alleged that the defendant, vendor-builder, has breached the contract by failing to construct the house in accordance with their written contract. At the close of the plaintiffs' evidence, the defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). This motion was granted. The question presented for review is whether the trial court properly granted the motion for directed verdict, finding as a matter of law that the plaintiffs were not entitled to specific performance.

The plaintiffs are citizens of the Republic of China, and in 1979 wished to move to the United States. They authorized Chin-Yuan Chou and his wife as their agents to locate and purchase a

house for them in Mecklenburg County, North Carolina, where the Chous were residents.

The Chous contacted the defendant and went with the defendant's agent, Craig McQueen, to see several model houses. Subsequently, they found a house that they felt would be suitable for the plaintiffs and entered into a contract with the defendant for the purchase of a lot and the construction of a house on 24 May 1980.

The contract specified that the house plan would be identical to that found in model house #4416 as well as the driveway, walkway, sliding glass door, bay window and garage sink. Yet, the color of the brick was to be that used in model house #4410, instead of model house #4416.

The contract also provided that the concrete patio would not be built if the landscape grade was more than one foot below floor level. Yet, after the Chous stated they did not want the house without the patio, McQueen added language to the contract providing that whether or not a patio could be built would be determined before construction began in order to allow the Chous the opportunity to buy another lot.

The house was constructed and the plaintiffs have refused repeated attempts by the defendant to close the sale. The plaintiffs brought this action on 6 February 1981, alleging that the defendant has breached the contract in that: (1) the wrong color brick veneer was used; (2) the driveway and walkway were constructed more narrowly than specified in the contract; (3) the living room bay window and surrounding area were constructed materially different than that specified in the contract; (4) the defendant failed to determine prior to construction that the concrete patio could not be built or at least graded the yard in such a way that the patio could not be easily constructed; and, finally, (5) the defendant failed to install the garage sink. The defendant counterclaimed as well as sued the Chous as third-party defendants for damages.

A motion for directed verdict presents the question of whether the evidence, as presented by the plaintiffs in this case, was sufficient to allow a jury to pass on it. *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). If the plain-

tiffs fail to make a prima facie showing for relief, they are not entitled to have their case sent to the jury and the trial judge may rule on the issue as a matter of law. A trial court should deny motions for directed verdict when "viewing the evidence in the light most favorable to the plaintiff . . . it finds 'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements." *Id.* at 644, 272 S.E. 2d at 360. *See also* 2 McIntosh, North Carolina Practice and Procedure § 1488.15 (2d ed. Phillips' Supp. 1970). Therefore, in this case, the trial court did not err in granting the defendant's motion if the plaintiffs failed to establish all the requisite elements entitling them to the relief of specific performance.

The equitable remedy of specific performance compels a party "to do that which in good conscience he ought to do without court compulsion." *Bell v. Concrete Products, Inc.*, 263 N.C. 389, 390, 139 S.E. 2d 629, 630 (1965). In order to claim a right to specific performance, that party must show the "existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E. 2d 281, 285 (1981). The facts indicate that a loan to buy the house has been procured. Yet, on direct examination, Mr. Chou, as an agent authorized to close the sale for the plaintiffs, stated only after these matters in dispute had been corrected would he be willing to close on the house. Thus, when viewing the evidence in the light most favorable to the plaintiffs, the evidence shows at best only a conditional willingness to perform. "[F]ollowing the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement . . . before an action will lie, either for its breach or for specific performance." *McAden v. Craig*, 222 N.C. 497, 500, 24 S.E. 2d 1, 3 (1943). The plaintiffs in this case made no such offer. As a general rule, specific performance will be denied a plaintiff who is able, but unwilling, to perform at the contract time. 81 C.J.S. *Specific Performance* § 106 (1977). Therefore, because the plaintiffs offered no evidence at trial that they were ready and willing to perform, the trial court correctly granted the motion for directed verdict.

In any event, specific performance may not be granted where the performance of the contract is impossible. 81 C.J.S. *Specific Performance* § 18 (1977). The plaintiffs' own evidence clearly indi-

cates that the wrong color brick was used because the desired brick veneer was no longer produced or available, the driveway could not be constructed to the contracted width without going over the property line, and the concrete patio could not be built because the grade level of the house was too low. Since a court of equity will not do a useless thing, specific performance will not be decreed against a defendant who is unable to comply with the contract even though the inability to perform is caused by the defendant's own act. *Lawing v. Jaynes and Lawing v. McLean*, 20 N.C. App. 528, 202 S.E. 2d 334, *modified on other grounds*, 285 N.C. 418, 206 S.E. 2d 162 (1974). Therefore, even if the plaintiffs had established they were ready, able and willing to perform, specific performance could not be granted because the defendant no longer had the ability to perform its part of the contract.

We hold the motion for directed verdict was properly granted because the plaintiffs as a matter of law were not entitled to the remedy of specific performance.

Affirmed.

Judges ARNOLD and WEBB concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY ALICE WILLIAMS TAYLOR (DIVORCED) DATED NOVEMBER 12, 1975, RECORDED IN MORTGAGE BOOK 814, PAGE 892, DURHAM COUNTY REGISTRY, BY MARSHALL T. SPEARS, JR., TRUSTEE

No. 8214SC527

(Filed 6 September 1983)

Mortgages and Deeds of Trust § 40— motion to dismiss motion to set aside foreclosure sale—properly granted

There was evidence to support the trial court's decision to grant respondents' motion for dismissal of petitioner's motion to set aside a foreclosure sale on the ground that she had not been properly served with notice where the evidence tended to show that a deputy served the Notice of Hearing on petitioner at her home and the return of service indicated that petitioner was properly served. The fact that petitioner's evidence indicated otherwise did not preclude the court from entering a dismissal. G.S. 45-21.16(a), G.S. 1A-1, Rule 41(b).

In re Foreclosure of Taylor

APPEAL by movant from *McLelland, Judge.* Order entered 4 February 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 April 1983.

On 12 November 1975, the movant, Alice W. Taylor, executed a note in the amount of $3,744.00 secured by a deed of trust to Guaranty State Bank on real property owned by the movant. During 1977 the movant became delinquent in payments on the note in the amount of $208.00 and a foreclosure proceeding was commenced. At the hearing before the Clerk of Superior Court, it was determined that the trustee could proceed with a foreclosure sale. The movant was not present at this hearing. The property was sold for $2,740.00 on 15 December 1977.

On 3 April 1981, the movant filed a motion in the cause to set aside the sale. She alleged that she was not served with notice of the foreclosure hearing as required by G.S. 45-21.16(a). At the hearing on the motion, the Clerk of Superior Court found that the movant had not been properly served with notice, and entered an order setting aside the foreclosure and sale. Respondents appealed to Durham County Superior Court for a hearing *de novo.* At the end of the movant's evidence the respondents made a motion to dismiss pursuant to G.S. 1A-1, Rule 41(b). The court found as a fact that the movant had been served with the notice of the hearing in the foreclosure proceedings and denied Mrs. Taylor's motion to set aside the foreclosure and sale. The movant appealed.

North Central Legal Assistance Program, by Alice A. Ratliff, for movant appellant.

Stubbs, Cole, Breedlove, Prentis and Poe, by G. Jona Poe, Jr., for respondent appellees.

WEBB, Judge.

In her sole assignment of error the movant contends that, when viewed in the light most favorable to her, the evidence was sufficient to establish her right to relief. She argues it was error for the trial court to grant the respondents' motion for dismissal under Rule 41(b) of the North Carolina Rules of Civil Procedure. We disagree.

G.S. 1A-1, Rule 41(b) provides in pertinent part as follows:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

The movant in this case had the burden to prove that she was not served with proper notice in order to be entitled to relief. During the presentation of the movant's evidence, Deputy W. L. Lawrence of the Durham County Sheriff's Department testified that he served the Notice of Hearing on the movant at her home on 25 October 1977. The return of service indicates that the movant was properly served. Although the movant presented evidence indicating she was at work and not at home at the time notice was allegedly served, we believe the judge's finding of fact was supported by the evidence. In a nonjury case, the judge is the trier of facts. At the close of the movant's evidence, the judge may grant judgment against the movant on the basis of facts as he determines them to be. G.S. 1A-1, Rule 41(b). This is true even where the movant has made out a *prima facie* case which would withstand a motion for directed verdict for the respondent in a jury trial. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). Judge McLelland heard and weighed the evidence presented here by the movant. He found as a fact that the movant was "personally served with the required notice of hearing in these foreclosure proceedings by [the deputy] on October 25, 1977" and this finding has support in the record. There was, therefore, no error in the order denying the motion to set aside the foreclosure and sale.

The movant relies on *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239 (1957) for her contention that her unequivocal testimony that she was not served with notice, coupled with supporting testimony from other witnesses, is sufficient to set aside the deputy's return of service. It is true that such evidence of nonservice may be enough to outweigh other evidence that proper service occurred, but *Harrington* does not require a reversal of

the order in the case at bar. In *Harrington* the trial judge weighed the evidence and found facts in favor of the defendant. In the present case, Judge McLelland considered the evidence and made findings of fact against the movant. In both cases "[t]he credibility of the witnesses and the weight of the evidence were for determination by the court below in discharging its duty to find the facts." *Harrington, supra,* at 643, 97 S.E. 2d at 241. Even though the movant presented some evidence of nonservice in the instant case, "[a] motion to dismiss made pursuant to Rule 41(b) permits the trial judge to weigh the evidence, to find facts against the [movant], and to sustain [respondents'] motion" at the conclusion of the movant's evidence. *Neasham v. Day,* 34 N.C. App. 53, 55, 237 S.E. 2d 287, 288 (1977). The trial judge here did precisely this, and we find no error.

Affirmed.

Judges WHICHARD and BRASWELL concur.

NATHAN P. EVERHART v. BILLY JOE SOWERS AND BILLY JOE SOWERS, T/A REEDY CREEK MOTORS

No. 8222SC509

(Filed 6 September 1983)

Actions § 10; Process § 1.2; Rules of Civil Procedure § 4— summonses listing wrong county—voluntary dismissal—new complaint—no relation back

Summonses which incorrectly listed the county in which the complaint had been filed as "Cabarrus" rather than "Davidson" were fatally defective and did not confer jurisdiction on the court over defendants in that action. Therefore, where plaintiff filed a voluntary dismissal of the action without prejudice and filed another complaint within a year thereafter, the second complaint signified the commencement of a new action, not the continuation of the previous one under G.S. 1A-1, Rule 41(a), and the statute of limitations was not tolled by the original action. G.S. 1A-1, Rule 4(a) and (b).

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 5 January 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 18 March 1983.

This is a civil action wherein plaintiff seeks a monetary recovery for personal injuries sustained in an automobile accident

allegedly resulting from defendants' negligent operation of a motor vehicle on 4 February 1977.

On 30 January 1980, nearly three years after the alleged date of the accident, plaintiff initiated legal proceedings by filing a complaint in Davidson County Superior Court. The Deputy Clerk of Davidson County Superior Court issued summonses on the same day directing defendants to appear and answer the complaint within 30 days "at the office of the undersigned clerk." The summonses were issued under the same docket number as the complaint and were consistent with the complaint in all other respects except that, in the space provided in the caption portion of the summonses for entering the name of the county in which the complaint has been filed, the summonses read "Cabarrus" rather than "Davidson."

On 20 February 1980, defendants made a special appearance and moved to dismiss plaintiff's complaint under G.S. 1A-1, Rule 12(b)(2) and (5), for lack of personal jurisdiction and insufficiency of process. On 28 April 1980, plaintiff, pursuant to G.S. 1A-1, Rule 41(a)(1)(i), filed notice of voluntary dismissal without prejudice in the action.

On 27 April 1981, 364 days after taking the voluntary dismissal, plaintiff filed a complaint in Davidson County which was identical in all material respects to the complaint filed on 30 January 1980. Defendants answered on 27 May 1981 denying the material allegations in the complaint and pleading the statute of limitations as a bar to plaintiff's action. Defendants also moved for judgment on the pleadings for the same reason. On 10 June 1981, plaintiff moved for leave to file a reply to defendants' answer. Plaintiff's motion was granted and defendants' motions were denied after a hearing on 18 June 1981. Plaintiff replied on 23 June 1981.

On 17 December 1981, defendants moved for summary judgment, alleging that the statute of limitations barred plaintiff's action. On 11 January 1982, the court entered an order granting summary judgment to defendants. Plaintiff appealed.

Thomas K. Spence, for plaintiff appellant.

Brinkley, Walser, McGirt, Miller & Smith, by Charles H. McGirt and Stephen W. Coles, for defendant appellees.

JOHNSON, Judge.

The sole question presented by this appeal is whether plaintiff's action is barred by the statute of limitations. The applicable sections of the North Carolina Statutes, G.S. 1-15 and 1-52(16), provide in effect that an action based on personal injury must be commenced within three years of the date on which the claim accrued. For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant.

Plaintiff argues that the trial court's grant of summary judgment for defendants was improper in that the statute of limitations was not a bar to plaintiff's action. Plaintiff contends that his entry of notice of voluntary dismissal without prejudice with respect to the 30 January 1980 complaint entitled him under Rule 41(a) to recommence the same action at any time within one year from the date of the voluntary dismissal.

Defendants contend that the summonses issued in connection with the 30 January 1980 complaint were fatally defective in that they failed to indicate the county where the action was pending. As such, defendants argue, the summonses were ineffective for purposes of obtaining in personam jurisdiction over them. Since the court had no jurisdiction, defendants contend that any subsequent proceedings in the action, including plaintiff's taking a voluntary dismissal without prejudice, did not affect them and were ineffective to suspend the running of the statute of limitations.

Plaintiff contends that the failure to indicate on the summonses the county where the action was pending was a nonjurisdictional defect in form and was, therefore, sufficient to give the court jurisdiction over defendants. In support of this contention, plaintiff cites the case of *Beck v. Voncannon*, 237 N.C. 707, 75 S.E. 2d 895 (1953).

Beck involved a situation where a summons had been issued over the signature of the Deputy Clerk of Court rather than the Clerk, as purported on the face of the summons. Defendant in that case contended that the summons, therefore, did not meet the requirements of due process and was ineffectual to confer jurisdiction. In overruling that contention, the *Beck* court held

that such formal irregularities were non-jurisdictional, not fatal to the action, and could be corrected by amendment.

However, with regard to the character of the defect in the summonses in the instant case, the case of *Grace v. Johnson*, 21 N.C. App. 432, 204 S.E. 2d 723 (1974), is directly on point. That case holds that where an action is filed in one county and summons issued directing defendant to appear and answer in another county, the summons is fatally defective. A fatally defective summons is incapable of conferring jurisdiction. *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974). The summonses issued in connection with the filing of the 30 January 1980 complaint did not confer jurisdiction of the court over defendants in that action.

The question that remains is how this failure to obtain jurisdiction affects the rights of the parties with respect to the statute of limitations and plaintiff's ability to preserve his claim under Rule 41(a).

Under the Rules of Civil Procedure, an action is commenced by the filing of a complaint or the issuance of a summons. G.S. 1A-1, Rule 3. Rule 4(a) states, "Upon the filing of a complaint, summons *shall* be issued forthwith, and in any event *within five days*." (Emphasis added.) Due process requires that a party be properly notified of the proceeding against him. *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966). In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982). Rule 4(b) provides that a summons "shall contain . . . the name of the court and the county where the action has been commenced." Where a complaint has been filed and proper summons does not issue within the five days allowed under Rule 4, the action is deemed never to have commenced. *Id.*

Inasmuch as the summonses issued in connection with the initial filing of the 30 January 1980 complaint failed to note the county where the action was pending, they were fatally defective and, for purposes of Rule 4, improper. Since proper summons did not issue within the five days allowed under the rule, the action which plaintiff alleges was initiated on 30 January 1980 is deemed never to have commenced. It follows, therefore, that the statute of limitations was never tolled with respect to the subject of that

complaint. *See Roshelli v. Sperry,* 63 N.C. App. 509, 305 S.E. 2d 218 (1983) (same case as above, different issue on appeal).

The complaint filed on 28 April 1981 signifies the initiation of a new action, not a continuation of the previous one. *Id.* Since this action was commenced more than three years from the date on which plaintiff's claim accrued, it is barred by the statute of limitations. *Id.* It would have been proper, therefore, for the trial court to have granted defendants' motions to dismiss and for judgment on the pleadings and never to have proceeded to summary judgment. The question that is before us, however, is whether the order granting summary judgment to defendants was proper. We hold that it was.

Affirmed.

Judges WELLS and HILL concur.

WILL C. MCMILLAN, ADMINISTRATOR OF THE ESTATE OF PEGGY STEPHENS MCMILLAN v. WILLIE RICKY NEWTON AND DAVID F. GREEN

No. 8212SC568

(Filed 6 September 1983)

Automobiles and Other Vehicles § 50— wrongful death action—automobile struck by car being pursued by patrolman—summary judgement for patrolman proper

The trial court properly granted summary judgment for a patrolman in a wrongful death action where the evidence tended to show that the patrolman tried to stop the other defendant for following a vehicle too closely, the other defendant increased his speed and the patrolman pursued defendant's vehicle and where the other defendant's vehicle collided with the vehicle in which plaintiff's intestate was driving.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 20 April 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 April 1983.

This is an action for wrongful death. The plaintiff's intestate was killed when an automobile in which she was riding was struck by an automobile being driven by the defendant Willie

Ricky Newton who was being pursued by the defendant David F. Green, a member of the North Carolina State Highway Patrol. The plaintiff alleged that the joint and concurring negligence of the two defendants was the proximate cause of his intestate's death.

The defendant David F. Green made a motion for summary judgment. The papers filed in regard to this motion showed that on 13 January 1980 the defendant Green was on duty in Cumberland County when he tried to stop the defendant Newton for following another vehicle too closely. Newton would not stop and Trooper Green pursued him at a speed that at times reached 110 miles an hour. Trooper Green requested assistance from the radio dispatcher during the pursuit. Trooper Green pursued the defendant for 7 to 10 miles, a part of the pursuit being inside the Town of Hope Mills. Trooper Green did not know who was driving the vehicle he was pursuing. While Trooper Green was approximately 300 feet behind Newton he saw a vehicle approximately ¾ of a mile ahead of Newton give a right turn signal. Trooper Green slowed down and saw the vehicle being driven by the defendant Newton collide with the vehicle which had given the right turn signal. The plaintiff's intestate was driving the vehicle with which Newton's vehicle collided and she died as a result of the collision.

The superior court granted the defendant Green's motion for summary judgment. The plaintiff appealed.

A. Maxwell Ruppe for plaintiff appellant.

Nance, Collier, Herndon and Ciccone, by James R. Nance; and Anderson, Broadfoot, Anderson, Johnson and Anderson, by Hal W. Broadfoot, for defendant appellee.

WEBB, Judge.

The granting of the motion for summary judgment by the defendant David F. Green did not dispose of all claims in the action and is not a final judgment. We believe the judgment does affect a substantial right which could work injury to the appealing party if not corrected prior to a final judgment. The plaintiff's claim against the defendant Green has been dismissed. If plaintiff gets a judgment against the other defendant, it could be of little use to plaintiff in being compensated for his damages. If the

defendant Green were liable to the plaintiff, we believe plaintiff should have a right to a judgment against both defendants after a trial without having to appeal and get a second trial against the second defendant. We hold the summary judgment in favor of the defendant Green is appealable. *See Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980).

This is an appeal from a summary judgment for a defendant in a wrongful death action based on negligence. We believe *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979) governs as to when a motion for summary judgment should be entered for a defendant in an action based on negligence. We believe that case holds that if the moving party makes a forecast of evidence which would be sufficient if offered at trial to compel a directed verdict in his favor, the opposing party is required to make a forecast of evidence, which if offered at trial, would prevent a directed verdict for the moving party. If the opposing party does not make such a forecast, the moving party is entitled to summary judgment in his favor.

In this case all the evidence shows that the defendant Green, while on duty as a member of the North Carolina State Highway Patrol, engaged in a high speed chase while pursuing the defendant Newton. The plaintiff's intestate was killed when Newton's vehicle collided with the vehicle she was driving. There is no evidence that Trooper Green drove his vehicle negligently unless engaging in the pursuit was negligent. G.S. 20-145 provides that Trooper Green was not bound by the posted speed limit.

We have not found a case from this jurisdiction on point but we believe Trooper Green was governed by the standard of the reasonable man. *See* W. Prosser, Handbook of the Law of Torts § 32, p. 149 (4th ed. 1971). In this case the question is what action would a reasonable man, who is serving as a member of the North Carolina State Highway Patrol, take when he tries to stop a motor vehicle for following too closely and the driver of the vehicle does not stop. In this case defendant Green pursued the vehicle. He called his radio dispatcher for assistance and continued the pursuit. We believe this is what a reasonable man in the circumstances of Trooper Green would have done.

There is danger in high speed chases by law enforcement officers. Nevertheless, we believe it is reasonable and good public

policy for law enforcement officers to pursue and apprehend those who do not stop when signalled to do so. The evidence is that Trooper Green conducted the pursuit in as careful a manner as was possible. If we held that on the evidence forecast Trooper Green could be found liable for negligence we would be holding that any law enforcement officer who engages in a pursuit would do so at his peril. This we cannot do. As tragic as the death in this case is, we do not believe Trooper Green is responsible for it.

The forecast of evidence being such that the defendant Green would be entitled to a directed verdict if the evidence were offered at trial we hold that summary judgment in his favor was properly granted.

Affirmed.

Judges WHICHARD and BRASWELL concur.

SOUTHERN GLOVE MANUFACTURING COMPANY, INC., JOYCE FIDLER AND HUSBAND, LEONARD C. FIDLER, JANICE HARVEY AND HUSBAND, WILLIAM J. HARVEY v. CITY OF NEWTON

No. 8225SC1039

(Filed 6 September 1983)

Municipal Corporations § 2.4— annexation ordinance—authority to remand for deletion of landowners

Although not explicitly authorized by G.S. 160A-50, a superior court judge had authority to remand an annexation ordinance to the city governing board upon the city's motion to exclude landowners who were originally covered by the ordinance.

APPEAL by petitioners from *Ferrell, Judge.* Judgment entered 31 July 1982 in Superior Court, CATAWBA County. Heard in the Court of Appeals 25 August 1983.

The petitioners brought this action to review exclusion from the City's annexation ordinance.

On 2 March 1982, the City adopted an annexation ordinance. The petitioners filed a petition for review of that ordinance in Superior Court on 31 March 1982.

At a pre-trial conference on 14 May 1982 in which the parties were represented by counsel, the City's counsel said that it wished to delete the petitioners' property from the proceeding. The trial judge instructed the City's counsel to file a written motion with that request.

