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2. Appointed 28 September 1984 to replace Charles C. Lamm, Jr.

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2. Appointed 17 September 1984.
3. Appointed 13 July 1984 to replace B. Craig Ellis.
4. Appointed Chief Judge 9 April 1984 to replace Robert L. Cecil who resigned as Chief Judge 9 April 1984.
5. Resigned as Chief Judge 9 April 1984.
6. Appointed 30 December 1983 to replace Walter M. Lampley who retired 30 November 1983.
7. Appointed 2 July 1984 to replace David R. Tanis who resigned 31 March 1984.
8. Appointed 27 September 1984.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SHIRLEY T. HARRIS v. W. F. MAREADY, WILLIAM H. PETREE, C. ROGER HARRIS, AND PETREE, STOCKTON, ROBINSON, VAUGHN, GLAZE AND MAREADY

No. 8221SC939

(Filed 20 September 1983)

1. **Rules of Civil Procedure § 15— motion to strike amended complaint—change of party—properly allowed**

The trial court properly allowed defendants' motion to strike an amendment to plaintiff's complaint through which plaintiff sought to delete "P.A." from the caption of the party-defendants, a law firm, since the amendment, were it to be allowed, would constitute at most a substitution of party-defendants and create a party who had never been served, a new party against whom the statute of limitations had run. The corporation which was designated a party-defendant was not the firm name of the partnership, and the court had no jurisdiction over the partnership or its partners.

2. **Process § 5; Rules of Civil Procedure § 4— denial of oral motion to amend summons—no abuse of discretion**

There was no abuse of discretion in the trial court's denial of plaintiff's oral motion to amend a summons served upon the individual defendant Maready by deleting the name "C. Roger Harris" and inserting in lieu thereof the name "W. F. Maready," and to amend the summons served upon the law firm by deleting the letters "P.A." Plaintiff did not move to amend the defective summons until the hearing on a motion to dismiss on 11 June 1982, and through the oral efforts to amend the summons, plaintiff was seeking to have all of her process relate back to 11 January 1982. The amendments would have constituted material prejudice to defendants in that the statute of limitations had run and substantial rights of the defendants had intervened. The amendment did not constitute correction of a misnomer, but was an attempt to add the defendant partnership as a new party.

3. **Process § 2; Rules of Civil Procedure § 4— serving general partner of law firm—no jurisdiction over law firm itself**

Plaintiff did not obtain jurisdiction over the law firm itself by serving a general partner in the law firm since the summons was not addressed to the law firm as a partnership but was addressed to the law firm as a corporation and since the fact that a general partner was properly named in the summons as an individual defendant did not make service upon his person sufficient process to bring in a partnership not named as a party in the summons. G.S. 1A-1, Rule 4(b).

4. **Process § 1.2; Rules of Civil Procedure § 4— summons addressed to one individual defendant served upon different individual defendant—no valid service of process obtained**

Plaintiff failed to comply with the statutory rules for service of process which were necessary to obtain valid service and jurisdiction against an individual defendant, Maready, where a summons addressed to defendant C. Roger Harris was served upon Maready.

5. **Attorneys at Law § 5.1; Rules of Civil Procedure § 8.1— professional malpractice action—matter in controversy exceeding $10,000—failure to properly state relief demanded—failure to dismiss action—abuse of discretion**

A trial judge abused his discretion by failing to allow defendant's motion to dismiss for a violation of G.S. 1A-1, Rule 8(a)(2) where, from a contextual reading of the complaint as a whole, and from both the original and amended prayer for relief, the complaint was a pleading based upon a professional malpractice action which demanded monetary relief of 5 million dollars against each defendant rather than stating that the controversy exceeds $10,000.00.

Judge WEBB concurring in part and dissenting in part.

Judge ARNOLD concurring in part and dissenting in part.

APPEAL by plaintiff from *Albright, Judge.* Order entered 21 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 June 1983.

James, McElroy & Diehl by William K. Diehl, Jr., and Katherine S. Holliday for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard by Hubert Humphrey for defendant appellees.

BRASWELL, Judge.

The plaintiff Shirley Harris, being a former client, sued the law firm of Petree, Stockton, Robinson, Vaughn, Glaze and Maready, along with the individual defendants W. F. Maready and William H. Petree, for professional legal malpractice. From July

1976 to 18 January 1979 the law firm, principally through W. F. Maready, represented Shirley Harris in domestic matters against defendant Roger Harris, her former husband. Because William H. Petree, a partner in the law firm, and Roger Harris were involved in some independent business enterprises, a conflict of interest allegedly existed between the law firm and its representation of Shirley Harris. After process was served, the defendants Maready, Petree, and the law firm made a special appearance on 1 March 1982 and filed a motion to dismiss. Plaintiff appeals from Order of the trial court filed 21 June 1982 dismissing the summons and complaint against the defendant law firm "upon the grounds of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process," and dismissing individual defendant Maready "upon the grounds of insufficiency of process and insufficiency of service of process," and from denial of plaintiff's oral motion to amend the summons served upon Maready and to delete "P.A." from the summons to the law firm. Defendants Maready and the law firm cross-assign error for failure to dismiss for a violation of the rule concerning pleading damages in a professional malpractice action. Defendant Petree did not cross-assign error and is not now individually before this Court. All matters as to defendant Harris have been deferred by the parties until a later time.