On 17 May 1982, the City filed the motion and served it by mail on the petitioners' counsel. On 18 May 1982, the trial judge signed an order permitting the City to delete the petitioners' property and remanded the proceeding to the City for appropriate action by its governing board. The City took that action on the same day. The order and amended ordinance were served on the petitioners' counsel by mail on 18 May 1982.

On 19 May 1982, the trial judge signed the final judgment which was served on the petitioners' counsel that day by mail.

Pursuant to a motion in the cause filed by the petitioners to set aside or amend the order and judgment, a hearing was held at which all counsel were present. On 31 July 1982, the trial judge denied the petitioners' motion to set aside but granted their motion to amend the 18 May 1982 order to the extent that it stated that the petitioners did not object to that order. The petitioners appealed.

Williams & Pannell, by Martin C. Pannell and Mullen, Holland and Cooper, by James Mullen, for petitioner-appellants.

Sigmon, Sigmon and Isenhower, by Jesse C. Sigmon, Jr., for defendant-respondent.

ARNOLD, Judge.

Although the petitioners were deleted from the annexation ordinance in this case, a separate annexation proceeding, which included the petitioners' land, was begun on 19 May 1982. Review of that proceeding is currently pending in Superior Court.

The petitioners' primary argument is that the annexation statutes do not provide for remand by a superior court judge to the City in a case like this one. They argue that the three possible dispositions on remand listed in G.S. 160A-50(g) are exclusive. We disagree.

That statute says that the superior court may affirm the action of the governing board without change, or it *may* remand to the municipal governing board for one of three dispositions, none of which is applicable here. G.S. 160A-50(g) does not say, however, that these are the only dispositions of an ordinance on remand.

The burden is on the petitioners to show by competent evidence that the City failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 25, 265 S.E. 2d 123, 126 (1980).

> The court's review is limited to these inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will 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 requirements of G.S. 160-453.16 [now in G.S. 160A-45 to -56] as applied to petitioners' property? G.S. 160A-453.18(a) and (f) [now in G.S. 160A-45 to -56].

In re: Annexation Ordinance, 278 N.C. 641, 646-47, 180 S.E. 2d 851, 855 (1971).

It is correct that G.S. 160A-50 does not explicitly empower a superior court judge to remand an annexation ordinance upon a City's motion to exclude a landowner who originally was covered by it. But we see no "material injury" to the petitioners by the remand in this case.

The end result of the ordinance that is before us in *this* case is that the petitioners are not part of the City of Newton. We cannot use this appeal to decide the merits of the second annexation ordinance adopted by the respondent which included the petitioners. That is a separate proceeding.

We refuse to strictly interpret these statutes and find error. Such an action would contravene the intent of the Legislature, which is to obtain a meaningful review of annexation ordinances. *See In re: Annexation Ordinance*, 284 N.C. 442, 456, 202 S.E. 2d 143, 152 (1974).

We affirm the remand by the trial judge to delete the petitioners' land in this case.

Affirmed.

Judges WEBB and BRASWELL concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA v. RICH E. KING

No. 8227DC989

(Filed 6 September 1983)

1. **Appeal and Error § 14— notice of appeal given after ten days not timely**

Under Rule 3(c) of the N.C. Rules App. Proc. and G.S. 1-279(c), the plaintiff had ten days to give notice of appeal after defendant gave notice of appeal in open court. Since it did not do so, its appeal on an issue concerning attorney's fees was not before the Court.

2. **Guaranty § 2— guaranty agreement—new promissory note with additional promissor—no notice to guarantors—guarantor liable on new note**

Where a creditor cancelled a note on which the guarantor was liable for the debts of a principal and issued a new note to the same principal and an additional principal as partners and individually without disbursing any new funds and without notifying the guarantor of the new note or addition of a new principal, the guarantor was liable for payment on the new note.

APPEAL by defendant from *Phillips (J. Ralph), Judge.* Judgment entered 31 March 1982 in District Court, GASTON County. Heard in the Court of Appeals 23 August 1983.

The plaintiff brought this action to collect an amount due on a promissory note on which the defendant is alleged to be the guarantor.

On 3 May 1978, the defendant signed an unconditional guaranty agreement guaranteeing to the plaintiff the payment of the obligations of Lloyd Williamson, d/b/a Wayne's TV Service, up to the sum of $5,000. Williamson borrowed $5,000 on the same date from the plaintiff with a security agreement on all of his inventory and equipment.

On 24 October 1978, Williamson and Bill Bingham signed a promissory note with the plaintiff in the amount of $4,083.46. They signed the note both as partners and individually.

When the 24 October note was executed, the 3 May note was cancelled by the plaintiff. No new funds were disbursed, but the

interest accrued on the May note from 1 October until 24 October was added to the principal of the October note.

Williamson and Bingham executed a security agreement to the plaintiff. The defendant was not notified of the formation of the partnership or that a promissory note was executed on 24 October.

When Williamson and Bingham defaulted on the October note, the plaintiff notified the defendant and demanded payment under the guaranty agreement. The defendant has not paid the amount due on the promissory note.

The trial judge entered judgment for the plaintiff in the amount due on the October note plus interest. The defendant appealed from that judgment.

The trial judge did not, however, order that the plaintiff could recover as reasonable attorney's fees an amount up to fifteen percent of the indebtedness outstanding at the time the complaint was filed. On 19 April 1982, the trial judge permitted the plaintiff to include this fact in an amended appeal entry. But when the record on appeal was settled on 1 September 1982, the trial judge overruled the plaintiff's objection "on the grounds that the Court did not make a conclusion of law that the Plaintiff was not entitled to recover reasonable attorneys fees equal to 15%, however, awarding attorneys fees was in the discretion of the trial Judge."

Peter Thompson for plaintiff-appellee.

Gray & Stroud, by Charles D. Gray, III, for defendant-appellant.

ARNOLD, Judge.

Two appellate rule violations must first be addressed before we consider the merits of this case.

[1] The plaintiff contends that the absence of an award of attorneys' fees in the judgment should be reviewed by this Court on appeal. We disagree because timely notice of appeal was not given.

The judgment was entered on 31 March 1982 and the defendant gave notice of appeal in open court. The amended appeal

entry, which stated for the first time that the plaintiff was appealing, was dated 19 April 1982.

Under Rule 3(c), N.C. Rules App. Proc. and G.S. 1-279(c), the plaintiff had 10 days to give notice of appeal after the defendant's appeal in open court. Since it did not do so, its appeal on the attorney's fees issue is not before this Court. Rule 3(c) and G.S. 1-279(c) are jurisdictional. *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E. 2d 46 (1976).

Although the defendant failed to list the relevant exceptions and assignments of error after his issue in his brief as Rule 28(b)(5) suggests, his exception is not abandoned because he did note them properly in the record. *See* Rule 10(b)(1) and (c). We now turn to the substantive issue presented by this case.

[2] This case presents the following question: when a creditor cancels a note on which the guarantor is liable for the debts of a principal and issues a new note to the same principal and an additional principal as partners and individually without disbursing any new funds and without notifying the guarantor of the new note or addition of a principal, is the guarantor liable for payment on the new note?

The RESTATEMENT OF SECURITY (1941) [hereinafter Restatement] provides guidance in resolving this case. Section 128 states in part:

> Where, without the surety's consent, the principal and the creditor modify their contract otherwise than by extension of time of payment
>
> (a) the surety, other than a compensated surety, is discharged unless the modification is of a sort that can only be beneficial to the surety. . . .

It should first be noted that the defendant is not a compensated surety. That designation contemplates "a person who engages in the business of executing surety contracts for a compensation called a premium, which is determined by a computation of risks on an actuarial basis." Restatement Section 82, comment i.

But the defendant was not discharged when the plaintiff modified its contract with the principal because the modification

could only benefit the surety. The October note that was substituted for the cancelled May note reduced the debt of the principals by almost $1,000.

In addition, a second principal was added on the October note, which gave the plaintiff another person to look to for payment of the debt before looking to the defendant. These changes could only benefit the defendant. *See* Restatement § 128, comment e and illustration 6 to that comment.

We also note the principle that construction of a contract like the guaranty agreement in this case is a matter of law for the courts when the language is plain and unambiguous. *Gillespie v. DeWitt*, 53 N.C. App. 252, 266, 280 S.E. 2d 736, 746, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981). Contracts of surety fare interpreted by general contract rules of construction. Restatement § 88.

With this principle in mind, we note the statement in the guaranty that the defendant enters the agreement "in order to induce FUNB, from time to time; in its sole discretion, to extend or continue credit . . . and enter into various contractual relationships with Customer [the principal]. . . ." The defendant also waived any notice "of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Customer and FUNB. . . ." These provisions illustrate that the guaranty agreement was not meant only to cover the May note.

Affirmed.

Judges WEBB and BRASWELL concur.

HBD, INC. v. STERI-TEX CORPORATION

No. 8218SC900

(Filed 6 September 1983)

Constitutional Law § 24.7; Process § 14.3— jurisdiction over foreign corporation—minimum contacts

Defendant foreign corporation had sufficient minimum contacts with North Carolina so that the assertion of personal jurisdiction over it by the courts of this State in an action to recover the purchase price of bags sold to defendant did not violate due process where defendant submitted written purchase orders to plaintiff for the bags in Greensboro, N.C.; plaintiff accepted the orders in Greensboro, N.C.; and plaintiff manufactured the bags in North Carolina and shipped them to defendant's customers in other states.

APPEAL by plaintiff from *Helms, Judge.* Judgment entered 1 April 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 June 1983.

Plaintiff, a North Carolina corporation which manufactures institutional bags, filed an action against defendant, a New York corporation, alleging that defendant had failed to pay plaintiff for bags which plaintiff had manufactured and shipped to defendant's customers pursuant to a contract between the parties. Defendant filed a motion to dismiss for lack of personal jurisdiction. This motion was granted on 1 April 1982. Plaintiff appeals from a judgment entered pursuant to the grant of defendant's motion to dismiss.

Graham, Cooke, Miles & Bogan, by James W. Miles, Jr., for plaintiff-appellant.

McNairy, Clifford & Clendenin, by Harry H. Clendenin, III, and Michael R. Nash, for defendant-appellee.

EAGLES, Judge.

The question of personal jurisdiction over a foreign corporation must be resolved by means of a bifurcated inquiry. We must first determine whether the North Carolina statutes permit the exercise of jurisdiction over the defendant and, secondly, whether the exercise of that statutory power will violate the due process clause of the Fourteenth Amendment to the United States Constitution. *Hankins v. Somers,* 39 N.C. App. 617, 251 S.E. 2d 640,

rev. denied, 297 N.C. 300, 254 S.E. 2d 920 (1979). Since defendant's brief concedes that the first requirement, statutory authority, has been met, we now can address the issue of whether assertion of personal jurisdiction over defendant under the facts of this case will violate the due process clause.

Plaintiff's unverified complaint alleged that

> IV. During the period from July 30, 1980 to August 28, 1981, the Defendant submitted thirty-four separate purchase orders to the Plaintiff in Greensboro, North Carolina for the manufacture and shipment of institutional bag products to the Defendant's customers in the total amount of $21,833.24.
>
> V. The Plaintiff accepted the Defendant's thirty-four purchase orders in Greensboro, North Carolina, manufactured the bag items which were ordered, and shipped the goods to the Defendant's customers with invoices for the purchase price sent to the Defendant in the total amount of $21,833.34.
>
> . . .
>
> IX. Although the Plaintiff has made repeated demands for payment, the Defendant has refused and continues to refuse to pay for any of the items which the Plaintiff manufactured and sold to the Defendant pursuant to the Defendant's purchase orders described in paragraph IV hereinabove.

In general, pleadings need not be verified and no lack of credibility will be implied by the absence of a verification of plaintiff's complaint. G.S. 1A-1, Rule 11(a); *Hankins v. Somers, supra.*

Plaintiff also submitted an affidavit which stated that

> 1. That during the period from July 30, 1980, to August 28, 1981, the Defendant, Steri-Tex Corporation, submitted written purchase orders to the Plaintiff in Greensboro, North Carolina. Each purchase order was accepted by the Plaintiff in Greensboro, North Carolina; the agreements between the parties came into existence when the orders were accepted by the Plaintiff in North Carolina.
>
> 2. The Plaintiff manufactured the bag items which were the subject of the Defendant's orders. The bag items were

manufactured in the State of North Carolina and therefore, performance of the contract by the Plaintiff occurred in North Carolina.

Defendant filed an affidavit in support of its motion to dismiss which stated

> 3. That Steri-Tex Corporation is a corporation organized and existing under the laws of a state other than North Carolina and is not doing business in North Carolina;
>
> 4. That Steri-Tex Corporation does not own, nor has it ever owned, any property in North Carolina nor does it or has it had an interest in, possessed, or used property in North Carolina;
>
> 5. That Steri-Tex Corporation does not have any agents, servants, or employees in the state of North Carolina;
>
> 6. That plaintiff solicited, in the state of New York, defendant's business and that all orders were placed from New York and merchandise was shipped to and received by third parties in states other than North Carolina;
>
> 7. That any account or contract between the defendant and the plaintiff arises out of solicitations occurring outside of North Carolina, and orders placed and to be completed outside of North Carolina.

The trial court concluded that defendant had insufficient minimum contacts with North Carolina, and that the exercise of personal jurisdiction over defendant would violate due process, based on the following findings of fact:

> 5. The Defendant Steri-Tex Corporation, does not own, nor has it ever owned, any property in North Carolina, nor does it or has it had an interest in, possessed, or used property in North Carolina.
>
> 6. The Defendant, Steri-Tex Corporation, does not have any agents, servants, or employees in the State of North Carolina.
>
> 7. The Plaintiff, HBD, Inc., solicited in the state of New York, the Defendant's business, and all orders were placed

from New York and merchandise was shipped to and received by third parties in States other than North Carolina.

8. Any account or contract between these parties resulted from solicitations of the Plaintiff in North Carolina by calling the Defendant outside of North Carolina and orders were placed by Defendant from outside the State of North Carolina.

9. During the period from July 30, 1980, to August 28, 1981, the Defendant, Steri-Tex Corporation, submitted thirty-four written purchase orders to the Plaintiff in Greensboro, North Carolina for institutional bag products in the total amount of $21,833.24. Plaintiff agreed to manufacture the products in North Carolina and to ship the products to Defendant's customers. Each purchase order was accepted by the Plaintiff in Greensboro, North Carolina; the agreements between the parties came into existence when the orders were accepted by the Plaintiff in North Carolina.

10. The Plaintiff manufactured the bag items which were the subject of the Defendant's orders, and such bag items were manufactured in the State of North Carolina and were shipped from the Plaintiff's plant in North Carolina and therefore performance of the contract by the Plaintiff occurred in North Carolina.

We hold that defendant has sufficient minimum contacts with North Carolina, the forum state, to permit the assertion of personal jurisdiction over it. The plaintiff met his initial burden of proving the existence of jurisdiction by a *prima facie* showing that the parties had entered into 34 contracts in Greensboro, North Carolina, and that the plaintiff had performed its obligations under those contracts in North Carolina. Defendant did not contradict either of these allegations in its affidavit and motion to dismiss. We hold that these two elements satisfy the minimum contacts requirement reiterated by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980). *See Equity Associates v. Society for Savings*, 31 N.C. App. 182, 228 S.E. 2d 761 (1976), *rev. denied*, 291 N.C. 711, 232 S.E. 2d 203 (1977) (decided before *World-Wide*). "[T]he defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled

into court there." 444 U.S. at 297, 62 L.Ed. 2d at 501, 100 S.Ct. at 567.

For the foregoing reason the trial court's judgment dismissing plaintiff's action for lack of personal jurisdiction over the defendant is reversed.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

B. P. LACKEY AND MARGARET LACKEY v. DAUGHT E. TRIPP, JR., AND RONALD LEE TRIPP

LEONARD F. MOSS, THOMAS M. MOSS, ELLENE B. MOSS AND SARAH M. PRATT v. DAUGHT E. TRIPP, JR., AND RONALD LEE TRIPP

JOSEPHINE E. REES v. DAUGHT E. TRIPP, JR. AND RONALD LEE TRIPP

No. 8213DC585

(Filed 6 September 1983)

1. **Trespass to Try Title § 1— State dredging—dumping creating land above high watermark—quitclaim deeds by State valid**

Proper statutory authority pursuant to G.S. 146-6 existed for plaintiffs' quitclaim deed from the State for land above the high watermark created when the State dredged a creek.

2. **Trespass to Try Title § 2— quitclaim deed from State—prima facie case of title**

Quitclaim deeds from the State to the plaintiffs were a direct grant of title from the State and proved a prima facie case of title in plaintiffs.

3. **Trespass to Try Title § 4.1— quitclaim deeds—property lines not drawn at right angles to waterline—no prejudicial error**

Since subsection (e) of G.S. 146-6, dealing with quitclaim deeds to riparian owners for land raised above the high watermark, is silent on how property lines are to be extended, the lines may be drawn as the Governor and Council of State in their discretion deem proper.

4. **Evidence § 30; Trespass to Try Title § 3— private, unrecorded map—ancient documents rule not requiring receipt into evidence**

Although the ancient documents rule dispenses with the necessity of authenticating certain old maps in the usual way, it does not dictate whether

any particular old paper is receivable as substantive or illustrative evidence; therefore, the rule did not dictate that a private, unrecorded map be admitted as substantive evidence, and the trial court correctly limited the unrecorded map to illustrative purposes and properly failed to admit it into evidence. G.S. 1-38.

5. Trespass to Try Title § 3— exclusion of evidence not prejudicial

In a trespass to try title action where all the evidence excluded was about peripheral, subordinate matters that could not have affected the crucial findings or the result of the trial, if error was committed in the exclusion of the evidence, it was not prejudicial.

APPEAL by defendants from *Gore, Judge.* Judgment entered 18 November 1981 in District Court, BRUNSWICK County. Heard in the Court of Appeals 20 April 1983.

These actions to recover damages for trespass and to quiet title to land, brought in 1974, were consolidated and tried without a jury. The evidence tended to show the following: The plaintiffs owned land abutting a navigable creek. In the 1930's, 1953, and 1962, dredgeboats dumped fill or spoil material into the waters adjacent to plaintiffs' lands. Before 1962 the area where the dumping was done was under the high watermark. But after the dredging in 1962 it was above high water, and the area was built up still futher by additional dredging in 1964. In 1964 the defendants' father began leveling and otherwise using part of the filled-in land, claiming ownership under a recorded deed which did not describe the lands purportedly conveyed with sufficient particularity to enable its boundaries to be located. In 1973 and 1974, by quitclaim deeds, the State of North Carolina conveyed and released its interest in the filled-in lands to the plaintiffs.

After making appropriate findings of fact and conclusions of law, the trial court entered judgment declaring the plaintiffs to be the fee simple owners of the lands described in their quitclaim deeds from the State, and awarding plaintiffs nominal damages for defendants' trespass thereon.

Newton, Harris & Shanklin, by Kenneth A. Shanklin, and Powell & Smith, by William A. Powell, for plaintiff appellees.

Lee & Lee, by J. B. Lee, for defendant appellants.

PHILLIPS, Judge.

[1] The defendants' three principal assignments of error relate to the court basing its judgment in favor of the plaintiffs on the quitclaim deeds they received from the State. The judgment is based upon a correct interpretation of G.S. 146-6. Subsection (d) of that statute states in part:

> Provided, however, that if in any process of dredging, by either the State or federal government, for the purpose of deepening any harbor or inland waterway, or clearing out or creating the same, a deposit of the excavated material is made upon the lands of any owner, and title to which at the time is not vested in either the State or federal government, or any other person, whether such excavation be deposited with or without the approval of the owner or owners of such lands, all such additions to lands shall accrue to the use and benefit of the owner or owners of the land or lands on which such deposit shall have been made, and such owner or owners shall be deemed vested in fee simple with the title to the same.

Subsection (e) of the same statute grants the Governor and Council of State the authority to execute a quitclaim deed to riparian owners for land raised above the high watermark as described in preceding subsections. Though the language of subsection (e) is rather awkward, the reference to "any other provision of this section" encompasses subsection (d) as well as (a). Thus, proper statutory authority exists for the plaintiffs' quitclaim deeds.

[2] G.S. 146-79 places the burden of proof in land controversies upon the party challenging the title of the State or its assigns. Defendants contend that the presumption in favor of the State does not apply and was incorrectly given weight in the trial because the instruments of conveyance were quitclaim deeds, rather than warranty deeds. Whether the presumption does or does not apply in this instance is irrelevant. Though plaintiffs are certainly assigns of the State, the decisive point in the case is that by their quitclaim deeds the plaintiffs proved a prima facie case of title in one of the sanctioned and time-honored ways, a direct grant from the State, *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889), and the defendants did not prove superior title.

[3] Defendants also contend that the deeds of the plaintiffs are void because the property lines were not drawn at right angles to the waterline. Defendants are correct in stating that G.S. 146-6(a) requires perpendicular extension, but this case is controlled by subsection (e), not subsection (a). Since subsection (e) is silent on how property lines are to be extended, the lines may be drawn as the Governor and Council of State in their discretion deem proper. The right angle rule propounded in *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937), states that it is subject to special legislation on the subject—legislation such as G.S. 146-6. Moreover, even if the lines for the quitclaim deeds had been drawn improperly, the defendants do not allege any harm that would constitute prejudicial error. G.S. 146-6(d) confers title to the disputed land on plaintiffs, and a redrawing of the property lines would not change the outcome of the case with respect to the defendants.

[4] The defendants next contend that the trial court erred in allowing their Exhibit G to be used only as illustrative evidence. The defendants argue that Exhibit G, an old map of their property, qualified as substantive evidence because of the Ancient Documents Rule. The effect and limits of this rule have been misperceived. The Ancient Documents Rule dispenses with the necessity of authenticating certain old papers in the usual way; but whether any particular old paper is receivable as substantive or illustrative evidence depends upon the document's nature, not its age. *See* 2 Brandis, *N.C. Evidence* § 196 (2d ed. 1982). Private maps are admissible only as illustrative evidence. *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593 (1946). Official maps, 1 Brandis, *supra*, § 34, and private maps that have been recorded, G.S. 1-38, may be substantive evidence. The record does not show that Exhibit G was anything other than a private, unrecorded map, so the trial court correctly limited it to illustrative purposes.

[5] Finally, defendants contend that the trial court committed prejudicial error in excluding certain evidence offered by them. The case was tried without a jury and defendants' counterclaim failed because the court found that their deed did not describe the lands in question so that they could be located by fitting the description in the deeds to the earth's surfaces, as the law requires, *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786 (1955), and because they had not been in adverse possession of the lands for

the period required to obtain title in that way, as alleged. All of the evidence excluded was about peripheral, subordinate matters that could not have affected these crucial findings or the result of the trial, in any event. Thus, if error was committed, it was not prejudicial.

No error.