On the plaintiff's appeal the crux of the case raises basic questions of civil procedure which are summarized as issues bearing on lack of jurisdiction over the person, insufficiency of process by substitution or by misnomer, insufficiency of service of process, amendment of complaint without amending summons, and amendment of right. After considering each of these subjects, we reject all of plaintiff's arguments and affirm the dismissal.

On the defendants' cross-assignment of error, in the alternative, we hold that the trial court committed error in failing to dismiss for plaintiff's violation of G.S. 1A-1, Rule 8(a)(2) of the Rules of Civil Procedure in pleading damages in a professional malpractice action, and reverse.

Although the trial court's order is interlocutory, the judge certified the case for immediate review on appeal under G.S. 1A-1, Rule 54 of the Rules of Civil Procedure. We agree that consideration of the issues raised should not be postponed.

THE LAW FIRM —
JURISDICTION, PROCESS AND AMENDMENTS

The trouble with jurisdiction and process against the defendant law firm is that in both the summons and original complaint the plaintiff sued and served the wrong party. Plaintiff sued a nonexistent corporation: "Petree, Stockton, Robinson, Vaughn, Glaze and Maready, P.A." The evidence is uncontradicted that the law firm, as well as its predecessor, has always been a partnership and has never been a professional association.

A brief recital of the course of events of the pleadings is necessary to show the further dealings of the parties. On 11 January 1982 the lawsuit began with the filing of summons, application, and order extending time to file complaint. On 26 January 1982 plaintiff filed her complaint. The summons shows service on 14 January 1982 upon "Petree, Stockton, Robinson, Vaughn, Glaze & Maready, P.A." by leaving copies with "William H. Petree (General Partner)." Delayed service of original complaint was made by certified mail, signed for by Bonnie Lawson, on 2 February 1982.

On 1 March 1982 the defendants made their special appearance and filed an extensive motion to dismiss alleging, among other things, a lack of jurisdiction over the person.

On 4 March 1982 plaintiff filed an amendment to her complaint without leave of court, maintaining that it was done as a matter of right under G.S. 1A-1, Rule 15(a) of the Rules of Civil Procedure. The amendment professed to cure the procedural defects of jurisdiction and process and also the G.S. 1A-1, Rule 8(a)(2) violation in the original complaint. On 5 April 1982 defendants filed a motion to dismiss and to strike the amendment to the complaint.

The amendment to the complaint as to the parties sought to accomplish the following things:

1. To delete the designation "P.A." from the caption of the party-defendants, and
2. To delete paragraph 5 and make this substitution:

"5. Plaintiff is informed, believes and therefore alleges that the law firm of Petree, Stockton, Robinson, Vaughn,

Glaze and Maready (hereinafter 'the Petree, Stockton law firm') is a general partnership of lawyers existing under and by virtue of the laws of the state of North Carolina, having its sole office and principal place of business in Winston-Salem, Forsyth County, North Carolina. The Petree, Stockton law firm is the successor in interest to the law firm of Hudson, Petree, Stockton, Stockton and Robinson. Upon information and belief, the former law firm was also a partnership in which Defendants Maready and Petree were general and/or senior partners. Upon information and belief, the Petree, Stockton law firm acquired or received all of the assets of the former partnership and assumed all of the liabilities of the former partnership law firm at the time it came into existence."

On 10 and 11 June 1982 Judge W. Douglas Albright conducted a hearing on all motions, made oral rulings, and filed a formal order on 21 June 1982.

[1] Even if the purported amendment were to be allowed, it would constitute at most a substitution of party-defendants and create a party who has never been served, a new party against whom the statute of limitations has run. Any amendment as of 4 March 1982 would make, not amend, process. *Camlin v. Barnes*, 50 N.C. (5 Jones) 296, 297 (1858). *Camlin* made the point even more explicit when it added: "We put our decision on the ground, that whenever it is necessary to issue *new* process to bring in a *new* defendant, the operation amounts to something which exceeds an amendment, in the broadest signification in which the word has ever been used." *Id.* at 297. The court has no power to ask that "the new defendant 'consider himself' as having been sued *nunc pro tunc.*" *Id.* at 298. In *Camlin* a motion had been made and denied to bring in the administrator of a deceased partner of the defendant in a case where the intestate partner had never been a party to the action.

The case closest to precedential value which we have found is *Electric Membership Corp. v. Grannis Brothers*, 231 N.C. 716, 58 S.E. 2d 748 (1950). Plaintiff sued a nonexistent corporation, "Grannis Bros., Inc." and obtained service of summons and complaint on "C. K. Grannis" who was a general partner in a three-person partnership of C. K. Grannis, K. Sloan, and Mary G. McLeod. The

defendants made a special appearance and moved to dismiss for lack of jurisdiction