Judges HILL and JOHNSON concur.

RED HOUSE FURNITURE CO. v. ANNIE SMITH

No. 8218DC945

(Filed 6 September 1983)

Sheriffs and Constables § 4.1— penalty for failure to execute writ of possession

A sheriff failed to show diligence in the execution of a writ of possession of furniture and was properly subjected to a penalty of $100.00 pursuant to G.S. 162-14 for his failure to take possession of the furniture from defendant and return it to plaintiff where the deputy sheriff who attempted execution of the writ noted on the return that defendant stated that she would work it out with plaintiff and was not going to let anyone have the furniture, and the deputy refused to enter the house forcibly to recover the furniture.

APPEAL by Paul H. Gibson, Sheriff of Guilford County, from *Cecil, Judge.* Judgment entered 3 August 1982 in District Court, GUILFORD County. Heard in the Court of Appeals 10 June 1983.

Plaintiff obtained a judgment against defendant declaring it to be entitled to possession of certain furniture. Pursuant to G.S. 1-313(4), the Clerk of Superior Court of Guilford County issued a writ of possession on 12 January 1982 commanding the sheriff to take possession of the furniture from defendant Annie Smith and to deliver the furniture to plaintiff.

The return on the writ indicated that the writ was received by the sheriff on 25 March 1982 and execution of the writ was attempted by Deputy Sheriff Coffer on 1 April 1982. In his return of the writ, Deputy Coffer noted that defendant "stated she did not owe much and would work it out with plaintiff rather than let me pick it up and was not going to let know (sic) one have it." He declined to forcibly enter the house to recover the furniture.

Upon motion of plaintiff, the court on 29 June 1982 entered judgment *nisi* in the sum of $100.00 against Paul H. Gibson, Sheriff of Guilford County for failing to execute and make due return upon the writ. Gibson was ordered to appear before the court and show cause why the judgment *nisi* should not become absolute.

On 3 August 1982, Gibson appeared and offered the defense that he had done all that was required of him by law in executing and returning the writ. The court ruled that the sheriff failed to take possession of the property and deliver it to the plaintiff and otherwise failed to take reasonable steps to properly execute the writ, and failed to show any defense as to why the judgment of amercement should not be made absolute. The sheriff appealed.

Gregory L. Gorham, for Paul H. Gibson, Sheriff of Guilford County, appellant.

Rossie G. Gardner, for plaintiff appellee.

JOHNSON, Judge.

Sheriff Gibson contends that the court erred in concluding that he, through his deputy, failed to take possession of the property described in the writ of possession and deliver it to the court and otherwise failed to execute the writ and that he had failed to show any defense as to why the judgment *nisi* should not be made absolute. Relying upon *State v. Whitaker*, 107 N.C. 802, 12 S.E. 456 (1890) and *State v. Armfield*, 9 N.C. 246 (1822), which hold that an officer may not break and enter a building against the consent of the owner for the purpose of making a levy on the goods of the owner, he argues that his deputy acted lawfully and reasonably in not attempting to use force to recover the property. He did all that was required of him since he had no alternative except to return the writ without having recovered the property.

G.S. 162-14 provides, in pertinent part, that a sheriff shall be subject to a penalty of forfeiting one hundred dollars ($100.00) for his failure to execute and make due return of all writs and other process to him legally issued and directed, unless he can show sufficient cause to the court at the next succeeding session after judgment *nisi* has been entered against him. The penalty is given to the party aggrieved "chiefly as a punishment to the officer,

and to stimulate him to active obedience." *Richardson v. Wicker*, 80 N.C. 172, 174 (1879). The statute imposes no undue hardship upon sheriffs. *Produce Co. v. Stanley*, 267 N.C. 608, 148 S.E. 2d 689 (1966).

Few cases involving amercement of sheriffs have been reported in this century, although amercement was a frequent occurrence in years past. *Produce Co. v. Stanley, supra.* These cases make it clear, however, that the sheriff must be diligent in both the execution and return of process or suffer the penalty. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E. 2d 159 (1977). The courts have no "dispensing power" to relieve a sheriff from the penalty imposed by G.S. 162-14. *Swain v. Phelps*, 125 N.C. 43, 34 S.E. 110 (1899).

The Superior Court of New Jersey faced the issue of whether a sheriff reasonably neglected or failed to execute a writ of execution out of fear of violence in *Vitale v. Hotel California, Inc.*, 446 A. 2d 880, *aff'd*, 455 A. 2d 508 (1982). Plaintiff there obtained a judgment and the issuance of a writ of execution instructing the sheriff to levy upon all monies and personal property at a bar defendant held the liquor license for. When the sheriff, through his deputy, went to the bar to execute the writ, he was denied access by the bar's bouncers. Fearing violence might ensue, the officer left. The court held that the fear of violence was insufficient to justify not making the levy. There was nothing in the record to show any danger of imminent harm to the officer.

Similarly, there is nothing in the record here to show that the deputy was in danger of imminent harm. There is no evidence that Ms. Smith had a weapon. Had Ms. Smith produced a weapon or struck the deputy, he would have had cause to arrest her. On the facts before us, we cannot say that the deputy's actions constituted a diligent attempt to execute the writ.

Moreover, under the claim and delivery article of the General Statutes, G.S. 1-472 *et seq.*, a plaintiff in an action to recover the possession of personal property may claim the immediate delivery of the property at any time before judgment in the principal action. G.S. 1-480 specifically allows a sheriff to break or enter a building where property subject to claim or delivery is concealed. If a sheriff can forcibly enter a building to recover concealed property before a responsive pleading can be filed, we see no reason why he should not be able to do so after judgment has

been finally entered establishing the party's entitlement to the property. If citizens were allowed to avoid execution of judgments by the simple expedient of refusing entry, the judgments rendered by our courts would thereby be rendered totally ineffective.

We thus conclude that the sheriff has failed to show sufficient cause for failing to execute the writ and that the trial court's findings of fact and conclusions of law were correct. The judgment of the trial court is

Affirmed.

Judges WHICHARD and EAGLES concur.

ELSIE JONES, MOTHER; MORRIS JONES, SR., FATHER; SHIRLEY JEAN JONES, SISTER; RUBY KATHLEEN JONES, WIDOW; AND JENNY SUTTON SANCHEZ, FRIEND OF MORRIS JONES, JR., DECEASED, EMPLOYEE, PLAINTIFFS v. SERVICE ROOFING & SHEET METAL COMPANY, EMPLOYER, U. S. FIDELITY & GUARANTY COMPANY, CARRIER, DEFENDANTS

No. 8210IC930

(Filed 6 September 1983)

Master and Servant § 79— workers' compensation—husband and wife living apart—finding of desertion by wife supported by evidence

In a workers' compensation proceeding where the Full Commission found opposite to the Hearing Commissioner that decedent's wife deserted him rather than that the decedent had deserted his wife, the Commission's findings of fact were supported by competent evidence and pursuant to G.S. 97-86 were conclusive on appeal as were the conclusions that the decedent's parents were partially dependent upon him and entitled to all the available compensation.

APPEAL by plaintiff Ruby K. Jones from the Full Industrial Commission. Opinion and Award filed 26 April 1982. Heard in the Court of Appeals 9 June 1983.

The plaintiffs all claimed benefits under the Workers' Compensation Act for the death of Morris Jones, Jr. The appellant, Ruby K. Jones, and the decedent were married in 1973, lived together for several years in Christiansburg, Virginia, and were still married April 24, 1980, when he was killed while doing con-

struction work in North Carolina. They had no children. Shirley Jones was the decedent's sister; Morris Jones, Sr. and Elsie Jones his parents; Jenny Sutton Sanchez was living with decedent in Ayden, North Carolina when he was killed and planned to marry him after he divorced Ruby Jones and she divorced her husband.

The construction job that decedent had with Tri-State Roofing Company of Charleston, West Virginia, required him to be away from Christiansburg a great deal. Before 1978, when decedent was away on jobs in Virginia and West Virginia, he usually went home on weekends. Ruby K. Jones had a regular job during most of their life together and except for occasional visits did not accompany her husband to the different places that his work took him. Around April, 1978, his employer sent him to Greenville, North Carolina as foreman of a large job being done there. For awhile, he went home every weekend and on one occasion Ruby Jones visited him in Greenville for several days; after a few months, however, his visits home became less frequent. The evidence is sharply conflicting as to the state of their relations and the reasons therefor during the last year or so before his death. The other family members, who live in Virginia, and Jenny Sutton Sanchez, who was living near Greenville in Ayden, testified that he severed all relations with Ruby Jones before April, 1979, when he began living with Jenny Sutton Sanchez. The parents and sister also testified that before separating himself from Ruby Jones he repeatedly asked her to move to Greenville and live with him there, but she refused. Ruby Jones testified that she never refused to move to Greenville, but was willing to go there if and when he got a place for them to live in, which he never did; she also testified that he said nothing to her about divorcing her before suit was filed March 17, 1980, alleging that they separated December 29, 1978. Ruby Jones wrote the decedent's lawyer a letter April 15, 1980, asserting that they last lived together in July, 1979, and that she would contest the divorce. The action was still pending when he was killed April 24, 1980.

Deputy Commissioner Rush found that Ruby K. Jones was not living with decedent at the time of his death because he had deserted her, and awarded the death benefits to her as the decedent's widow under the provisions of G.S. 97-2(14). It was also found and concluded that decedent's parents and sister were not

wholly dependent on him and that Jenny Sutton Sanchez's affair with him gave her no rights under the Act.

On appeal, the Full Commission found and concluded that Ruby Jones deserted the decedent by refusing to accompany him to North Carolina, as he requested, that his parents were partially dependent on him, and awarded the death benefits to them.

Owens & Rouse, by Robert D. Rouse, III, for plaintiff appellant Ruby K. Jones.

Taft, Taft & Haigler, by Thomas F. Taft and Kenneth E. Haigler, for plaintiff appellees Elsie Jones and Morris Jones, Sr.

PHILLIPS, Judge.

Why did Ruby K. Jones and her husband, Morris Jones, Jr., not live together during the several months immediately preceding his death? That is the question upon which the resolution of this appeal depends. If this proceeding was at common law, the question would not be material, since the evidence clearly establishes that they were still legally married at his death, and she is thus his widow. But the law of widows under the Workers' Compensation Act is different, though a widow who meets the statutory standard is presumed to have been wholly dependent upon her deceased husband and has first priority to any death benefits due. G.S. 97-38, 39.

To qualify as the "widow" under our Workers' Compensation law, being the surviving wife is not enough; if not living with her husband at the time of his death, it must be for "justifiable cause or by reason of his desertion at such time." G.S. 97-2(14). The competent evidence of record on this point is directly in conflict; part indicates that they did not live together because he became interested in, began living with, and planned to marry another woman; the other part indicates that they did not live together because Ruby Jones refused to accompany him to Greenville as he requested. The evidence is sufficient to support a finding to either effect.

The Hearing Commissioner, with the advantage of seeing the witnesses in person, found in favor of the surviving wife; the Full Commission found against her. Though we cannot discern from the record why the Full Commission found credible testimony

that the Hearing Commissioner did not and vice versa, the law does not require us to. Since the Commission's findings of fact are abundantly supported by competent evidence, they are conclusive with us, G.S. 97-86, and our review is limited to determining whether the facts so found support the conclusions and decision that were made. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

Findings that Ruby K. Jones refused to join her husband in Greenville, though he repeatedly asked her to, because she preferred living in Virginia and did not want to leave her job there, is basis enough for the conclusion that her living apart from her husband was without justifiable cause.

The Commission's conclusions that the decedent's parents were partially dependent upon him and therefore entitled to all the available compensation are likewise supported by the findings and competent evidence that the decedent had regularly sent them small sums, neither was employed, and their only other income was a monthly Social Security check in the amount of $313.

The decision appealed from is therefore

Affirmed.

Judges HEDRICK and WELLS concur.

HATTIE THOMPSON SHAW v. CLIFTON SHAW

No. 8221DC1023

(Filed 6 September 1983)

Divorce and Alimony § 24.1— child support decree—payment to clerk—credit for direct payments—burden of proof

In an action to collect arrearages in child support due under a judgment by confession which required payments to be made to the clerk of court, defendant had the burden of proving the amount of any payments made directly to plaintiff and the minor children in order to be given credit for such payments, the trial court erred in denying plaintiff's motion to enforce the collection of arrearages because the court was unable to determine the amount of such direct payments, and the cause is remanded for findings as to whether defendant was entitled to credit for direct payments and the amount thereof.

Shaw v. Shaw

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 28 June 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 25 August 1983.

This is a civil action wherein plaintiff, wife, seeks to collect arrearages in child support due her from the defendant, husband. On 3 March 1977, a Judgment by Confession was entered against defendant which required him to pay to the Clerk of Superior Court of Forsyth County the sum of sixty dollars per week for the support of the parties' four minor children. On 27 April 1982, plaintiff filed a motion in the cause seeking to enforce the collection of arrearages under this judgment and requesting that the court order a continuing garnishment of defendant's wages to pay both the arrearages and future child support payments as they become due.

In the order dated 28 June 1982, the trial judge made the following pertinent findings of fact:

> II. That the records of the Clerk of Court of Forsyth County show that the defendant is in arrears in his payments under the above referenced judgment in the amount of Eight Thousand three hundred thirty-one and 91/100 dollars ($8,331.91) as of June 18, 1982.
>
> III. That the defendant has made payments directly to the plaintiff and the parties' minor children for the benefit of said minor children in an undetermined amount.

Based on the findings of fact, the trial judge made the following pertinent conclusion of law:

> I. Notwithstanding the finding of fact that the records in the office of the Forsyth County Clerk of Court show that the defendant is in arrears in his weekly payments to be made under the Judgment by Confession entered in this cause on March 3, 1977, in the amount of Eight Thousand three hundred thirty-one and 91/100 dollars ($8,331.91) as of June 18, 1982, the Court is unable to determine the amount of said arrearages due to the undetermined amount of payments made by the defendant directly to the plaintiff and the minor children of the parties and the Court concludes as a matter of law that the plaintiff's motion to enforce the collection of arrearages should therefore be denied.

From that portion of the court's order denying plaintiff's motion to enforce the payment of arrearages, plaintiff appealed.

William Y. Wilkins and L. Donald Long, Jr., for the plaintiff, appellant.

Morrow and Reavis, by John F. Morrow for the defendant, appellee.

HEDRICK, Judge.

Plaintiff assigns as error that the court's findings of fact do not support its conclusions of law that the court was unable to determine the amount of arrearages due and that plaintiff's motion thus should be denied. Plaintiff also assigns as error the court's failure to make a conclusion of law as to the amount of arrearages owed by defendant. Plaintiff contends she presented a prima facie case that defendant owed a determined amount of child support, and that defendant, by raising the affirmative defense of payment, had the burden of offering proof of any payments made and their amount. Since defendant failed to produce sufficient evidence of payment, plaintiff claims her motion should have been granted.

A delinquent parent's right to receive credit for expenditures paid outside an order of the court in an action to enforce the collection of arrearages in child support was recognized in *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). There, the Court held "the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case." *Id.* at 81, 231 S.E. 2d at 182. Subsequently, in *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981), this Court held "[t]he trial court has . . . wide discretion in deciding initially whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded." *Id.* at 109, 278 S.E. 2d at 264.

While a delinquent parent's right to receive credit for payments made outside of a court order has been recognized, it must be remembered that payment is an affirmative defense and as such it must be pleaded by the party asserting it. N.C. Gen. Stat.

Sec. 1A-1, Rule 8(c). "[T]he general rule is that the burden of showing payment must be assumed by the party interposing it." *Auto Finance Co. v. McDonald*, 249 N.C. 72, 74, 105 S.E. 2d 193, 194 (1958) (citations omitted); *Critcher v. Ogburn*, 30 N.C. App. 182, 186, 226 S.E. 2d 414, 416 (1976). A party seeking credit for payments outside a court order thus has the burden of producing evidence showing that he has made such payments and the amount thereof.

In the instant case, the defendant claimed that he was entitled to credit for payment but failed to show the amount paid. The trial court found that defendant had indeed made payments to plaintiff, but did not find as a fact that defendant was entitled to credit, nor did the court make a finding as to the amount of such credit. The lack of these specific findings prevents this Court from determining whether the trial judge acted properly in denying plaintiff's motion. Because the court's order does not contain sufficient findings to support its judgment, the judgment must be vacated. We remand this case to the District Court for further findings, conclusions, and a judgment consistent with this decision.

Vacated and remanded.

Judges WELLS and PHILLIPS concur.

RALPH K. VANLANDINGHAM v. NORTHEASTERN MOTORS, INC.

No. 821SC815

(Filed 6 September 1983)

1. Evidence § 29.1— verified statement of account—business records exception

A verified statement of account was properly admitted into evidence even though the verifier had no personal knowledge of all the matters contained therein since he certified that he was familiar with the books and records of the business and was competent to, and did in fact, testify to their correctness. Further, since it affirmatively appeared from the record that the various entries on the papers comprising the verified statement of account were made in the regular course of business and were authenticated by a witness familiar with the system under which they were made, the exhibit was also admissible under the business records exception to the hearsay rule.

2. Accounts § 2— account stated

By receiving, paying on, and not disputing, during the nearly two years that services were admittedly rendered by plaintiff accountant to defendant, any of the itemized statements received, the correctness thereof was impliedly admitted, and where no excuse, mistake or fraud was suggested or shown by defendant, defendant's account with the plaintiff became an account stated by the operation of law.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 29 March 1982 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 19 May 1983.

Plaintiff's suit for accounting and tax services rendered defendant was tried without a jury. The services were rendered under a written agreement which provided that plaintiff would be paid at the rate of $25 an hour for his work and be reimbursed for his expenses.

During the trial, plaintiff introduced into evidence over the defendant's objection an exhibit, identified as PX-B, which plaintiff testified was an itemized summary of all the time accumulated and the charges made therefor. The exhibit consisted of (a) some nineteen different itemized bills mailed defendant from September 21, 1979 through April 10, 1981, each of which summarized the services rendered during the period covered, the time required, expenses incurred, the amount due therefor, defendant's previous balance and the total amount then due; (b) copies of the Accounts Receivable and Revenue Ledger sheets maintained for defendant, showing a balance due of $23,376.68 and that the last payment was received June 12, 1981; (c) copies of Unbilled and Billed Client Receivables sheets maintained by plaintiff for defendant.

Plaintiff's verified statement containing the following is attached to the exhibit:

> 1. That from July, 1979, through June, 1981, he was a sole trader doing business as Ralph K. VanLandingham, Certified Public Accountant, and that as such he makes this affidavit.
>
> 2. That he is familiar with the books and business of said Ralph K. VanLandingham, Certified Public Accountant, and that an itemized statement of account upon which this action is brought is hereto attached, marked "Exhibit A-1"; and that

the attached statement of account of Northeastern Motors, Inc. is correctly copied from the books of original entry of said Ralph K. VanLandingham, Certified Public Accountant. That the charges were made in said books at or about the time of their respective dates; that the services rendered for which said charges were made were rendered as charged; that the charges are correct and the account just and true as that stated. That there is now due on said account the sum of $23,376.68; that no part of said sum has been paid or in any manner settled; and that there are no deductions or offsets of any kind.

Plaintiff also testified that he did much of the work himself; the exhibit reflected the work that he, his associates and employees did; the billings were prepared from his own time sheets and ledger reports; and he was familiar with the records and business practices of his office, but had no personal knowledge of the matters contained in time reports prepared by his employees and submitted to him.

At the end of the trial, the court rendered judgment for the plaintiff in the amount of $23,376.68.

Jennette, Morrison, Austin & Halstead, by John W. Halstead, Jr., for plaintiff appellee.

White, Hall, Mullen, Brumsey & Small, by G. Elvin Small, III, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's contention that the trial court erred in admitting into evidence the exhibit as a verified statement of account under G.S. 8-45 is without merit. The different itemized bills for each period showing the services rendered, the time required, expenses incurred, charges made, the previous balance, the amount then due, and the different ledger sheets showing charges, payments, and balances all along, are ingredients enough for a good, verified statement of account. *Bramco Electric Corp. v. Shell*, 31 N.C. App. 717, 230 S.E. 2d 576 (1976). That the verifier had no personal knowledge of all the matters contained therein did not disqualify the exhibit as a verified statement, since he certified that he was familiar with the books and records of the business

and was competent to, and in fact did, testify to their correctness. Our law requires no more. *Johnson Service Co. v. Richard J. Curry and Co., Inc.*, 29 N.C. App. 166, 223 S.E. 2d 565 (1976). Furthermore, since it affirmatively appears from the record that the various entries on the papers comprising the exhibit were made in the regular course of business, at or near the time of the transactions involved, and were authenticated by a witness familiar with the system under which they were made, the exhibit was also admissible under the business records exception to the hearsay rule. *Bond Park Truck Service, Inc. v. Hill*, 53 N.C. App. 443, 281 S.E. 2d 61 (1981).

[2] The defendant's argument that the verdict rendered is unsupported by evidence is likewise unavailing. Not only does the recorded evidence support the verdict rendered—the hours worked and the charges made therefor being tallied on the statements received monthly by the defendant, and the ledger sheets showing the balances due at all stages, including at trial—but the verdict is also justifiable under the theory of account stated. By receiving, paying on, and not disputing, during the nearly two years that services were admittedly rendered, any of the itemized statements received—all of which showed defendant's running balance—the correctness thereof was impliedly admitted; and no excuse, mistake or fraud being either shown or suggested, defendant's account with the plaintiff became an account stated by operation of law. *Nello L. Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962). Indeed, even at trial the correctness of no service rendered or charge made was disputed by defendant, whose evidence was only that plaintiff's auditing job did not enable it to get the bank loan that it desired, as had been anticipated.

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA, DAN MILES, CHILD SUPPORT ENFORCEMENT OFFICER, EX REL. v. RICHARD RANKINS

No. 826DC948

(Filed 6 September 1983)

1. **Bastards § 10— paternity action by State—mother's testimony as to sexual intercourse with another**

In a paternity action instituted by the State to recover AFDC payments made for the support of the child, testimony by the mother that she had sexual intercourse with a man other than defendant eight months before the child was born should have been admitted on the issue of paternity and to contradict the mother's testimony that she had sexual intercourse only with defendant during the time in which the child could have been conceived.

2. **Bastards § 10— paternity action by State—effect upon AFDC payments**

In a paternity action instituted by the State, the trial court erred in allowing a child support enforcement officer to testify that the outcome of the case would have no effect upon the mother's AFDC payments for support of the child.

APPEAL by defendant from *Williford, Judge.* Judgment entered 22 April 1982 in District Court, BERTIE County. Heard in the Court of Appeals 10 June 1983.

Plaintiff filed a complaint for support alleging that defendant was the father of a child born to Mary Palmer Holley on 28 October 1970, and that defendant owed the State of North Carolina for Aid to Families with Dependent Children (AFDC) payments made to Ms. Holley for the support of that child. Defendant answered, denying that he was the child's father and responsible for the child's support.

Plaintiff presented evidence tending to show that Ms. Holley had sexual intercourse with defendant every weekend from late 1969 to March 1970. Ms. Holley testified that she did not have sexual intercourse with anyone other than defendant in January or February 1970. The child was born 28 October 1970. Defendant gave the child money on two occasions for shoes and school supplies and gave Ms. Holley $5.00 to take the child to the doctor once. She had received AFDC payments for the support of her child.

Defendant denied that he had ever had sexual relations with Ms. Holley, that he was the father of the child, and that he had given the child and Ms. Holley any money.

The jury found that defendant was the father of the child born to Ms. Holley, and that he had failed to repay the AFDC funds which Ms. Holley had received as support for the child. From judgment entered pursuant to the jury verdict, defendant appealed.

Gillam, Gillam, and Smith, by Lloyd C. Smith, Jr., and Roswald B. Daly, Jr., for plaintiff appellee.

Law Firm of Carter W. Jones, by Carter W. Jones, Kevin M. Leahy, and Charles A. Moore, for defendant appellant.

JOHNSON, Judge.

[1] Defendant contends that the court erred in excluding testimony by Ms. Holley that she had sexual intercourse with a man other than defendant eight months before the birth of the child. We agree. As the Supreme Court aptly stated in 1899:

> [T]he issue is the paternity of the child, and whatever tends to prove or disprove the affirmative of this issue is competent. It would not be competent to show that the prosecutrix, years before the birth of the child, had intercourse with someone else. Nor would it have been competent to prove that the prosecutrix at some other time had such intercourse, when it was apparent from the laws of nature that the child could not be the result of such intercourse. This would be incompetent because it did not tend to prove or disprove the affirmative of the issue. To admit such evidence would only be to allow the defendant to attack the character of the prosecutrix in a way not allowed by law.
>
> *But it seems to us that when the defendant offered to prove that another man had intercourse with the prosecutrix at the time when by the course of nature the child must have been begotten, this evidence bears directly upon the issue and is competent.* (Emphasis added.)

State v. Warren, 124 N.C. 807, 809-810, 32 S.E. 552, 553 (1899); *see also Levi v. Justice and Searcy v. Justice*, 27 N.C. App. 511, 219

S.E. 2d 518 (1975). This excluded testimony was clearly relevant to the issue of paternity. It also contradicted Ms. Holley's testimony that she had sexual intercourse only with defendant during the period of time in which the child could have been conceived. Although Ms. Holley subsequently testified on *voir dire* that she had intercourse with this particular man when she was eight months pregnant, it was for the jury to resolve any conflicts in, as well as the credibility of, her testimony. However, any other testimony regarding Ms. Holley's sexual activity not within a period in which the child could have been conceived was properly excluded.

[2] We also find merit in defendant's contention that the court erred in allowing the child support enforcement officer to testify over objection that the outcome of this case would have no effect upon Ms. Holley's AFDC payments. This testimony had no relevance to the issues being tried, *i.e.*, whether defendant was the natural father of the child, whether Ms. Holley had received AFDC payments for the child's support, and whether defendant had refused or neglected to repay the State for these payments.

We have carefully considered defendant's remaining assignments of error and find that they have no merit.

Because the excluded testimony of Ms. Holley's sexual activity with another man eight months before the child's birth had a direct bearing upon the key issue of the case, paternity, the case must be remanded for a

New trial.

Judges WHICHARD and EAGLES concur.

CAPITOL FUNDS, INC. v. THURMAN C. WHITE, D/B/A J.P.W. INDUSTRIES

No. 8226SC730

(Filed 6 September 1983)

Landlord and Tenant § 13— lease—no requirement of formal termination before leased to another

It is not the law that an existing lease of real property must be formally cancelled or terminated before the property can be validly leased to another. Therefore, where plaintiff's prior tenant orally agreed to cancel the lease and vacate the premises and allow defendant to occupy the premises, defendant could not avoid the lease on the basis that the prior lease had not been formally cancelled or terminated.

APPEAL by plaintiff from *Lewis, Robert D., Judge.* Judgment entered 2 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1983.

In June, 1979, plaintiff owned an empty store building that was under a written lease to Thomas & Howard Company until May, 1980. The evidence at trial indicated that Thomas & Howard was willing to terminate the lease and surrender possession to a new tenant at any time, and upon doing so, was obligated to return the premises to their former condition. Defendant, knowing this, decided to rent the building; but before taking possession wanted to have certain repairs accomplished and was told to negotiate with Thomas & Howard about them, which defendant did over a period of several weeks. A three-year lease between the parties was written June 20, 1979, providing for a beginning date of July 1, 1979. It was signed by defendant July 20, 1979, after changing the beginning date to August 1, 1979, which was acceptable to plaintiff, who executed it July 30, 1979.

When the lease was executed, defendant was still negotiating with Thomas & Howard about the repairs to be made and when they could be completed and the premises delivered to defendant. On August 9, 1979, defendant and Thomas & Howard agreed in writing that the latter would replace some missing floor tiles, paint certain wall space, and pay defendant's August rent until the repairs were completed and possession was taken. Twelve days later, the repairs not having been completed to defendant's satisfaction, he notified plaintiff the lease was being cancelled because of plaintiff's failure to deliver possession to him as the

lease required. Two days later, on August 23, 1979, Thomas & Howard completed the repairs and so certified to the defendant. When defendant received the keys to the building is not clear, but he had them when he inspected the premises on August 21, 1979, and undertook to repudiate his lease.

At the close of all the evidence, based upon findings that the beginning date of the lease was August 1, 1979, and the prior lease had not been formally cancelled or terminated when the subsequent lease was executed, it was concluded as a matter of law that the lease between the parties was void and a directed verdict, dismissing plaintiff's action, was entered pursuant to defendant's motion.

James M. Shannonhouse, Jr. for plaintiff appellant.

Kenneth W. Parsons for defendant appellee.

PHILLIPS, Judge.

The judgment appealed from was erroneously entered. It is not the law that an existing lease of real property must be formally cancelled or terminated before the property can be validly leased to another. An oral agreement to rescind or terminate an existing lease is valid. "The statute of frauds applies to the making of enforceable contracts to sell or convey land, not to their abrogation." *Scott v. Jordan*, 235 N.C. 244, 248, 69 S.E. 2d 557, 560 (1952). The agreed statement of facts indicates that the prior tenant was willing to cancel the lease and vacate the premises at any time and its occupancy after 1 August 1979 was with defendant's consent and for the purpose of accomplishing repairs that defendant wanted. If the jury so finds, the lease sued upon is enforceable by law.

Defendant's decision to repudiate the lease was apparently precipitated by the prior tenant's failure to promptly complete the repairs that defendant desired. In sending the case back for a new trial, we point out that according to the evidence the plaintiff had no responsibility at all for the repairs or any delays that occurred in connection with them. In the lease, defendant agreed to accept the building as it was and the evidence plainly shows that the repairs involved were made at his request. Thus, any delay that occurred was defendant's responsibility and irrelevant to plaintiff's case.

Reversed.

Judges HILL and JOHNSON concur.

DURHAM LIFE BROADCASTING, INC. v. INTERNATIONAL CARPET OUTLET, INC.

No. 8210DC1036

(Filed 6 September 1983)

Contracts § 25— failure to prove existence of contract

Plaintiff failed to prove a right to recover on an account for advertisements when plaintiff failed to prove the existence of a contract, which was a prerequisite to its right to recovery. Exhibits which included an itemized statement of account and supporting invoices pursuant to G.S. 8-45 did not establish the existence of a contract and did not entitle plaintiff to recover since there was a dispute concerning the existence of a contract.

APPEAL by plaintiff from *Barnett, Judge.* Judgment entered 11 May 1982 in District Court, WAKE County. Heard in the Court of Appeals 25 August 1983.

This action was brought to recover on an account for advertisements run on WPTF, a Raleigh radio station owned by the plaintiff.

Georgia Smith, the plaintiff's collections coordinator, was the only witness at trial. Exhibits offered into evidence included an itemized statement of account and supporting invoices. The defendant presented no evidence but denied that it requested or contracted for the advertisements to be run.

After arguments by counsel for both parties, the trial judge held for the defendant because there was no contract which authorized the plaintiff to air the advertisements on the defendant's behalf. From this judgment, the plaintiff appealed.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelley Sousa, for plaintiff-appellant.

Gulley and Barrow, by H. Spencer Barrow, for defendant-appellee.

ARNOLD, Judge.

When an action is brought by a plaintiff, it has the burden of proof of establishing a right to recover. It must allege and prove all the essential elements of its cause of action. *See Wiles v. Mullinax*, 275 N.C. 473, 483, 168 S.E. 2d 366, 373 (1969). In this case, the plaintiff failed to prove the existence of a contract, which was a prerequisite to its right of recovery.

G.S. 8-45 does not establish the existence of a contract as the plaintiff argues. That statute says:

> In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

This statute is applicable only where there is no dispute about an account. *Nall v. Kelly*, 169 N.C. 717, 719, 86 S.E. 627, 628 (1915); *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 719, 230 S.E. 2d 576, 577 (1976); 1 Brandis, N.C. Evidence § 157 (2d rev. ed. 1982). There is clearly a dispute in the case *sub judice* where the defendant denies the existence of a contract.

Because the plaintiff did not show the existence of a contract, judgment was properly entered for the defendant.

Affirmed.

Judges WEBB and BRASWELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 SEPTEMBER 1983

BEST v. FELLOWS No. 8211SC704	Johnston (80CVS1118)	No Error
BUMGARNER v. HARRIS No. 8226SC622	Mecklenburg (80CVS11135)	Affirmed
KORDAS v. ROBBINS No. 8215DC974	Orange (81CVD739)	No Error
LINEBERRY v. GARNER No. 8219SC1037	Randolph (82CVS307)	Affirmed
NORRIS v. WEST No. 824DC986	Duplin (78CVD373)	No Error
PEELE v. GENERAL ELECTRIC CO. No. 8210IC990	Industrial Commission (G9558)	Affirmed
PURIFOY v. WILLIAMSON No. 824SC994	Sampson (80CVS347)	Affirmed
RAMSEY v. NORTON No. 8224SC836	Madison (80SP67)	No Error
STATE v. BARNES No. 8226SC1131	Mecklenburg (81CRS50036)	No Error
STATE v. WILLIAMS No. 8212SC1152	Cumberland (81CRS56182)	No Error
TAYLOR v. COOK No. 8219SC889	Cabarrus (80CVS1707)	No Error
WACHOVIA BANK & TRUST v. DAVIS No. 8221SC675	Forsyth (81CVS1477)	Affirmed

APPENDIXES

AMENDMENTS TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

AMENDMENT TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 16 of the North Carolina Rules of Appellate Procedure appearing at 287 N.C. 671, 720 entitled "SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS" is amended as follows:

1. The second sentence of subparagraph (a) entitled "How Determined" is amended to read:

> Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

2. Subparagraph (b) entitled "Appellant—Appellee Defined" is hereby renumbered and redesignated as paragraph (c). This amendment in no way alters the contents of the paragraph but simply changes its alphabetical designation from (b) to (c).

3. A new subparagraph (b) to be entitled "Scope of Review in Appeal Based Solely Upon Dissent" is hereby adopted as follows:

> (b) Scope of Review in Appeal Based Solely Upon Dissent. Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

Adopted by the Court in Conference this 3rd day of November, 1983, to become effective with notices of appeal filed in the Supreme Court on and after January 1, 1984. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

FRYE, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 10(b) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 699, is hereby amended by the addition of a new subdivision to be designated "(3)" and to read as follows:

(3) Sufficiency of the Evidence. A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

Adopted by the Court in Conference this 7th day of July, 1983. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

FRYE, J.
For the Court

AMENDMENT
NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), and July 19, 1982 (305 N.C. 784), has been approved by the Library Committee and hereby is promulgated:

Section 1. Rule 3 is amended to read as follows:

> *Hours.*—Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until five o'clock in the afternoon.

Section 2. This amendment shall become effective January 1, 1984.

This the 8th day of November, 1983.

Frances H. Hall
Librarian

APPROVED:

JAMES G. EXUM, JR.
Chairman, For the Library Committee

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION
ACCOUNTANTS
ACCOUNTS
ACTIONS
ADMINISTRATIVE LAW
ADVERSE POSSESSION
APPEAL AND ERROR
ATTACHMENT
ATTORNEYS AT LAW
AUTOMOBILES AND OTHER VEHICLES

BANKS AND BANKING
BASTARDS
BILLS AND NOTES
BURGLARY AND UNLAWFUL BREAKINGS

CANCELLATION AND RESCISSION OF INSTRUMENTS
CHAMPERTY AND MAINTENANCE
CONSTITUTIONAL LAW
CONTRACTS
COURTS
CRIMINAL LAW

DAMAGES
DEATH
DIVORCE AND ALIMONY

EASEMENTS
EMINENT DOMAIN
EVIDENCE

FRAUD
FRAUDS, STATUTE OF

GUARANTY

HOMICIDE

INFANTS
INSANE PERSONS
INSURANCE
INTOXICATING LIQUOR

JUDGMENTS

LABORERS' AND MATERIALMEN'S LIENS
LANDLORD AND TENANT
LIBEL AND SLANDER
LIMITATION OF ACTIONS
LIS PENDENS

MASTER AND SERVANT
MORTGAGES AND DEEDS OF TRUST
MUNICIPAL CORPORATIONS

NEGLIGENCE

PARENT AND CHILD
PARTITION
PARTNERSHIP
PENSIONS
PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS
PRINCIPAL AND AGENT
PRINCIPAL AND SURETY
PRIVACY
PROCESS

QUASI CONTRACTS AND RESTITUTION

RAPE AND ALLIED OFFENSES
REFORMATION OF INSTRUMENTS
ROBBERY
RULES OF CIVIL PROCEDURE

SALES
SEARCHES AND SEIZURES
SHERIFFS AND CONSTABLES

SLANDER OF TITLE
SPECIFIC PERFORMANCE

TRESPASS TO TRY TITLE
TRIAL
TROVER AND CONVERSION
TRUSTS

UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE

VENDOR AND PURCHASER

WAIVER
WITNESSES

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

A draft from an insurance company with the words "for all claims" failed to establish an unequivocable intent by either of the parties to settle plaintiffs' claim against the defendant for the amount of the draft, and summary judgment was improperly entered for defendant on his claim of accord and satisfaction. *Moore v. Frazier*, 476.

Where defendant and plaintiff jointly owned a piece of property and where defendant stated that his deed of 43 acres of the property to plaintiff served as an accord and satisfaction but plaintiff specifically denied agreeing to take the 43 acres in lieu of his share of the profits, his denial created a genuine issue of material fact as to whether an accord or modification or novation occurred. *Bumgarner v. Tomblin*, 636.

ACCOUNTANTS

§ 1. Generally

In an action involving a contract for the sale of a trucking company and its affiliates by defendant to plaintiff at a purchase price which was to be adjusted after an accounting firm's audit of the net worth of the company and its affiliates, the evidence was insufficient to support a rejection of the audit on the ground of conflict of interest by defendant's attorney, general manager, or accountant, but the evidence was sufficient to support rejection of the audit for gross mistake. *Spector Industries v. Mitchell*, 391.

ACCOUNTS

§ 2. Accounts Stated

By receiving, paying on, and not disputing, during the nearly two years that services were admittedly rendered by plaintiff accountant to defendant, any of the itemized statements received, the correctness thereof was impliedly admitted, and where no excuse, mistake or fraud was suggested or shown by defendant, defendant's account with the plaintiff became an account stated by the operation of law. *Vanlandingham v. Northeastern Motors, Inc.*, 778.

ACTIONS

§ 10. Method of Commencement and Time

Where a summons was issued in the name of defendant's daughter on the date the complaint was filed and a summons was issued in defendant's name eleven days later, plaintiff's failure to cause a summons to be issued in defendant's name within five days of the filing of his complaint resulted in a discontinuance of the action against defendant, and the summons issued in defendant's name initiated a new action at the time of its issuance which was barred by the statute of limitations. *Roshelli v. Sperry*, 509.

Summonses which incorrectly listed the county in which the complaint had been filed were fatally defective and did not confer jurisdiction on the court over defendants, and where plaintiff took a voluntary dismissal without prejudice and filed another complaint within a year thereafter, the second complaint began a new action and did not relate back to the original action for statute of limitations purposes. *Everhart v. Sowers*, 747.

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

The trial court properly dismissed plaintiffs' actions in that they had failed to exhaust their state administrative remedies before bringing an action in the state courts. *Snuggs v. Stanly Co. Dept. of Public Health*, 86.

§ 8. Scope and Effect of Judicial Review

Although G.S. 150A-51 provides that a trial judge must set out in writing the reasons for reversal or modification of an agency decision, there is no similar provision governing affirmance of agency decisions. *In re House of Raeford Farms v. Brooks*, 106.

ADVERSE POSSESSION

§ 7. By One Tenant in Common Against Other Tenants in Common

Where plaintiff, as tenant in common with defendant, could show adverse possession for 10 years plus a few months at most, the evidence failed to contain facts justifying an award of title to plaintiff by adverse possession, since, even under color of title, adverse possession will not ripen against a tenant in common short of 20 years. *McCann v. Travis*, 447.

§ 25.2. Particular Cases Where Evidence Insufficient

Respondents failed to prove adverse possession under G.S. 1-40 where several letters from one of the petitioners and from their attorney were sufficient to toll the running of the adverse possession statute. *Casstevens v. Casstevens*, 169.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability, Premature Appeals

An appeal from an order setting aside a judgment as having been entered upon surprise and excusable neglect must be dismissed as interlocutory. *Braun v. Grundman*, 387.

In an action for specific performance of a contract or monetary damages, plaintiff had a right of immediate appeal from the trial court's grant of summary judgment for defendants on the specific performance claim. *Lewis v. City of Washington*, 552.

§ 6.3. Appeals Based on Jurisdiction, Venue, and Related Matters

Denial of a motion to dismiss for lack of *in personam* jurisdiction is immediately appealable. *Coastal Chemical Corp. v. Guardian Industries*, 176.

Denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *Latch v. Latch*, 498.

§ 6.6. Appeals Based on Motions to Dismiss

Defendant had no right of immediate appeal from the denial of its motion to dismiss for plaintiff's violation of Rule 8(a)(2) which prohibits the pleadings from stating the demand for monetary relief in a products liability action in which the matter in controversy exceeds $10,000.00. *Coastal Chemical Corp. v. Guardian Industries*, 176.

§ 14. Appeal and Appeal Entries

Under Rule 3(c) of the N.C. Rules of App. Proc. and G.S. 1-279(c), the plaintiff had ten days to give notice of appeal after defendant gave notice of appeal in open court. *First Union Nat'l Bank v. King*, 757.

ATTACHMENT

§ 5. Levy of Attachment

Although an order of attachment issued against property later acquired by plaintiff from her daughter was not properly executed because the levy was not carried out within the ten days provided by statute, the defective levy was a non-jurisdictional procedural defect which did not invalidate the docketing of *lis pendens* notice of the order of attachment and which did not prohibit the judgment against plaintiff's daughter from relating back to the docketing of *lis pendens* and from being binding on the plaintiff. *Edwards v. Brown's Cabinets*, 524.

ATTORNEYS AT LAW

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

A corporation's promissory note and an assumption agreement signed by defendants placed on defendants liability for attorney fees incurred by plaintiff in an action on the note. *N.C.N.B. v. McKee*, 58.

AUTOMOBILES AND OTHER VEHICLES

§ 2.1. Grounds for Discretionary Suspension or Revocation of License

A conviction of "driving left of center" in violation of G.S. 20-150(d) constituted a conviction of one form of "illegal passing" for which four points must be assessed under G.S. 20-16(c). *Belk v. Peters*, 196.

Convictions of plaintiff for failure to yield the right-of-way, hit-and-run driving, and reckless driving after drinking were not convictions for traffic offenses "committed on a single occasion," and points were properly added to defendant's driving record for each of the three offenses. *Gaither v. Peters*, 559.

§ 45.4. Evidence of Physical Conditions at Scene

A civil engineer was properly permitted to testify as to where two cars would have come to rest under two hypothetical fact situations. *McKay v. Parham*, 349.

§ 50. Sufficiency of Evidence on Issue of Negligence

The trial court properly granted summary judgment for a patrolman in a wrongful death action where the evidence tended to show that the patrolman tried to stop the other defendant for following a vehicle too closely and the accident occurred when the other defendant increased his speed as the patrolman pursued. *McMillan v. Newton*, 751.

§ 50.2. Sufficiency of Evidence of Intoxication

A violation of the statute regulating sale of intoxicating liquors can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer. *Hutchens v. Hankins*, 1.

In order for a licensee to violate G.S. 18A-34, prohibiting the sale of alcohol to obviously intoxicated persons, there must be a sale to an intoxicated person whom the licensee knew to be in an intoxicated condition. *Ibid.*

The consequences of serving liquor to an intoxicated motorist are not reasonably unforeseeable events so as to insulate a tavern owner who knew or should have known that his patron intended to drive a motor vehicle from liability as a matter of law. *Ibid.*

§ 55. Sufficiency of Evidence of Stopping Without Signal

Where all the evidence showed a violation of the standard of care required by G.S. 20-141(h) which constituted negligence *per se*, and where appellant's evidence

AUTOMOBILES AND OTHER VEHICLES — Continued

neither contradicted nor materially impeached the evidence of appellees, the credibility of the movants was manifest, and directed verdict in their favor was proper. *Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss*, 306.

§ 108.2. Family Purpose Doctrine; Competency, Relevancy and Sufficiency of Evidence

Although the trial court erred in directing a verdict for defendant husband because the evidence was sufficient to show that the family purpose doctrine applied, such error was harmless where the jury found that defendant wife who was driving the family car was not negligent. *McKay v. Parham*, 349.

§ 114. Assault and Homicide; Instructions

In a prosecution for manslaughter, driving under the influence and other related traffic offenses, the trial court clearly instructed the jury that if they found either that defendant failed to keep a proper lookout, failed to look at the stop sign, or drove under the influence, then the next thing they would have to find beyond a reasonable doubt is that defendant's violation was culpable negligence. *S. v. Jones*, 411.

§ 126. Competency and Relevancy of Evidence of Driving Under the Influence

The admission into evidence of defendant's refusal to take a breathalyzer test does not violate his Fifth Amendment right against self-incrimination and is not unconstitutional under North Carolina law. *S. v. Jones*, 411.

§ 126.3. Blood and Breathalyzer Tests; Qualification of Expert; Manner and Time of Administration of Test

Defendant's argument that evidence that a blood test was made was inadmissible because of the lapse of time between the accident and test was without merit. *S. v. Jones*, 411.

BANKS AND BANKING

§ 3. Duties to Depositors

Where the decedent and the individual defendant signed a signature card creating a joint savings account with right of survivorship, the signature card was a contract which in clear and unambiguous terms expressed the intent of the parties as to entitlement to the funds remaining in the account upon the death of either. *Salvation Army v. Welfare*, 156.

BASTARDS

§ 1. Elements of the Offense of Wilful Refusal to Support Illegitimate Child

The trial court erred in dismissing an order of paternity which was entered after defendant executed a written acknowledgment of paternity and a written voluntary support agreement and after plaintiff affirmed the fact that she and defendant were the parents of the child. *Holt v. Shoffner*, 381.

A 1974 guilty plea by the defendant to a criminal charge of nonsupport of an illegitimate child, and an order to pay a lump sum plus medical expenses to the child's mother for the child's benefit, did not bar the subsequent action by a county social services department for child support. *Wilkes County v. Gentry*, 432.

§ 5. Competency and Relevancy of Evidence

In a paternity action, it was not prejudicial error for the trial court to sustain plaintiff's objections to defendant's questions concerning the length of time the

BASTARDS — Continued

mother and another man had been dating, how many times she had had sexual intercourse with the other man, and where the other man lived. *S. v. Farmer*, 384.

The trial court properly sustained plaintiff's objections to defendant's question to the mother in a paternity action concerning whether the twins had been placed in incubators after birth. *Ibid.*

Where the amount of AFDC payments made by the Department of Social Services attributable to each twin was irrelevant to any of the four issues submitted to the jury in a paternity action, the trial court properly excluded testimony concerning it. *Ibid.*

§ 9.1. Judgment on Issue of Paternity

The G.S. 110-132(b) provision that the "judgment as to paternity shall be *res judicata* as to that issue and shall not be reconsidered by the court" applies to child support proceedings thereunder, and does not establish an absolute bar to relief, pursuant to G.S. 1A-1, Rule 60(b)(6), from the underlying acknowledgment (judgment) of paternity. *Leach v. Alford*, 118.

§ 10. Civil Action by Illegitimate Child to Establish Paternity

In a paternity action instituted by the State to recover AFDC payments made for the support of the child, testimony by the mother that she had sexual intercourse with a man other than defendant eight months before the child was born should have been admitted on the issue of paternity and to contradict other testimony by the mother. *S. v. Rankins*, 782.

BILLS AND NOTES

§ 15. Payment and Discharge

Plaintiff bank's acceptance of a corporation's promissory note as a replacement for a note executed by the individual defendants did not constitute "payment and satisfaction" of defendants' note so as to discharge defendants from liability for the debt. *N.C.N.B. v. McKee*, 58.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence; Testimony

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking and entering, the State was precluded by double jeopardy and collateral estoppel from presenting evidence of defendant's guilt of larceny in his retrial for breaking and entering. *S. v. Edwards*, 92.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 5. For Breach of Condition

Defendant could not seek rescission of a contract for the sale of a trucking company where defendant had not tendered return of a sum paid to him pursuant to the contract. *Spector Industries v. Mitchell*, 391.

§ 10.2. Sufficiency of Evidence of Duress, Undue Influence, and Mental Incapacity

Plaintiff's evidence was sufficient to justify submission to the jury of the question of undue influence in the execution of a deed. *Hardee v. Hardee*, 321.

CHAMPERTY AND MAINTENANCE

§ 1. Generally

The trial court properly entered summary judgment against plaintiffs on their claim of champerty and maintenance where defendant insurance company's settlement with a third party included an agreement that the third party would attempt to collect a part of the damages from parties defendant insurance company reasonably believed were joint tort-feasors. *Wright v. Commercial Union Ins. Co.*, 465.

CONSTITUTIONAL LAW

§ 6. Legislative Powers Generally

G.S. 90-21.13(a)(3), which deals with informed consent to health care treatment, is not unconstitutional as a legislative infringement on the judicial power delegated to the courts by Art. IV, § 1 of the North Carolina Constitution. *Dixon v. Peters*, 592.

§ 24.7. Foreign Corporations; Nonresident Individuals; Service of Process

Defendant foreign corporation had sufficient minimum contacts with this State to warrant assertion of personal jurisdiction over it in an action for breach of warranty of a security system. *Coastal Chemical Corp. v. Guardian Industries*, 176.

Defendant foreign corporation had sufficient minimum contacts with North Carolina so that the assertion of personal jurisdiction over it by the courts of this State in an action to recover the purchase price of bags sold to defendant did not violate due process. *HBD, Inc. v. Steri-Tex Corp.*, 761.

§ 33. Ex Post Facto Laws

The admission into evidence of defendant's refusal to take a breathalyzer test does not violate his Fifth Amendment right against self-incrimination and is not unconstitutional under North Carolina law. *S. v. Jones*, 411.

CONTRACTS

§ 4.1. Circumstances Where Consideration Was Found

Where plaintiffs alleged defendant failed to share the profits from sale of a parcel of land equally owned by defendant and plaintiffs, the trial court erred in entering summary judgment for defendant. *Bumgarner v. Tomblin*, 636.

§ 6.1. Contracts by Unlicensed Contractors or Businesses

In an action in which plaintiff sought to recover sums from defendants from supervising the construction of their residence, the trial court erred in entering summary judgment for defendants on the ground that plaintiff was engaged in general contracting without a license pursuant to G.S. 87-1. *Coats v. Jones*, 151.

The inability of a general contractor, because of noncompliance with a licensing requirement, to recover on a contract with a property owner will not prevent a subcontractor as subrogee from recovery on the rights created by that same contract. *Zickgraf Enterprises, Inc. v. Yonce*, 166.

§ 12.1. Construction of Clear and Unambiguous Agreements

Where the decedent and the individual defendant signed a signature card creating a joint savings account with right of survivorship, the signature card was a contract which in clear and unambiguous terms expressed the intent of the parties as to entitlement to the funds remaining in the account upon the death of either. *Salvation Army v. Welfare*, 156.

CONTRACTS — Continued

§ 21.2. Breach of Building and Construction Contracts

Affidavits on the part of third-party defendant house movers did not entitle them to judgment as a matter of law on third-party plaintiff's breach of contract claim. *Porter v. Matthews Enterprises*, 140.

§ 25. Pleading Contract Actions

Plaintiff failed to prove a right to recover on an account for advertisements when plaintiff failed to prove the existence of a contract which was a prerequisite to its right to recovery. *Durham Life Broadcasting v. Internat'l Carpet Outlet*, 787.

§ 25.1. Sufficiency of Particular Allegations

In a breach of contract action where plaintiffs allegedly lost profits from potential sales of a parcel of land, jointly owned by plaintiffs and one defendant, due to the defendant's mismanagement of his alleged duty to finance the land purchase, the trial court erred in granting summary judgment for defendant. *Bumgarner v. Tomblin*, 636.

§ 27. Sufficiency of Evidence

In an action involving a contract for the sale of a trucking company and its affiliates by defendant to plaintiff at a purchase price which was to be adjusted after an accounting firm's audit of the net worth of the company and its affiliates, the evidence was insufficient to support a rejection of the audit on the ground of conflict of interest by defendant's attorney, general manager, or accountant, but the evidence was sufficient to support rejection of the audit for gross mistake. *Spector Industries v. Mitchell*, 391.

The trial court properly found that a seller, by accepting a second plaintiff's offer to convey property, revoked her original offer to the first set of plaintiffs. *Normile v. Miller and Segal v. Miller*, 689.

§ 29.5. Measure of Damages; Interest

In an action brought to recover for equipment and services furnished to defendant, the trial court properly awarded interest at the G.S. 24-11(a) rate from a time at which all accounts were more than 30 days overdue. *Inco, Inc. v. Planters Oil Mill*, 374.

In an action to recover for equipment and services furnished to defendant, the trial court properly awarded interest on the damages even though there was no advance agreement between the parties on finance charges. *Ibid.*

§ 34. Actions for Interference; Sufficiency of Evidence

Plaintiff's evidence was insufficient to support an action for tortious interference with an employment contract. *Dawson v. Radewicz*, 731.

COURTS

§ 9.4. Motions for Dismissal, Judgment on the Pleadings, or Summary Judgment

The trial judge's allowance of defendant's motion for summary judgment on the ground of res judicata did not overrule another judge's order denying defendant's motion to dismiss for lack of jurisdiction. *Edwards v. Brown's Cabinets*, 524.

§ 21.6. Conflict of Laws Between States; Products Liability; Actions for Breach of Warranty

The law of Texas governed an action for fraud and unfair trade practices in the sale of gold jewelry to plaintiff. *Michael v. Greene*, 713.

CRIMINAL LAW

§ 5.1. Determination of Issue of Insanity

The trial court in a homicide case did not abuse its discretion in denying defendant's motion for a bifurcated trial on the issues of his sanity and guilt or innocence. *S. v. Monk*, 512.

§ 26.5. Plea of Former Jeopardy; Particular Cases; Same Acts or Transaction Violating Different Statutes

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking and entering, the State was precluded by double jeopardy and collateral estoppel from presenting evidence of defendant's guilt of larceny in his retrial for breaking and entering. *S. v. Edwards*, 92.

§ 29. Mental Capacity to Plead or Stand Trial

The issue concerning the constitutionality of an order compelling defendant to take medication necessary to render him competent to stand trial was moot. *S. v. Monk*, 512.

§ 42.6. Chain of Custody or Possession

Where culture smears were used in laboratory tests from which tests testimony was given, the culture smears were not real evidence and a chain of custody need not have been established. *S. v. Edwards*, 737.

§ 63.1. Nature, Competency, and Effect of Evidence as to Sanity

The trial court did not err in failing to strike testimony of law enforcement officers that their opinions of defendant's mental capacity were based on the fact that defendant ran away from the crime scene. *S. v. Monk*, 512.

§ 70. Tape Recordings

The authenticity of a typed transcript of defendant's tape-recorded statement was sufficiently established to permit the officer who took the statement to read it into evidence without testimony showing the condition of the recording device, the skill of the operator, and the custody of the tape. *S. v. Jeffries*, 181.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights; Generally; Insanity; Retardation

The evidence supported a determination by the trial court that in-custody statements made by a defendant who had a history of mental illness were made freely and voluntarily after defendant knowingly, intelligently and understandingly waived his constitutional rights. *S. v. Monk*, 512.

§ 85.2. Character Evidence; State's Evidence Generally

The trial court in an armed robbery case erred in refusing to give defendant's requested instruction that evidence of a "mug shot" taken of defendant several months prior to the crime charged was not to be considered in determining his guilt or innocence of the crime charged. *S. v. Foster*, 531.

§ 86.1. Impeachment of Defendant

Defendant's argument that evidence that a blood test was made was inadmissible because of the lapse of time between the accident and test was without merit. *S. v. Jones*, 411.

§ 86.2. Impeachment of Defendant; Prior Convictions

In a prosecution for manslaughter, driving under the influence and other traffic related crimes, the trial court did not err in allowing testimony of defendant's driving record over the past 20 years. *S. v. Jones*, 411.

CRIMINAL LAW — Continued

§ 89.1. Evidence of Character Bearing on Credibility; Character Witnesses

The trial court erred in permitting one witness to state an opinion that another witness was a truthful person. *S. v. Coble*, 537.

§ 89.2. Corroboration

In a prosecution of a nursery school teacher for taking indecent liberties with a four year old child, the trial court erred in refusing to permit a defense witness to testify for corroborative purposes concerning the duties of a teacher to determine whether a child has urinated in his pants. *S. v. Coble*, 537.

§ 95.2. Form and Effect of Instruction

In a prosecution for manslaughter, driving under the influence, and other traffic violations where defendant had been found not guilty of speeding in district court, the trial court did not err in denying defendant's motion to strike testimony concerning speed limit signs posted around the intersection of the accident. *S. v. Jones*, 411.

§ 100. Permitting Counsel to Assist or Act in Lieu of Prosecutor

Defendant was not denied an impartial prosecution when a private prosecutor appeared with the district attorney. *S. v. Jones*, 411.

§ 114.5. Prejudicial Statement of Opinion in Instructions

The trial court erroneously and prejudicially expressed an opinion as to defendant's guilt by instructing the jury that "I do not know and cannot explain to you why [defendant] is not charged with the felonious breaking or entering, after hearing the testimony." *S. v. Morrison and S. v. Templeton*, 125.

§ 128.2. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial

The trial court in a homicide case did not err in failing to declare a mistrial when two witnesses testified that defendant's brother told them that defendant "did it." *S. v. Monk*, 512.

§ 138. Severity of Sentence and Determination Thereof

In a prosecution for robbery with a firearm under G.S. 14-87, the trial court improperly considered as factors in aggravation that (1) the offense was committed for pecuniary gain, and (2) the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. *S. v. Foster*, 507.

The omission from the record on appeal of the transcript of defendant's sentencing hearing precluded appellate review of the trial judge's finding that defendant had prior convictions. *S. v. Monk*, 512.

The trial court erred in finding the age of the victim as an aggravating circumstance in sentencing defendant for the shooting death of his stepfather. *Ibid.*

§ 143.1. Time For, and Notice or Other Manner of Commencement of Revocation Proceeding

Where defendant was served with notice which alleged that he had violated the "good behavior" condition of his suspended sentence by repeatedly playing loud music which greatly disturbed his neighbors and by taking their personal property without permission, defendant's suspended sentence could not be revoked on the ground that he violated the "good behavior" condition by trespassing upon and damaging real and personal property belonging to his neighbors. *S. v. Cunningham*, 470.

CRIMINAL LAW — Continued

§ 143.8. Subsequent Prosecution for or Conviction of Crime

Defendant's conduct in playing loud music through a speaker located twenty-five feet from his neighbor's back door did not constitute a violation of the "good behavior" condition of his suspended sentence. *S. v. Cunningham*, 470.

§ 146.6. Where Issue of Appeal is Moot; Escape of Defendant

The issue concerning the constitutionality of an order compelling defendant to take medication necessary to render him competent to stand trial was moot. *S. v. Monk*, 512.

§ 166. The Brief

Two of defendant's assignments of error were overruled where defendant failed to make an offer of proof as to what excluded evidence would have been, and where defendant did not present an argument following his assignment of error as required by Rule 28(b)(5) of the Rules of Appellate Procedure. *S. v. Jones*, 411.

DAMAGES

§ 9. Mitigation of Damages

The trial court erred in failing to give a requested instruction on the doctrine of avoidable consequences in an action for personal injury. *Radford v. Norris*, 501.

DEATH

§ 3.6. Sufficiency of Evidence in Wrongful Death Actions

In a wrongful death action, the trial judge erred in entering summary judgment for defendant pool owner and defendant lifeguard. *Corda v. Brook Valley Enterprises, Inc.*, 653.

DIVORCE AND ALIMONY

§ 16.9. Alimony; Amount and Manner of Payment

The trial court's order requiring plaintiff to pay defendant alimony of $25,000.00 per year was supported by the record although plaintiff's designated salary from a drug company which he owns is only $31,500.00 per year. *Ahern v. Ahern*, 728.

§ 17. Alimony Upon Divorce from Bed and Board

Military non-disability retired pay is a personal entitlement, and is not a property interest subject to state community property laws. *Gardner v. Gardner*, 678.

§ 19. Modification of Alimony Decree

Where the legal basis for a consent judgment no longer existed, it was not equitable to require defendant's compliance with it. *Gardner v. Gardner*, 678.

§ 21.3. Enforcement of Alimony Award; Evidence and Findings

In order to reduce an arrearage in alimony payments to judgment for a sum certain, plaintiff must prove not only the amount of the arrearage but also that defendant's failure to pay had been willful and without lawful excuse. *Wade v. Wade*, 189.

DIVORCE AND ALIMONY — Continued

§ 23.5. Absence or Presence of Child as Factor in Custody Proceeding

The courts of this State have subject matter jurisdiction of an action for custody of a child who is physically present in Pennsylvania after having been abducted from North Carolina. *Latch v. Latch*, 498.

§ 24.1. Determining Amount of Child Support

In an action to collect arrearages in child support due under a judgment which required payments to be made to the clerk of court, defendant had the burden of proving the amount of any payments made directly to plaintiff and the minor children in order to be given credit for such payments. *Shaw v. Shaw*, 775.

The trial court did not err in taking judicial notice of the general effect of inflation on the cost of raising a child. *Walker v. Walker*, 644.

The trial court's finding that a child had reasonable monthly expenses of $645.00 was not supported by the evidence. *Ibid.*

§ 24.3. Construction and Effect of Support Orders

Plaintiff was not required to show a substantial change in circumstances from the time of a separation agreement as justification for an increase in child support over the amount required by the agreement. *Walker v. Walker*, 644.

§ 24.4. Enforcement of Support Orders; Contempt

In a civil action to collect arrearages in child support, the trial court erred in finding defendant in contempt for willful refusal to comply with an order to pay support. *Hilton v. Howington*, 717.

§ 24.11. Review of Support Orders

A prior action concerning child support is res judicata only as long as the circumstances existing at the time of the prior action have remained the same. *Walker v. Walker*, 644.

§ 25.10. Custody; Findings

The court's finding that a child had lost "the sparkle in his eyes" was insufficient to support a conclusion that there had been a substantial change in circumstances justifying modification of a custody order. *Ellenberger v. Ellenberger*, 721.

EASEMENTS

§ 4.1. Creation by Deed or Agreement; Adequacy of Description

In a slander of title action where defendants' predecessor in title failed to reserve an easement in that the description was too vague, there was still an issue as to whether an easement by prescription or by necessity had been created. *Allen v. Duvall*, 342.

§ 6.1. Creation of Easements by Prescription; Burden of Proof, Presumptions and Evidence

Plaintiff failed to show an easement by prescription in a 20-foot corridor over defendant's property. *Orange Grocery Co. v. CPHC Investors*, 136.

§ 11. Termination of Easements

In an action for slander of title, there was insufficient evidence of abandonment of an easement. *Allen v. Duvall*, 342.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Defendant city's extension of waste disposal services into a newly annexed area previously served by plaintiffs under an exclusive franchise granted by the county pursuant to a county ordinance so impaired the value of plaintiffs' franchises as to amount to a taking thereof for which plaintiffs are entitled to just compensation. *Stillings v. City of Winston-Salem*, 618.

EVIDENCE

§ 3.5. Facts Within Common Knowledge; Social and Economic Matters

The trial court did not err in taking judicial notice of the general effect of inflation on the cost of raising a child. *Walker v. Walker*, 644.

§ 11.6. Transactions Relating Solely to Mental Capacity

G.S. 8-51 allows an interested witness, when the decedent's mental capacity of free exercise of will is at issue, to relate personal transactions and conversations between the witness and the decedent as support for his opinion as to the mental capacity of that decedent. *Hardee v. Hardee*, 321.

§ 18. Experimental Evidence

In a wrongful death action stemming from a possible pool drowning, the trial court properly admitted into evidence testimony by a lifeguard that using a stopwatch he had repeated six to eight times his actions at the time of the alleged drowning. *Corda v. Brook Valley Enterprises, Inc.*, 653.

§ 19.1. Evidence of Similar Facts and Transactions; Conditions at Other Times

In an action by a tenant of an apartment complex owned and operated by defendants to recover for personal injuries suffered when she was sexually assaulted at gunpoint, the trial court did not err in admitting evidence about the lighting at the apartment complex at times other than when she was attacked and to compare the apartment lighting with that of other complexes. *Shepard v. Drucker & Falk*, 667.

§ 19.2. Evidence of Other Accidents or Injuries

In an action by a tenant of an apartment complex owned and operated by defendants to recover for personal injuries suffered when she was sexually assaulted at gunpoint, the trial court properly excluded evidence of prior crimes committed at the apartment complex. *Shepard v. Drucker & Falk*, 667.

§ 29.1. Letters

A verified statement of account was properly admitted into evidence even though the verifier had no personal knowledge of all the matters contained therein. *Vanlandingham v. Northeastern Motors, Inc.*, 778.

§ 29.3. Hospital Records; Other Documents

In a wrongful death action, it was error for the trial court to exclude an emergency room report in regard to the victim where the parties stipulated to its authenticity. *Corda v. Brook Valley Enterprises, Inc.*, 653.

§ 30. Ancient Documents

The ancient documents rule did not dictate that a private, unrecorded map be admitted as substantive evidence, and the trial court correctly limited the unrecorded map to illustrative purposes and properly failed to admit it into evidence. *Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp*, 765.

EVIDENCE — Continued

§ 31. Best and Secondary Evidence Relating to Writings

Where there was no evidence that there was a written contract between the plaintiffs and a third party, there was no error in the court's finding that the plaintiffs had made a contract to sell the property to the third party. *Allen v. Duvall*, 342.

§ 33.2. Examples of Hearsay Testimony

The trial court properly excluded answers to interrogatories which were based on information and belief rather than on personal knowledge. *Corda v. Brook Valley Enterprises, Inc.*, 653.

§ 36. Admissions and Declarations by Agents or Representatives

In a wrongful death action arising from a possible pool drowning, the trial court properly excluded statements made by the lifeguard concerning safety provisions which were not provided by the corporate defendant. *Corda v. Brook Valley Enterprises, Inc.*, 653.

§ 44. Evidence as to Physical Condition and General Health

In a wrongful death action in which the victim allegedly drowned in a swimming pool, the trial court properly allowed a lifeguard to testify as to his observation of the victim at times prior to the date of the drowning when the victim was in the swimming pool. *Corda v. Brook Valley Enterprises, Inc.*, 653.

§ 48.1. Failure to Prove Qualification of Expert

The trial court properly prohibited a witness from testifying about the relationship between crimes against property and violent crime since the witness was never qualified as an expert. *Shepard v. Drucker & Falk*, 667.

§ 48.2. Competency and Qualification of Expert; Discretion of Trial Court

There was no abuse of discretion in the trial court's failure to accept defendant's witness as an expert on the speed at which plaintiff's employees performed their work. *Inco, Inc. v. Planters Oil Mill*, 374.

§ 50. Testimony by Medical Experts

The trial court properly allowed the video tape testimony of a medical doctor who answered that after reviewing defendant's deposition and the medical report, he felt the treatment rendered by defendant was appropriate. *Moore v. Reynolds*, 160.

§ 50.1. Testimony by Medical Experts; Nature and Extent of Injury

A medical doctor's opinion testimony concerning the extent of plaintiff's preexisting disability was properly admitted. *Chapman v. Southern Import Co.*, 194.

§ 50.3. Testimony by Medical Experts; Cause of Death

In a wrongful death action stemming from a possible pool drowning, the trial court erred in excluding a pathologist's answer as to whether or not the victim could have been successfully resuscitated had a lifeguard gotten to him within thirty seconds of the beginning of the inhalation of water. *Corda v. Brook Valley Enterprises, Inc.*, 653.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiffs forecast sufficient evidence of constructive fraud to survive a motion for summary judgment. *Bumgarner v. Tomblin*, 636.

Where plaintiffs alleged defendant failed to share the profits from sale of a parcel of land equally owned by defendant and plaintiffs, the trial court erred in entering summary judgment for defendant. *Ibid.*

Defendant's statements to plaintiff were merely statements of opinion or puffing which could not constitute a basis for an action for fraud. *Michael v. Greene*, 713.

Plaintiff's evidence was sufficient for the jury in an action against his former employer for fraudulent misrepresentation that a company pension plan was still in effect. *Shaver v. Monroe Construction Co.*, 605.

§ 13. Instructions and Damages

In an action in which plaintiff alleged constructive fraud in that defendant abused a fiduciary responsibility in the sale of land, the trial court erred in entering summary judgment for defendant on plaintiffs' cause of action asking for punitive damages. *Bumgarner v. Tomblin*, 636.

The trial court did not err in instructing the jury that silence could constitute actionable fraud. *Shaver v. Monroe Construction Co.*, 605.

In an action for fraudulent misrepresentation that a company pension plan was still in effect, the proper measure of damages was the difference between the amount which would have been distributed to plaintiff had continuous contributions been made to the plan and the amount which was actually distributed to him. *Ibid.*

FRAUDS, STATUTE OF

§ 6.1. Contracts Affecting Realty; Cases Where Statute of Frauds is Inapplicable

In a breach of contract action where plaintiffs allegedly lost profits from potential sales of a parcel of land, jointly owned by plaintiffs and one defendant, due to the defendant's mismanagement of his alleged duty to finance the land purchase, the trial court erred in granting summary judgment for defendant. *Bumgarner v. Tomblin*, 636.

GUARANTY

§ 2. Actions to Enforce Guaranty

Where a creditor cancelled a note on which the guarantor was liable for the debts of a principal and issued a new note to the same principal and an additional principal as partners and individually without disbursing any new funds and without notifying the guarantor of the new note or addition of a new principal, the guarantor was liable for payment on the new note. *First Union Nat'l Bank v. King*, 757.

A husband's signature for the wife on a promissory note pursuant to an unrecorded power of attorney was valid, and defendant was required to pay under his guaranty of the note when the husband and wife petitioned for bankruptcy. *Cabarrus Bank & Trust Co. v. Chandler*, 724.

HOMICIDE

§ 16. Dying Declarations; Apprehension of Death

Decedent's statements to a deputy sheriff that defendant shot him and that he was dying were properly admitted as dying declarations although doctors attending decedent had told him that he was in no danger of dying. *S. v. White*, 734.

INFANTS

§ 5. Jurisdiction to Award Custody of Minor

The courts of this State have subject matter jurisdiction of an action for custody of a child who is physically present in Pennsylvania after having been abducted from North Carolina. *Latch v. Latch*, 498.

§ 16. Juvenile Hearings; Rights to Jury and Public Trial

In a hearing to review the custody of a child who had been taken from its mother and placed in the custody of its father because of physical abuse, the trial court erred in using a change of circumstance standard and in requiring the mother to show that it was not in the child's best interest for the child to stay with its father. *In re Shue*, 76.

§ 18. Juvenile Hearings; Admissibility and Sufficiency of Evidence

The trial court erred in finding that respondent had violated the conditions of his probation where the evidence was insufficient to establish that respondent committed any of the offenses for which he was tried. *In re Mash*, 130.

In juvenile dispositional and review hearings, the trial courts may properly consider all written reports and materials submitted in connection with such hearings. *In re Shue*, 76.

INSANE PERSONS

§ 2.3. Removal of Guardian

The clerk and the superior court were not in error in holding that the evidence was insufficient to prove that the respondent had neglected to maintain the ward for whom he had been appointed in a manner suitable to the ward's degree. *In re Thomas*, 495.

§ 11. Restoration of Sanity and Discharge

The statute requiring a hearing before release from a mental health facility of a person who was committed after being charged with a violent crime and found incompetent to stand trial or not guilty by reason of insanity does not violate equal protection. *In re Rogers*, 705.

§ 12. Sterilization of Mental Defective

The petitioner in a compulsory sterilization proceeding must meet the following standards by clear, strong and convincing evidence: (1) that the respondent is a mentally ill or retarded person subject to the sterilization statutes; and (2) the respondent is physically capable of procreation; and (3) there is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation; and (4) the respondent is unwilling or unable to control procreation by alternative birth control or conception methods; and (5) that the proposed method of sterilization entails the least invasion of the body of the respondent. *In re Truesdell*, 258.

INSANE PERSONS — Continued

The trial court properly denied a petition to sterilize respondent because the petitioner failed to meet its burden of establishing that sterilization of respondent at this time would further the State's interest in preventing the conception and the birth of a child whose parent is unable to adequately care for it. *Ibid.*

INSURANCE

§ 1. Authority of Commissioner of Insurance

The Insurance Commissioner did not exceed his statutory authority by promulgating a rule in conjunction with G.S. 58-251.2 that required optionally renewable hospitalization and accident and health insurance policies to be terminated before a rate increase could be granted to a company. *American Nat'l Ins. Co. v. Ingram*, 38.

§ 19.1. Imputation to Insurer of Knowledge of its Agent

Plaintiff insurer was estopped to assert that a life insurance policy was void because of false statements concerning insured's status as an employee of the corporate beneficiary which were inserted in the application by an insurance broker. *Northern Nat'l Life Ins. v. Miller Machine Co.*, 424.

§ 122. Conditions of Fire Insurance; Forfeiture

In an action on a fire insurance policy, the trial court erred in excluding certain evidence relating to motive for plaintiff to burn his home. *Durham v. Quincy Mutual Fire Ins. Co.*, 700.

INTOXICATING LIQUOR

§ 24. Civil Liability Generally

A violation of the statute regulating sale of intoxicating liquors can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer. *Hutchens v. Hankins*, 1.

In order for a licensee to violate G.S. 18A-34, prohibiting the sale of alcohol to obviously intoxicated persons, there must be a sale to an intoxicated person whom the licensee knew to be in an intoxicated condition. *Ibid.*

The consequences of serving liquor to an intoxicated motorist are not reasonably unforeseeable events so as to insulate a tavern owner who knew or should have known that his patron intended to drive a motor vehicle from liability as a matter of law. *Ibid.*

JUDGMENTS

§ 35.1. Res Judicata in General

An action involving the determination of liability of plaintiff's daughter upon an account was not res judicata in plaintiff's action to remove a cloud on title to real property conveyed to plaintiff by her daughter after an order of attachment had issued in the action against the daughter. *Edwards v. Brown's Cabinets*, 524.

§ 37. Requisites of Res Judicata; Finality and Validity of Judgment; Determination of Merits

In an action by an architect against a real estate developer, the trial court erred in finding that defendant was entitled to a directed verdict as a matter of law "on the grounds of res judicata and collateral estoppel in consequence of the dismissal with prejudice in a prior action." *Kabatnik v. Westminster Co.*, 708.

JUDGMENTS — *Continued*

§ 37.3. Preclusion or Relitigation of Issues; Issues that Could Have Been Decided But Were Not

By reason of a prior criminal judgment against defendant for willful nonsupport, defendant should have been precluded from raising a paternity issue in his wife's subsequent civil action for child support. *S. v. Lewis*, 98.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor or Material Furnisher; Recovery Against Owner

A compromise contract which reduced the amount owed by the general contractor to a first tier subcontractor also reduced the amount owed plaintiff second tier subcontractor as subrogee of the first tier subcontractor. *Consolidated Systems v. Granville Steel Corp.*, 485.

LANDLORD AND TENANT

§ 13. Termination of Estate Generally

It is not the law that an existing lease of real property must be formally cancelled or terminated before the property can validly be leased to another. *Capitol Funds v. White*, 785.

LIBEL AND SLANDER

§ 5.2. Imputations Affecting Business, Trade or Profession

As literal assertions in an editorial, the implied charges, as well as those stated explicitly in the editorial, more nearly resembled the statements found sufficiently factual in Gertz v. Robert Welch, Inc. to support a libel action, than they did the obviously personal evaluations expressed through slogans insufficiently specific to be proved false in Greenbelt Pub. Ass'n v. Bresler. *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

An editorial was protected, if at all, only by the qualified protection afforded by Sullivan for a comment based upon erroneous facts where proof is lacking that the defendants actually knew of the falsity or acted in reckless disregard to the truth or falsity of the assertions. *Ibid.*

The fact that defendants disclosed the underlying facts supporting their opinion in an editorial, standing alone, did not insulate the editorial under First Amendment protections. *Ibid.*

§ 6. Publication

Pleadings in a defamation action sufficiently alleged republication with knowledge of material inaccuracies or in reckless disregard of whether such statements were inaccurate to withstand defendants' motion to dismiss the complaint. *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

§ 14.1. Words Actionable Per Se and Words Susceptible of Two Interpretations

The trial court erred in dismissing plaintiff's action for defamation where an editorial as a whole was reasonably susceptible of a defamatory meaning so as to warrant its submission to the jury to determine if, in fact, the defamatory meaning was so understood. *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

LIBEL AND SLANDER — Continued

§ 14.3. Privilege, Justification and Mitigation

The privilege of fair comment is a matter of defense to an action for defamation. *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

LIMITATION OF ACTIONS

§ 4.5. Accrual of Cause of Action for Breach of Contract; Demand

A federal order which found that plaintiffs' cause of action accrued in 1973 when plaintiffs declared the entire amount of two notes due and payable and which found that the three-year statute of limitations for breach of contract barred their action which was not brought until 1980 was proper. *Coker v. Basic Media and Canfield v. Basic Media*, 69.

§ 4.6. Particular Contracts

Where a subcontractor expressly assumed the general contractor's obligations to the owner with respect to the work subcontracted, the trial court erred in dismissing the general contractor's third party claim against the subcontractor on the ground that the subcontract was not under seal and work under the subcontract was completed more than three years before the suit was brought. *Martin County v. R. K. Stewart & Son*, 556.

Defendant alleged sufficient evidence to raise a jury question in quasi contract; however, the statute of limitations applied to bar part of defendant's counterclaim seeking reimbursement for payments made on a note. *Bumgarner v. Tomblin*, 636.

§ 8.1. Fraud, Mistake, and Ignorance of Cause of Action as Exceptions to Operation of Limitation Laws

Plaintiff's claim that she is entitled on the basis of fraud to the return of deposits she made on two occasions as highest bidder at a judicial partition sale was barred by the three-year statute of limitations. *Brown v. Miller*, 694.

LIS PENDENS

§ 1. Generally

Although an order of attachment issued against property later acquired by plaintiff from her daughter was not properly executed because the levy was not carried out within the ten days provided by statute, the defective levy was a nonjurisdictional procedural defect which did not invalidate the docketing of lis pendens notice of the order of attachment and which did not prohibit the judgment against plaintiff's daughter from relating back to the docketing of lis pendens and from being binding on the plaintiff. *Edwards v. Brown's Cabinets*, 524.

MASTER AND SERVANT

§ 22. Liability of Contractor to Contractee in Performance of Work by Subcontractor

There was a conflict in the evidence over the relationship between a contractor and an electrical subcontractor which created an issue of fact over a possible relationship which could result in holding the contractor liable for the alleged negligence of the subcontractor. *Wilson Brothers v. Mobil Oil*, 334.

§ 48. Employers Subject to Act

The evidence supported a determination by the Industrial Commission that it had no jurisdiction of a workers' compensation claim because defendant employer

MASTER AND SERVANT — Continued

did not regularly employ four or more employees and did not have a compensation insurance policy in effect at the time of the accident. *Wiggins v. Rufus Tart Trucking*, 542.

§ 66. Mental Disorders

Plaintiff was entitled to additional compensation for a disabling post-traumatic neurosis with a depressive reaction which was first caused by the accident itself and was followed by a regression from plaintiff's improved mental condition when he was told that his leg would be permanently shorter. *Davis v. Edgecomb Metals*, 48.

§ 67.3. Pre-existing Condition as Factor

Reviewing collectively the medical testimony of two experts, the evidence was sufficient to support a finding of the Industrial Commission that plaintiff sustained a fifteen per cent permanent partial disability of his back as the result of an accident. *Chapman v. Southern Import Co.*, 194.

§ 68. Occupational Diseases

Plaintiff's claim to recover workers' compensation for byssinosis was barred by the two-year statute of limitations. *Hogan v. Cone Mills Corp.*, 439.

§ 74. Disfigurement

The evidence was sufficient to support a determination by the Industrial Commission that plaintiff was entitled to compensation for serious bodily disfigurement from four scars on his leg as a result of a chain saw accident. *Locklear v. Canal Wood Corp.*, 185.

§ 77. Modification and Review of Award

Plaintiff's claim to recover workers' compensation for byssinosis was barred by res judicata. *Hogan v. Cone Mills Corp.*, 439.

§ 79. Persons Entitled to Payment

The evidence supported a determination by the Industrial Commission that decedent's wife deserted him and that decedent's parents were partially dependent on him and entitled to all available compensation. *Jones v. Service Roofing & Sheet Metal Co.*, 772.

§ 96.1. Scope of Review; Review of Findings Generally

Under the laws of this state, the Full Industrial Commission has the power to review determinations made by Deputy Commissioners on the credibility of witnesses. *Pollard v. Krispy Waffle*, 354.

§ 114. Occupational Safety and Health Act

G.S. 95-137(b)(1) only requires notice to the employer by certified mail by the Labor Department of an OSHA violation. *In re House of Raeford Farms v. Brooks*, 106.

Although G.S. 150A-51 provides that a trial judge must set out in writing the reasons for reversal or modification of an agency decision, there is no similar provision governing affirmance of agency decisions. *Ibid.*

The notice provision in G.S. 95-137(b)(1) satisfies the constitutional due process requirement that notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 15. Transfer of Property Mortgaged or of Equity of Redemption; Rights of Transferee

Where a deed of trust stated that it may be assumed if defendant gives prior written approval, and if the property is transferred without such written approval, defendant may declare the balance due and payable, defendant was not entitled to accelerate the indebtedness when the property was sold subject to the deed of trust. *Driftwood Manor Investors v. City Federal Savings & Loan*, 459.

§ 19.6. Grounds for Injunctive Relief

Where a holder of a note has repeatedly accepted monthly installment payments after their respective due date, the noteholder will be held to have waived the right to insist on punctual payment unless prior to the late payment the noteholder notified the payor that prompt payment is again required. *Driftwood Manor Investors v. City Federal Savings & Loan*, 459.

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

The trial court's findings were insufficient to resolve the issue of whether the beneficiaries of a deed of trust who had assigned the note secured thereby to a bank as security for a loan had possession of the note at the time of trial so as to be holders of the note entitled to foreclose the deed of trust. *In re Foreclosure of Connolly v. Potts*, 547.

§ 40. Suits to Set Aside Foreclosure; Particular Grounds for Setting Aside Sale or Conveyance

Petitioner's motion to set aside a foreclosure sale on the ground that she had not been properly served with notice was properly dismissed. *In re Foreclosure of Taylor*, 744.

MUNICIPAL CORPORATIONS

§ 2.1. Compliance with Statutory Requirements in General; Annexation

The description in an annexation ordinance and in the notice of hearing, together with tax and topographic maps referred to therein, provided a sufficient boundary description of the annexed area which could be ascertained on the ground. *Garland v. City of Asheville*, 490.

§ 2.3. Annexation; Requirements

The trial court did not err in finding that natural topographic features were used where practical in fixing the boundaries of an annexed area because contour rather than ridge lines were used. *Garland v. City of Asheville*, 490.

§ 2.4. Remedies to Attack Annexation or Annexation Proceedings

A superior court judge had authority to remand an annexation ordinance to the city governing board upon the city's motion to exclude landowners who were originally covered by the ordinance. *Southern Glove Mfg. Co. v. City of Newton*, 754.

§ 15. Warnings, Barriers, and Lights

A city street maintenance employee was not contributorily negligent when he was struck by defendant's automobile while sawing up a large tree which had fallen and was blocking three-fourths of the street on a cold and rainy night. *Pinkston v. Connor*, 628.

MUNICIPAL CORPORATIONS — Continued

§ 22.2. Formation and Construction of Contracts; Duration of Contracts

A city's contract to lease city-owned waterfront property to plaintiff on the condition that plaintiff would construct boat slips on the property for rental to the public was ultra vires and void where the city zoning laws prohibited such use of the property. *Lewis v. City of Washington*, 552.

§ 23. Franchises for Public Utilities and Services

Defendant city's extension of waste disposal services into a newly annexed area previously served by plaintiffs under an exclusive franchise granted by the county pursuant to a county ordinance so impaired the value of plaintiffs' franchises as to amount to a taking thereof for which plaintiffs are entitled to just compensation. *Stillings v. City of Winston-Salem*, 618.

§ 30.6. Special Permits and Variances

In determining whether to issue a special use permit for a housing authority's subsidized multi-family housing project, the evidence supported a town council's findings that the project conformed with the town's comprehensive land use plan, that the project was a public necessity, and that the project was designed to maintain the value of contiguous property. *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

A town council adequately complied with a zoning ordinance's mandate that it "review the record of the public hearing" in determining whether to issue a special use permit. *Ibid.*

A town council did not fail to comply with its own zoning regulations by failing strictly to apply the three per cent subsidized housing distribution standard of its comprehensive land use plan in determining whether to issue a special use permit for a public housing project. *Ibid.*

§ 30.12. Zoning Ordinances; Mobile Homes

A town zoning ordinance prohibiting the use of mobile homes on lots zoned R-20 for single-family residential use while permitting the use of modular or site-built homes in such zoning districts was authorized by G.S. 160A-381 and did not violate due process or equal protection. *Duggins v. Town of Walnut Cove*, 684.

§ 30.13. Billboards and Outdoor Advertising Signs

A city sign control ordinance which prevented the use of blimps and other windblown signs constituted a valid exercise of the city's police power. *Goodman Toyota v. City of Raleigh*, 660.

§ 30.18. Amortization of Nonconforming Uses

The 90-day period provided by a city sign control ordinance for the amortization of nonconforming windblown and portable signs did not violate equal protection rights of an automobile dealer who had been using a blimp for advertising purposes. *Goodman Toyota v. City of Raleigh*, 660.

§ 30.22. Ordinances; Judgment and Sufficiency of Evidence to Support Judgment

A town council made sufficient findings in ruling on an application for a special use permit where the findings merely tracked the language of the applicable ordinance without enumerating specific facts in the record which supported the findings. *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

§ 31.1. Standing to Appeal or Sue

A corporate property owners' association which represents individuals who live in the affected area has standing to seek judicial review of a municipality's ac-

MUNICIPAL CORPORATIONS — Continued

tion in approving an application for a special use permit. *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

NEGLIGENCE

§ 1.3. Violation of Statute or Ordinance

A violation of the statute regulating sale of intoxicating liquors can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer. *Hutchens v. Hankins*, 1.

In order for a licensee to violate G.S. 18A-34, prohibiting the sale of alcohol to obviously intoxicated persons, there must be a sale to an intoxicated person whom the licensee knew to be in an intoxicated condition. *Ibid.*

§ 2. Negligence Arising from Performance of Contract

Based upon third-party defendants' representations as to their experience, expertise and capacity to move a building, such defendants were under a duty to third-party plaintiffs to protect the building from harm while it was under their care. *Porter v. Matthews Enterprises*, 140.

Based upon third-party defendants' representations as to their experience, expertise, and capability to move a building, such defendants were under a duty to third-party plaintiffs to protect the building from harm while it was in their care. Thus, the trial court erred in entering summary judgment for third-party defendants since third-party plaintiffs forecasted sufficient evidence to withstand the motion for summary judgment on their claim of negligence. *Ibid.*

§ 8.1. Natural and Probable Consequences

The consequences of serving liquor to an intoxicated motorist are not reasonably unforeseeable events so as to insulate a tavern owner who knew or should have known that his patron intended to drive a motor vehicle from liability as a matter of law. *Hutchens v. Hankins*, 1.

§ 29. Sufficiency of Evidence of Negligence

The plaintiffs presented sufficient evidence to create an issue as to whether defendant installed the wiring that caused a fire in plaintiffs' store and to raise a question as to whether defendant was negligent in installation of the wires. *Wilson Brothers v. Mobil Oil*, 334.

There was a conflict in the evidence over the relationship between a contractor and an electrical subcontractor which created an issue of fact over a possible relationship which could result in holding the contractor liable for the alleged negligence of the subcontractor. *Ibid.*

§ 30. Nonsuit Generally

The trial court properly granted summary judgment in favor of a defendant who manufactured plastic trays burned in plaintiffs' store. *Wilson Brothers v. Mobil Oil*, 334.

PARENT AND CHILD

§ 1. The Relationship Generally; Creation and Termination of Relationship

Respondent's lack of involvement with his children for a period of more than two years established a pattern of abandonment and neglect. *In re Graham*, 146.

PARENT AND CHILD — Continued

Respondent mother's parental rights were properly terminated on the ground that she has neglected the child. *In re Sterling*, 562.

The evidence was sufficient to support the court's order terminating a mother's parental rights on the ground that she had neglected the child. *In re Ballard*, 580.

§ 6.1. Factors to be Considered in Determining Custody

A trial court's finding that the best interest of the minor child would be promoted by his remaining with his grandmother was supported by sufficient evidence. *Campbell v. Campbell*, 113.

§ 7.3. Enforcement of Parental Obligation

Where the trial court failed to make any finding determining the living expenses of the minor child, the order did not contain findings sufficient to support its judgment on child support. *Campbell v. Campbell*, 113.

PARTITION

§ 6. Whether the Property Should be Sold for Partition or Actually Partitioned

The trial court properly ordered an actual partition of land held by plaintiff, the only child of deceased, and deceased's widow even though some lands might need to be sold to satisfy the debts of the estate. *Chamberlain v. Beam*, 377.

§ 10.1. Validity and Effect of Sale; Collateral Attack

Plaintiff's complaint in an action to set aside a commissioner's deed resulting from a judicial partition sale on the ground of fraud by the commissioners constituted an impermissible collateral attack on a judicial sale and was properly dismissed for failure to state a claim for relief. *Brown v. Miller*, 694.

PARTNERSHIP

§ 1.2. Formation and Existence of Partnership; Tests or Indicia; Particular Applications

A genuine issue of material fact was presented as to whether an "Agreement and Note" executed by the parties constituted a limited partnership agreement. *Johnson v. Manning*, 673.

PENSIONS

§ 1. Generally

The courts of this State had jurisdiction of plaintiff's action against his former employer for fraudulent misrepresentation that a company pension plan was still in effect for the purpose of inducing plaintiff to remain with the employer and to forego salary increases and bonuses, and plaintiff's evidence was sufficient for the jury. *Shaver v. Monroe Construction Co.*, 605.

In an action for fraudulent misrepresentation that a company pension plan was still in effect, the proper measure of damages was the difference between the amount which would have been distributed to plaintiff had continuous contributions been made to the plan and the amount which was actually distributed to him. *Ibid.*

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 15. Competency and Relevancy of Evidence

Using an objective standard, rather than a subjective standard, for determining proximate cause in informed consent cases does not violate the substantive due process rights under both the North Carolina and the United States Constitution. *Dixon v. Peters*, 592.

§ 17. Departing from Approved Methods or Standards of Care

Plaintiff's evidence was sufficient for the jury on the issue of whether a violation of the standard of care for administering injections by defendant's nurse was a proximate cause of plaintiff's injury. *Holbrooks v. Duke University*, 504.

§ 17.1. Failure to Inform Patient of Risks or Side Effects of Treatment

G.S. 90-21.13(a)(3), which deals with informed consent to health care treatment, is not unconstitutional as a legislative infringement on the judicial power delegated to the courts by Art. IV, § 1, of the North Carolina Constitution. *Dixon v. Peters*, 592.

The standard of review for cases arising under the informed consent statute is not the middle tier/substantial state interest constitutional test, but is the lower tier/rational basis/legitimate state interest test, and there is a rational basis for the promulgation of G.S. 90-21.13. *Ibid.*

§ 17.2. Diagnosis; Use of X-Ray

Plaintiff's evidence was sufficient for the jury in an action to recover damages for the amputation of plaintiff's left leg because of a circulatory disease which defendant general practitioner allegedly negligently failed to diagnose. *Mashburn v. Hedrick*, 454.

§ 17.3. Fractures or Dislocations

The evidence was insufficient to establish medical malpractice on the part of a doctor who treated plaintiff and failed to discover a shoulder dislocation. *Moore v. Reynolds*, 160.

§ 18. Leaving Foreign Substance in Patient's Body

The evidence would permit the jury to find that defendant surgeon was negligent in failing to conduct a search for sponges before closing plaintiff's incision and in relying on a sponge count by operating room nurses. *Tice v. Hall*, 27.

PRINCIPAL AND AGENT

§ 1. Creation and Existence of Relationship

The recordation requirement of G.S. 47-115.1 for a power of attorney applies only where a competent principal later becomes incompetent, and a husband's signature for his competent wife on a promissory note pursuant to an unrecorded power of attorney was valid. *Cabarrus Bank & Trust Co. v. Chandler*, 724.

PRINCIPAL AND SURETY

§ 10. Private Construction Bonds

G.S. 58-54.23 did not prevent a bonding company from seeking reimbursement from its indemnitors under an indemnification agreement made before the bonding company agreed to bond a general contractor. *Henry Angelo & Sons, Inc. v. Prop. Development Corp.*, 569.

PRIVACY

§ 1. Generally

For the same reasons that editorial opinions may predicate a libel action, they may also predicate a false light invasion of privacy action. *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

PROCESS

§ 1.2. Process; Defects or Omissions in Copy Delivered to Served Party

Summonses which incorrectly listed the county in which the complaint had been filed were fatally defective and did not confer jurisdiction on the court over defendants, and where plaintiff took a voluntary dismissal without prejudice and filed another complaint within a year thereafter, the second complaint began a new action and did not relate back to the original action for statute of limitations purposes. *Everhart v. Sowers*, 747.

§ 14.3. Service on Foreign Corporation; Sufficiency of Evidence; Contacts Within this State

Defendant foreign corporation had sufficient minimum contacts with this State to warrant assertion of personal jurisdiction over it in an action for breach of warranty of a security system. *Coastal Chemical Corp. v. Guardian Industries*, 176.

Defendant foreign corporation had sufficient minimum contacts with North Carolina so that the assertion of personal jurisdiction over it by the courts of this State in an action to recover the purchase price of bags sold to defendant did not violate due process. *HBD, Inc. v. Steri-Tex Corp.*, 761.

QUASI CONTRACTS AND RESTITUTION

§ 5. Particular Situations and Applications

Defendant alleged sufficient evidence to raise a jury question in quasi contract; however, the statute of limitations applied to bar part of defendant's counterclaim seeking reimbursement for payments made on a note. *Bumgarner v. Tomblin*, 636.

RAPE AND ALLIED OFFENSES

§ 4. Relevancy and Competency of Evidence

The trial court erred in admitting the testimony of a doctor that test results for gonorrhea made on defendant were positive. *S. v. Edwards*, 737.

§ 6.1. Instructions; Lesser Degrees of Crime

In a prosecution for second degree rape, the trial court properly failed to submit to the jury charges of attempted second degree rape and assault on a female. *S. v. Edwards*, 737.

REFORMATION OF INSTRUMENTS

§ 1.1. Mutual or Unilateral Mistake

A contract could not be reformed on the ground of unilateral mistake where there was insufficient evidence of undue influence or fraud in the inducement of the contract. *Spector Industries v. Mitchell*, 391.

ROBBERY

§ 5.2. Instructions Relating to Armed Robbery

In a prosecution for armed robbery, the trial court erred in failing to instruct on "mere presence" by the defendant. *S. v. Johnson*, 173.

RULES OF CIVIL PROCEDURE

§ 4. Process

Where a summons was issued in the name of defendant's daughter on the date the complaint was filed and a summons was issued in defendant's name eleven days later, plaintiff's failure to cause a summons to be issued in defendant's name within five days of the filing of his complaint resulted in a discontinuance of the action against defendant, and the summons issued in defendant's name initiated a new action at the time of its issuance which was barred by the statute of limitations. *Roshelli v. Sperry*, 509.

G.S. 1A-1, Rule 4(d) does not apply to cause a summons issued in defendant's name and endorsed by the clerk to relate back to an original summons issued in the name of a person who was not a party to the action. *Ibid.*

§ 12. Defenses and Objections

A ruling on the merits cannot be made on a motion to dismiss for failure to state a claim for which relief could be granted. *S. v. Lewis*, 98.

§ 15.1. Discretion of Court to Grant Amendment

There was no abuse of discretion in the trial court's denial of plaintiffs' motion to amend their complaint fourteen months after the complaint was filed, a year after defendant's answer was filed, and a month after defendant's motion for summary judgment was made. *Wright v. Commercial Union Ins. Co.*, 465.

§ 32. Use of Depositions in Court Proceedings

Where plaintiffs read into evidence a portion of a doctor's deposition dealing with plaintiff's nerve injury and its causation, the court did not err in requiring plaintiffs to read into evidence a part of the doctor's deposition concerning his treatment of plaintiff and the proper place for the intramuscular injection involved in the case. *Holbrooks v. Duke University*, 504.

§ 50. Motions for Directed Verdict

There was no merit to appellant's argument that two parties' motions for directed verdict were not timely because they were not made immediately after the close of defendant's evidence, but were made after the charge to the jury. *Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss*, 306.

§ 50.2. Directed Verdict Against Party with Burden of Proof

In a negligence action in which movants' motion for directed verdict was granted, appellant admitted the truth of movants' allegations by introducing the movants' complaint into evidence. *Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss*, 306.

§ 55. Default

The clerk's entries of default and default judgment against defendants were void where defendants had appeared in the action through settlement negotiations with plaintiff. *N.C.N.B. v. McKee*, 58.

RULES OF CIVIL PROCEDURE — Continued

The trial court did not abuse its discretion in refusing to enter a default and default judgment against defendants where defendants showed excusable neglect and a meritorious defense of accord and satisfaction. *Ibid.*

§ 56.6. Summary Judgment in Negligence Cases

Where all the evidence showed a violation of the standard of care required by G.S. 20-141(h) which constituted negligence *per se*, and where appellant's evidence neither contradicted nor materially impeached the evidence of appellees, the credibility of the movants was manifest, and directed verdict in their favor was proper. *Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss*, 306.

§ 60. Relief from Judgment or Order

Where an action for child support was dismissed because of failure of plaintiff's attorney to draft an order within the time required by the trial judge, and not because either party made a Rule 41 motion, and where an order for child support was not entered until after the court had set aside the dismissal of the previous action, the order for child support was valid. *Hilton v. Howington*, 717.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court did not err in refusing to set aside a default judgment against defendant for "any other reason" under Rule 60(b)(4) on the ground that defendant was not validly served with process and was unaware of the suit against him. *Sawyer v. Goodman*, 191.

SALES

§ 14.1. Actions for Counterclaims or Breach of Warranty

The three-year statute of limitations applicable to contract actions barred two of plaintiff's breach of warranty claims. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

§ 17.1. Cases Involving Express Warranties; Sufficiency of Evidence

Statements by defendant's service manager fell short of being express warranties. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

§ 22. Actions for Personal Injuries Based Upon Negligence; Defective Goods or Materials; Seller's Liability

North Carolina does not recognize strict liability in tort as a theory of liability. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

Although two of plaintiff's claims arose in states which apply strict liability in tort, the North Carolina statute of limitations for negligence under G.S. 1-52(16) barred these claims. *Ibid.*

The trial court properly entered summary judgment on plaintiff's claims which arose in Tennessee and South Carolina. *Ibid.*

§ 22.2. Defective Goods or Materials; Sufficiency of Evidence

Plaintiff presented insufficient evidence to support its claims for negligent manufacture of tires. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

The trial court properly granted summary judgment in favor of a defendant who manufactured plastic trays burned in plaintiffs' store. *Wilson Brothers v. Mobil Oil*, 334.

SEARCHES AND SEIZURES

§ 9. Arrest for Traffic Violations

In a prosecution for manslaughter, driving under the influence of intoxicating liquor, and other traffic violations, the trial court did not err in failing to suppress evidence of bottles containing alcohol which were found in a briefcase next to defendant bus driver's seat. *S. v. Jones*, 411.

SHERIFFS AND CONSTABLES

§ 4.1. Return of Process; Return of Execution

A sheriff failed to show diligence in the execution of a writ of possession of furniture and was properly subjected to a penalty of $100.00 pursuant to G.S. 162-14 for his failure to take possession of the furniture from defendant and return it to plaintiff. *Red House Furniture Co. v. Smith*, 769.

SLANDER OF TITLE

§ 1. Generally

The elements of slander of title are (1) the uttering of slanderous words in regard to the title of one's property, (2) the falsity of the words, (3) malice and (4) special damages. *Allen v. Duvall*, 342.

In a slander of title action where defendants' predecessor in title failed to reserve an easement in that the description was too vague, there was still an issue as to whether an easement by prescription or by necessity had been created. *Ibid.*

In a slander of title action, there was sufficient evidence from which the court could find that there was probable cause for defendant to believe the right-of-way in an easement did exist when he stated that it did not. *Ibid.*

In an action for slander of title, the trial court did not err in calculating the damages for the loss of the use of money at thirteen per cent nor in awarding damages for the expenses the plaintiffs incurred in having the easement surveyed. *Ibid.*

SPECIFIC PERFORMANCE

§ 2. Inequitable Conduct in Making Contract; Waiver of Right to Sue; Plaintiff's Performance or Tender of Performance

Plaintiffs were not entitled to specific performance of a contract for the construction and sale of a house where their evidence showed only a conditional willingness on their part to perform and that defendant no longer had the ability to perform the disputed parts of the contract. *Hong v. George Goodyear Co.*, 741.

TRESPASS TO TRY TITLE

§ 1. Nature and Essentials of Right of Action

Proper statutory authority pursuant to G.S. 146-6 existed for plaintiffs' quitclaim deed from the State for land above the high watermark created when the State dredged a creek. *Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp*, 765.

§ 2. Presumptions and Burden of Proof

G.S. 146-79 which creates a presumption that the State has title to otherwise unclaimed land is valid and constitutional. *S. v. Taylor*, 364.

TRESPASS TO TRY TITLE — Continued

Quitclaim deeds from the State to the plaintiffs were a direct grant of title from the State and proved a prima facie case of title in plaintiffs. *Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp*, 765.

§ 3. Competency and Relevancy of Evidence

The ancient documents rule did not dictate that a private, unrecorded map be admitted as substantive evidence, and the trial court correctly limited the unrecorded map to illustrative purposes and properly failed to admit it into evidence. *Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp*, 765.

§ 4. Sufficiency of Evidence

In an action in which the State asserted ownership of certain lands, defendant failed satisfactorily to prove good and valid title in and to himself, and thus rebut the presumption raised that the State owned the land in question. *S. v. Taylor*, 364.

§ 4.1. Fitting Descriptions in Chain of Title to Land Claimed

Since subsection (e) of G.S. 146-6, dealing with quitclaim deeds to riparian owners for land raised above the high watermark, is silent on how property lines are to be extended, the lands may be drawn as the Governor and Council of State in their discretion deem proper. *Lackey v. Tripp; Moss v. Tripp; Rees v. Tripp*, 765.

TRIAL

§ 6.1. Particular Stipulations

In a negligence action in which movants' motion for directed verdict was granted, appellant admitted the truth of movants' allegations by introducing the movants' complaint into evidence. *Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss*, 306.

§ 57. Trial and Hearing by Court

Statements by a trial judge in which he stated that "I have already reached a conclusion" were not prejudicial to plaintiff. *Consolidated Systems v. Granville Steel Corp.*, 485.

TROVER AND CONVERSION

§ 3. Procedure for Action for Possession of Personalty

The jury could properly find that defendant converted plaintiff's stock certificate when he refused to return the certificate in September 1980 rather than when he received the certificate in late 1976 or early 1977, and plaintiff's action for conversion instituted in October 1980 was not barred by the three-year statute of limitations. *Hoch v. Young*, 480.

§ 4. Measure of Damages

Plaintiff offered sufficient evidence of the value of converted stock to overcome defendant's motion to dismiss although there was no direct testimony as to the fair market value of the shares themselves. *Hoch v. Young*, 480.

TRUSTS

§ 7. Investment and Management of Funds

Combining plaintiff's stock with that of others to be sold was not a breach of duty by defendant in its fiduciary capacity. *Church v. First Union Nat'l Bank*, 359.

TRUSTS — Continued

§ 11. Actions by Beneficiaries Against Trustees

The trial judge correctly gave defendant a directed verdict on plaintiffs' breach of promissory note claim where the way the defendant signed the note excluded the defendant as trustee from any personal liability. *Church v. First Union Nat'l Bank*, 359.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Statutes relating to unfair trade practices have no application to Texas transactions. *Michael v. Greene*, 713.

UNIFORM COMMERCIAL CODE

§ 11. Express Warranties

The limitation of damages in defendant's warranty on its tires sold to plaintiff was effective. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

§ 32. Liability of Parties

Plaintiff bank's acceptance of a corporation's promissory note as a replacement for a note executed by the individual defendants did not constitute "payment and satisfaction" of defendants' note so as to discharge defendants from liability for the debt. *N.C.N.B. v. McKee*, 58.

The recordation requirement of G.S. 47-115.1 for a power of attorney applies only where a competent principal later becomes incompetent, and a husband's signature for his competent wife on a promissory note pursuant to an unrecorded power of attorney was valid. *Cabarrus Bank & Trust Co. v. Chandler*, 724.

VENDOR AND PURCHASER

§ 5.1. Matters Precluding Specific Performance

Plaintiffs were not entitled to specific performance of a contract for the construction and sale of a house where their evidence showed only a conditional willingness on their part to perform and that defendant no longer had the ability to perform the disputed parts of the contract. *Hong v. George Goodyear Co.*, 741.

WAIVER

§ 1. Matters Which May Be Waived

Where a holder of a note has repeatedly accepted monthly installment payments after their respective due date, the noteholder will be held to have waived the right to insist on punctual payment unless prior to the late payment the noteholder notified the payor that prompt payment is again required. *Driftwood Manor Investors v. City Federal Savings & Loan*, 459.

WITNESSES

§ 5.2. Evidence of Character and Reputation

In a medical malpractice action in which the jury was dealing strictly with a medical question of what was the applicable standard of care, the trial judge erred in allowing character and reputation evidence to be introduced on the behalf of defendant. *Holiday v. Cutchin*, 369.

WORD AND PHRASE INDEX

ABDUCTION

Jurisdiction of custody action for child taken to another state, *Latch v. Latch*, 498.

ACCORD

Insufficient evidence of, *Moore v. Frazier*, 476.

ACCOUNT STATED

Services rendered by accountant, *Vanlandingham v. Northeastern Motors, Inc.*, 778.

ACCOUNTANTS

Gross mistake in audit, *Spector Industries v. Mitchell*, 391.

Payment for services rendered by, *Vanlandingham v. Northeastern Motors, Inc.*, 778.

ADMINISTRATIVE REMEDIES

Failure to exhaust, *Snuggs v. Stanly Co. Dept. of Public Health*, 86.

ADVERSE POSSESSION

Constructive ouster, *Casstevens v. Casstevens*, 169.

Tenant in common, *McCann v. Travis*, 447.

Tolling of statute of limitations, *Casstevens v. Casstevens*, 169.

AFDC PAYMENTS

Irrelevant in paternity action, *S. v. Farmer*, 384.

AGGRAVATING CIRCUMSTANCES

Irrelevancy of victim's age, *S. v. Monk*, 512.

Pecuniary gain improperly considered, *S. v. Foster*, 507.

AGGRAVATING CIRCUMSTANCES —Continued

Prior convictions, findings as to counsel, *S. v. Foster*, 507.

ALIMONY

Award of $25,000 per year, *Ahern v. Ahern*, 728.

Willful failure to pay, *Wade v. Wade*, 189.

AMPUTATION

Malpractice in failing to diagnose circulatory disease, *Mashburn v. Hedrick*, 454.

ANCIENT DOCUMENTS RULE

Not requiring receipt of private unrecorded map into evidence, *Lackey v. Tripp; Moss v. Tripp; and Rees v. Tripp*, 765.

ANNEXATION

Authority to remand for deletion of landowners, *Southern Glove Mfg. Co. v. City of Newton*, 754.

Sufficiency of boundary description, *Garland v. City of Asheville*, 490.

Use of contour rather than ridge lines, *Garland v. City of Asheville*, 490.

APARTMENT COMPLEX

Assault in parking lot of, *Shepard v. Drucker & Falk*, 667.

APPEARANCE

Settlement negotiations as, *N.C.N.B. v. McKee*, 58.

ARCHITECT

Action against real estate developer, *Kabatnik v. Westminster Co.*, 708.

ARMED ROBBERY

Failure to instruct on "mere presence," *S. v. Johnson*, 173.

ARSON

Exclusion of evidence relating to possible motive, *Durham v. Quincy Mutual Fire Ins. Co.*, 700.

ASSAULT

In parking lot, *Shepard v. Drucker & Falk*, 667.

ATTORNEY FEES

Provisions of note and assumption agreement, *N.C.N.B. v. McKee*, 58.

AUDIT

Gross mistake in audit of trucking company, *Spector Industries v. Mitchell*, 391.

AVOIDABLE CONSEQUENCES

Failure to do back exercises as instructed by doctor, *Radford v. Norris*, 501.

Failure to instruct on error, *Radford v. Norris*, 501.

BLIMP

Ordinance prohibiting use for advertising, *Goodman Toyota v. City of Raleigh*, 660.

BOAT SLIPS

Ultra vires lease of city property for, *Lewis v. City of Washington*, 552.

BONDING COMPANY

Right to reimbursement by indemnitors, *Henry Angelo & Sons, Inc. v. Prop. Development Corp.*, 569.

BREACH OF CONTRACT

Mismanagement of duty to finance land purchase, *Bumgarner v. Tomblin*, 636.

BREACH OF CONTRACT—Continued

To move building, *Porter v. Matthews Enterprises*, 140.

BREATHALYZER TEST

Defendant's refusal to take admitted into evidence, *S. v. Jones*, 411.

BRIEFCASE

Search of in bus following accident, *S. v. Jones*, 411.

BUS DRIVER

Driving under the influence, manslaughter, *S. v. Jones*, 411.

BUSINESS RECORDS EXCEPTION

Verified statement of account, *Vanlandingham v. Northeastern Motors, Inc.*, 778.

BYSSINOSIS

Claim barred by statute of limitations and res judicata, *Hogan v. Cone Mills Corp.*, 439.

CHAIN OF CUSTODY

Not necessary for culture smears, *S. v. Edwards*, 737.

CHAMPERTY AND MAINTENANCE

Summary judgment properly entered, *Wright v. Commercial Union Ins. Co.*, 465.

CHARACTER EVIDENCE

Improperly introduced in medical malpractice action, *Holiday v. Cutchin*, 369.

CHILD CUSTODY

Changed circumstances not shown for modification of, *Ellenberger v. Ellenberger*, 721.

CHILD CUSTODY—Continued

In grandmother rather than mother, *Campbell v. Campbell*, 113.

Jurisdiction where child abducted to another state, *Latch v. Latch*, 498.

CHILD SUPPORT

Action for, inability to raise paternity issue, *S. v. Lewis*, 98.

Credit by clerk for direct payments to mother, *Shaw v. Shaw*, 775.

Failure to determine living expenses of child, *Campbell v. Campbell*, 113.

Finding of willful refusal to comply, *Hilton v. Howington*, 717.

Illegitimate, *Wilkes County v. Gentry*, 432.

Increase in amount required by separation agreement, burden of proof, *Walker v. Walker*, 644.

Judicial notice of inflation, *Walker v. Walker*, 644.

Monthly expenses of child not supported by evidence, *Walker v. Walker*, 644.

Validity of order after dismissal set aside, *Hilton v. Howington*, 717.

CHOICE OF FORUMS

To bring section 1983 civil rights action, *Snuggs v. Stanly Co. Dept. of Public Health*, 86.

CITY EMPLOYEE

Struck by car, no contributory negligence, *Pinkston v. Connor*, 628.

CIVIL RIGHTS ACTION

Concurrent jurisdiction of State courts, *Snuggs v. Stanly Co. Dept. of Public Health*, 86.

COLLATERAL ESTOPPEL

Evidence of larceny in breaking and entering case after acquittal of larceny, *S. v. Edwards*, 92.

COLLATERAL ESTOPPEL—Continued

Federal decision determinative of state court decision, *Coker v. Basic Media and Canfield v. Basic Media*, 69.

Precluding raising paternity issue, *S. v. Lewis*, 98.

COMMUNITY PROPERTY STATE

Enforcing judgment of, *Gardner v. Gardner*, 678.

CONFESSIONS

Competency of statement by defendant with history of mental illness, *S. v. Monk*, 512.

CONSENT JUDGMENT

Legal basis for no longer existing, *Gardner v. Gardner*, 678.

CONSTRUCTION CONTRACT

Issue as to whether general contractor and unlicensed, *Coats v. Jones*, 151.

CONSTRUCTIVE FRAUD

In abusing fiduciary duty in sale of land, *Bumgarner v. Tomblin*, 636.

CONSTRUCTIVE OUSTER

Demand for rent preventing, *Casstevens v. Casstevens*, 169.

CONTEMPT OF COURT

Error in child support action absent finding of willfulness, *Hilton v. Howington*, 717.

CONTRACT

Failure to prove existence of, *Durham Life Broadcasting v. Internat'l Carpet Outlet*, 787.

CONTRIBUTORY NEGLIGENCE

None by city employee struck by car, *Pinkston v. Connor*, 628.

CONVERSION

Refusal to return stock certificates, *Hoch v. Young*, 480.

COUNTEROFFER

Not considered option, *Normile v. Miller and Segal v. Miller*, 689.

CRIMINALLY INSANE

Statute requiring hearing before release of, *In re Rogers*, 705.

CULTURE SMEARS

No chain of custody necessary, *S. v. Edwards*, 737.

DAMAGES

Interest on award of proper, *Inco, Inc. v. Planters Oil Mill*, 374.

DEAD MAN'S STATUTE

Not precluding evidence of mental capacity, *Hardee v. Hardee*, 321.

DEED OF TRUST

Foreclosure of, insufficient evidence to show whether beneficiaries in possession of note, *In re Foreclosure of Connolly v. Potts*, 547.

Limiting assumption to written approval, *Driftwood Manor Investors v. City Federal Savings & Loan*, 459.

DEFAMATION

Newspaper editorial concerning minority admission procedures, *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

DEFAULT JUDGMENT

Excusable neglect where information furnished to attorney, *N.C.N.B. v. McKee*, 58.

Improper after appearance by defendants through settlement negotiations, *N.C.N.B. v. McKee*, 58.

DEFAULT JUDGMENT—Continued

Refusal to set aside for "any other reason," *Sawyer v. Goodman*, 191.

DEPOSITION

Requiring additional portions to be read into evidence, *Holbrooks v. Duke University*, 504.

DEPUTY SHERIFF

Penalty for failure to execute writ of possession, *Red House Furniture Co. v. Smith*, 769.

DESERTION

By wife; not entitled to husband's compensation, *Jones v. Service Roofing & Sheet Metal Co.*, 772.

DOUBLE JEOPARDY

Evidence of larceny in breaking and entering case after acquittal of larceny, *S. v. Edwards*, 92.

DRAFT

From insurance company; insufficient evidence of accord, *Moore v. Frazier*, 476.

DRAM SHOP

Sale of alcohol to intoxicated customer, *Hutchens v. Hankins*, 1.

DREDGING

Dumping creating land above high water mark, *Lackey v. Tripp; Moss v. Tripp; and Rees v. Tripp*, 765.

DRIVER'S LICENSE

Assessment of points for each of three offenses, *Gaither v. Peters*, 559.

Points assessed for driving left of center, *Belk v. Peters*, 196.

DRIVING LEFT OF CENTER

Points assessed for, *Belk v. Peters*, 196.

DRIVING UNDER INFLUENCE

Bus driver, *S. v. Jones*, 411.

Sale of alcohol to intoxicated customer, *Hutchens v. Hankins*, 1.

DYING DECLARATIONS

Decedent's belief that he was dying, *S. v. White*, 734.

EASEMENTS

Description too vague, *Allen v. Duvall*, 342.

Insufficient evidence of abandonment, *Allen v. Duvall*, 342.

Prescriptive easement, sufficient evidence, *Allen v. Duvall*, 342; insufficient evidence, *Orange Grocery Co. v. CPHC Investors*, 136.

EDITORIAL

Potentially defamatory, *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

ELECTRICAL WIRING

Negligence in installation of, *Wilson Brothers v. Mobil Oil*, 334.

Whether subcontractor was employee or independent contractor, *Wilson Brothers v. Mobil Oil*, 334.

EMERGENCY ROOM REPORTS

Improperly excluded, *Corda v. Brook Valley Enterprises, Inc.*, 653.

EMPLOYMENT CONTRACT

Tortious interference with, *Dawson v. Radewicz*, 731.

ESTOPPEL

Insurer estopped by misrepresentations in application by broker, *Northern Nat'l Life Ins. v. Miller Machine Co.*, 424.

EXPERIMENT

Conducted by lifeguard properly admitted, *Corda v. Brook Valley Enterprises, Inc.*, 653.

EXPERT TESTIMONY

Civil engineer; reconstructing accident, *McKay v. Parham*, 349.

Medical; nature of injury, *Chapman v. Southern Import Co.*, 194.

FAIR SENTENCING ACT

See Aggravating Circumstances this Index.

FAMILY PURPOSE DOCTRINE

Sufficiency of evidence, *McKay v. Parham*, 349.

Summons issued in name of wrong party, *Roshelli v. Sperry*, 509.

FIDUCIARY DUTY

In sale of land, *Bumgarner v. Tomblin*, 636.

No breach of in selling stock, *Church v. First Union Nat'l Bank*, 359.

FIRE INSURANCE

Possible motive for plaintiff to burn home, *Durham v. Quincy Mutual Fire Ins. Co.*, 700.

FORECLOSURE SALE

Notice of hearing, *In re Foreclosure of Taylor*, 744.

FRAUD

Misrepresentation concerning pension plan, *Shaver v. Monroe Construction Co.*, 605.

Opinion or puffing is insufficient basis for, *Michael v. Greene*, 713.

Statute of limitations on claim, *Brown v. Miller*, 694.

FURNITURE

Penalty for failure to execute writ of possession of, *Red House Furniture Co. v. Smith*, 769.

GENERAL CONTRACTOR

Indemnification agreement made before bonding of, *Henry Angelo & Sons, Inc. v. Prop. Development Corp.*, 569.

GOLD JEWELRY

Misrepresentations in sale of, *Michael v. Greene*, 713.

GONORRHEA

Evidence of test results improperly admitted, *S. v. Edwards*, 737.

Exposure of rape victim to, *S. v. Edwards*, 737.

GOOD BEHAVIOR

Condition of suspended sentence not violated by playing loud music, *S. v. Cunningham*, 470.

GUARANTY AGREEMENT

Husband signing promissory note as attorney-in-fact for wife, *Cabarrus Bank & Trust Co. v. Chandler*, 724.

New promissory note with additional promisor, *First Union Nat'l Bank v. King*, 757.

GUARDIAN

Removal of, insufficient evidence, *In re Thomas*, 495.

HAIR TRANSPLANT

Informed consent, *Dixon v. Peters*, 592.

HEALTH INSURANCE

Regulation requiring termination before rate increase, *American Nat'l Ins. Co. v. Ingram*, 38.

HIGH WATER MARK

Dumping creating land above, *Lackey v. Tripp; Moss v. Tripp; and Rees v. Tripp*, 765.

HOUSE MOVERS

Negligence of, *Porter v. Matthews Enterprises*, 140.

ILLEGITIMATE CHILD

Failure to support, *Wilkes County v. Gentry*, 432.

INCUBATORS

Use of after birth; paternity action, *S. v. Farmer*, 384.

INDECENT LIBERTIES

Duties of teacher competent for corroboration, *S. v. Coble*, 537.

INDEMNIFICATION AGREEMENT

Bonding company's right to reimbursement, *Henry Angelo & Sons, Inc. v. Prop. Development Corp.*, 569.

INDUSTRIAL COMMISSION

Determination of credibility different from hearing officer, *Pollard v. Krispy Waffle*, 354.

INFORMED CONSENT

Constitutionality of statute, *Dixon v. Peters*, 592.

Hair transplant, *Dixon v. Peters*, 592.

INSANE PERSONS

Statute requiring hearing before release of criminally insane, *In re Rogers*, 705.

INSANITY DEFENSE

Denial of bifurcated trial, *S. v. Monk*, 512.

INSURANCE

Alleged champerty and maintenance, *McCann v. Travis*, 447.

Draft from; insufficient evidence of accord, *Moore v. Frazier*, 476.

INSURANCE REGULATION

Commissioner not exceeding statutory authority, *American Nat'l Ins. Co. v. Ingram*, 38.

INTEREST

On damages properly awarded, *Inco, Inc. v. Planters Oil Mill*, 374.

INTERFERENCE

With employment contract, *Dawson v. Radewicz*, 731.

INTERLOCUTORY APPEAL

Order setting aside judgment upon surprise and neglect, *Braun v. Grundman*, 387.

INTERROGATORIES

Properly excluded, *Corda v. Brook Valley Enterprises, Inc.*, 653.

INTOXICATED PERSON

Bus driver, *S. v. Jones*, 411.

Sale of alcohol to, *Hutchens v. Hankins*, 1.

INVERSE CONDEMNATION

Municipality extending waste disposal services to area under franchise, *Stilling v. City of Winston-Salem*, 618.

JOINT SAVINGS ACCOUNT

Property passing outside will, *Salvation Army v. Welfare*, 156.

JUDICIAL NOTICE

Inflation in child support case, *Walker v. Walker*, 644.

JURY INSTRUCTIONS

Prejudicial statement of opinion in, *S. v. Morrison and S. v. Templeton*, 125.

JUVENILE

Admissibility of written reports in hearing, *In re Shue*, 76.

Revocation of probation error, *In re Mash*, 130.

LAND PURCHASE

Mismanagement of duty to finance, *Bumgarner v. Tomblin*, 636.

LARCENY

Evidence in breaking and entering case after acquittal of, *S. v. Edwards*, 92.

LAW ENFORCEMENT OFFICER

Tortious interference with employment contract, *Dawson v. Radewicz*, 731.

LEASE

No requirement of formal termination before leased to another, *Capitol Funds v. White*, 785.

LIBEL

Newspaper editorial concerning minority admission procedures, *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

LIFE INSURANCE

Misrepresentations in application by broker, estoppel of insurer, *Northern Nat'l Life Ins. v. Miller Machine Co.*, 424.

LIFEGUARD

Possible negligence of, *Corda v. Brook Valley Enterprises, Inc.*, 653.

LIGHTING

At apartment complex where rape occurred, *Shepard v. Drucker & Falk*, 667.

LIMITED PARTNERSHIP

Agreement and note as formation of, *Johnson v. Manning*, 673.

LIS PENDENS

Defective levy of attachment did not invalidate, *Edwards v. Brown's Cabinets*, 524.

MANSLAUGHTER

Intoxicated bus driver involved in accident, *S. v. Jones*, 411.

MEDICAL MALPRACTICE

Character evidence improperly introduced, *Holiday v. Cutchin*, 369.

Failure to properly diagnose shoulder dislocation, *Moore v. Reynolds*, 160; circulatory disease, *Mashburn v. Hedrick*, 454.

Leaving sponge in patient's body, *Tice v. Hall*, 27.

Negligent injection by nurse, *Holbrooks v. Duke University*, 504.

MEDICAL OPINION TESTIMONY

Appropriateness of treatment, *Moore v. Reynolds*, 160.

MENTAL CAPACITY

To execute deed, *Hardee v. Hardee*, 321.

MENTALLY RETARDED PERSON

Standards for compulsory sterilization of, *In re Truesdell*, 258.

"MERE PRESENCE"

Failure to instruct on in armed robbery trial, *S. v. Johnson*, 173.

MILITARY NON-DISABILITY RETIRED PAY

Not subject to community property laws, *Gardner v. Gardner*, 678.

MINIMUM CONTACTS

Breach of warranty action against foreign corporation, *Coastal Chemical Corp. v. Guardian Industries*, 176.

Jurisdiction over foreign corporation in action to recover purchase price, *HBD, Inc. v. Steri-Tex Corp.*, 761.

MOBILE HOMES

Ordinance prohibiting use in residential zone, *Duggins v. Town of Walnut Cove*, 684.

MOOT QUESTION

Order compelling defendant to take medication, *S. v. Monk*, 512.

MUG SHOT

Refusal to give limiting instruction, *S. v. Foster*, 531.

NEGLECTED CHILD

Burden of proof in review of custody hearing, *In re Shue*, 76.

NEGLIGENCE

In installation of wires, *Wilson Brothers v. Mobil Oil*, 334.

In manufacturing of tires, *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

In moving building, *Porter v. Matthews Enterprises*, 140.

In sale of alcohol to intoxicated person, *Hutchens v. Hankins*, 1.

Slowing vehicle to stop in highway, *Murdock v. Ratliff; Conner Homes v. Ratliff; and Ratliff v. Moss*, 306.

NEWSPAPER

Editorial potentially defamatory, *Renwick v. News and Observer and Renwick v. Greensboro News*, 200.

NOTICE OF APPEAL

Untimely notice by plaintiff after defendant's notice, *First Union Nat'l Bank v. King*, 757.

NURSE

Negligent injection by, *Holbrooks v. Duke University*, 504.

OPTION

Counteroffer not considered as, *Normile v. Miller and Segal v. Miller*, 689.

ORTHOPEDIC SURGEON

Failure to follow back exercises prescribed by, *Radford v. Norris*, 501.

OSHA VIOLATION

Constitutionality of notice statute, *In re House of Raeford Farms v. Brooks*, 106.

Review of superior court proper, *In re House of Raeford Farms v. Brooks*, 106.

PARENTAL RIGHTS

Abandonment and neglect of child by incarcerated father, *In re Graham*, 146.

Sufficient finding of jurisdiction, *In re Ballard*, 580.

Termination for neglect of child, *In re Sterling*, 562; *In re Ballard*, 580.

PARKING LOT

Assault in, *Shepard v. Drucker & Falk*, 667.

PARTITION

Actual partition supported by evidence, *Chamberlain v. Beam*, 377.

Collateral attack on partition sale, *Brown v. Miller*, 694.

PARTNERSHIP

Agreement and note as formation of, *Johnson v. Manning*, 673.

PATERNITY

Collateral estoppel preventing raising issue of, *S. v. Lewis*, 98.

PATERNITY — Continued

Dismissal of order after acknowledgment of, *Holt v. Shoffner*, 381.

Effect of case upon AFDC payments, *S. v. Rankins*, 782.

Mother's testimony as to sexual intercourse with another, *S. v. Rankins*, 782.

Questions concerning relationship with other men, *S. v. Farmer*, 384.

Relief from underlying acknowledgment of, *Leach v. Alford*, 118.

Subsequent revelation that not father, *Leach v. Alford*, 118.

PATHOLOGIST

Opinion as to cause of death improperly excluded, *Corda v. Brook Valley Enterprises, Inc.*, 653.

PATROLMAN

Automobile struck by car pursued by, *McMillan v. Newton*, 751.

PAYMENT

Acceptance of replacement note was not, *N.C.N.B. v. McKee*, 58.

PENSIONS

Fraudulent misrepresentation concerning pension plan, *Shaver v. Monroe Construction Co.*, 605.

PERSONAL JURISDICTION

Action against foreign corporation for breach of warranty, *Coastal Chemical Corp. v. Guardian Industries*, 176.

Minimum contacts of foreign corporation with state, *HBD, Inc. v. Steri-Tex Corp.*, 761.

PHOTOGRAPH

Mug shot of defendant, refusal to give limiting instruction, *S. v. Foster*, 531.

PLASTIC TRAYS

Insufficient evidence of negligence in manufacture of, *Wilson Brothers v. Mobil Oil*, 334.

POINTS

Assessment of for each of three offenses, *Gaither v. Peters*, 559.

Number assessed for driving left of center, *Belk v. Peters*, 196.

POOL DROWNING

Summary judgment improperly entered, *Corda v. Brook Valley Enterprises, Inc.*, 653.

POWER OF ATTORNEY

Failure to register does not invalidate promissory note, *Cabarrus Bank & Trust Co. v. Chandler*, 724.

PREEXISTING CONDITION

Partial disability of back, *Chapman v. Southern Import Co.*, 194.

PRIVATE PROSECUTOR

No denial of impartial prosecution, *S. v. Jones*, 411.

PROBATION

Revocation of, insufficiency of evidence, *In re Mash*, 130.

PROCESS

Listing of wrong county, new complaint does not relate back, *Everhart v. Sowers*, 747.

PROMISSORY NOTE

Acceptance of replacement note not payment, *N.C.N.B. v. McKee*, 58.

PUBLIC HOUSING PROJECT

Approval of special use permit for, *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

QUITCLAIM DEEDS

By State valid, *Lackey v. Tripp; Moss v. Tripp; and Rees v. Tripp*, 765.

RADIO ADVERTISEMENTS

Failure to show contract for, *Durham Life Broadcasting v. Internat'l Carpet Outlet*, 787.

REAL ESTATE DEVELOPER

Action against by architect, *Kabatnik v. Westminster Co.*, 708.

RES JUDICATA

Inapplicable where no identity of issues or parties, *Kabatnik v. Westminster Co.*, 708.

Judgment of paternity, *Leach v. Alford*, 118.

ROOFING CONTRACT

Statute of limitations for subcontract assuming general contractor's obligations, *Martin County v. R. K. Stewart & Son*, 556.

SEAL

Notes not under, *Coker v. Basic Media and Canfield v. Basic Media*, 69.

SEARCHES AND SEIZURES

Search of briefcase in bus, *S. v. Jones*, 411.

SECOND DEGREE RAPE

Failure to instruct on lesser offenses proper, *S. v. Edwards*, 737.

SHERIFF

Penalty for failure to execute writ of possession, *Red House Furniture Co. v. Smith*, 769.

SHOULDER DISLOCATION

Failure to properly diagnose, *Moore v. Reynolds*, 160.

SIGN CONTROL ORDINANCE

Valid exercise of police power, *Goodman Toyota v. City of Raleigh*, 660.

SLANDER OF TITLE

Statement concerning easement, *Allen v. Duvall*, 342.

SPECIAL USE PERMIT

Standing of corporation representing property owners, *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

Validity for public housing project, *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

SPECIFIC PERFORMANCE

Construction and sale of house, *Hong v. George Goodyear Co.*, 741.

Right to appeal denial of, *Lewis v. City of Washington*, 552.

SPONGE

Surgeon's leaving in patient's body, *Tice v. Hall*, 27.

STATE LANDS

Title to unclaimed lands, *S. v. Taylor*, 364.

STATE PERSONNEL COMMISSION

Appeal of dismissal to, *Snuggs v. Stanly Co. Dept. of Public Health*, 86.

STATUTE OF LIMITATIONS

Barring warranty claims, *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

Contract not under seal, *Coker v. Basic Media and Canfield v. Basic Media*, 69.

Subcontract assuming general contractor's obligations, *Martin County v. R. K. Stewart & Son*, 556.

STERILIZATION

Minimum standards for compulsory sterilization, *In re Truesdell*, 258.

STOCK

Combining plaintiff's with others to be sold, *Church v. First Union Nat'l Bank*, 359.

Time of conversion of, *Hoch v. Young*, 480.

STOPPING IN HIGHWAY

Proximate cause of collision, *Murdock v. Ratliff; Conner Homes v. Ratliff and Ratliff v. Moss*, 306.

STRICT LIABILITY

Claims arising in other states, *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

SUBCONTRACTOR

Not prevented from recovering by unlicensed contractor, *Zickgraf Enterprises, Inc. v. Yonce*, 166.

SUBROGATION

Of second tier contractor, compromise by first tier subcontractor, *Consolidated Systems v. Granville Steel Corp.*, 485.

SUMMONS

Listing of wrong county, new complaint does not relate back, *Everhart v. Sowers*, 747.

Naming person not party, subsequent summons naming defendant as new action, *Roshelli v. Sperry*, 509.

SURGEON

Leaving sponge in patient's body, *Tice v. Hall*, 27.

SUSPENDED SENTENCE

Good behavior condition not violated by playing loud music, *S. v. Cunningham*, 470.

SUSPENDED SENTENCE—Continued

Notice of alleged violations of, *S. v. Cunningham*, 470.

TAPE RECORDING

Authentication of transcript, *S. v. Jeffries*, 181.

TAVERN OWNER

Sale of alcohol to intoxicated customer, *Hutchens v. Hankins*, 1.

TENANT IN COMMON

Failure to show adverse possession, *McCann v. Travis*, 447.

TIRES

Negligent manufacture of, *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

TRANSCRIPT

Tape-recorded statement by defendant, authentication of, *S. v. Jeffries*, 181.

TRESPASS TO TRY TITLE

Presumption that State has title to unclaimed land, *S. v. Taylor*, 364.

TRUCKING COMPANY

Gross mistake in audit of, *Spector Industries v. Mitchell*, 391.

No rescission of contract for sale of, *Spector Industries v. Mitchell*, 391.

TRUSTEE

Excluded from personal liability, *Church v. First Union Nat'l Bank*, 359.

UNDUE INFLUENCE

In executing deed, *Hardee v. Hardee*, 321.

UNFAIR TRADE PRACTICES

Inapplicability of statutes to Texas transaction, *Michael v. Greene*, 713.

UNLICENSED CONTRACTOR

Issue as to whether general contractor, *Coats v. Jones*, 151.

Not preventing subcontractor from recovering on contract, *Zickgraf Enterprises, Inc. v. Yonce*, 166.

WAIVER

Of right to insist on punctual payment of rent, *Driftwood Manor Investors v. City Federal Savings & Loan*, 459.

WARRANTY

Effectively limiting damages on tires, *Byrd Motor Lines v. Dunlop Tire and Rubber*, 292.

WASTE DISPOSAL

Franchises for in annexed area, *Stillings v. City of Winston-Salem*, 618.

WATERFRONT PROPERTY

City's ultra vires lease of, *Lewis v. City of Washington*, 552.

WINDBLOWN SIGNS

Ordinance valid exercise of police power, *Goodman Toyota v. City of Raleigh*, 660.

WIRES

Installation of causing fire, *Wilson Brothers v. Mobil Oil*, 334.

WORKERS' COMPENSATION

Byssinosis claim barred by statute of limitations and res judicata, *Hogan v. Cone Mills Corp.*, 439.

Disfigurement in chain saw accident, *Locklear v. Canal Wood Corp.*, 185.

WORKERS' COMPENSATION— Continued

Finding of desertion by wife supported by evidence, *Jones v. Service Roofing & Sheet Metal Co.*, 772.

Insufficient number of employees, *Wiggins v. Rufus Tart Trucking*, 542.

Leg injury, additional compensation for mental condition, *Davis v. Edgecomb Metals*, 48.

Partial disability of back, preexisting condition, *Chapman v. Southern Import Co.*, 194.

WRIT OF POSSESSION

Penalty for sheriff's failure to execute, *Red House Furniture Co. v. Smith*, 769.

WRONGFUL DEATH ACTION

Automobile struck by car pursued by patrolman, *McMillan v. Newton*, 751.

Pool drowning, *Corda v. Brook Valley Enterprises, Inc.*, 653.

ZONING

Prohibiting use of mobile homes in residential zone, *Duggins v. Town of Walnut Cove*, 684.

Special use permit for public housing project, *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 244.

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina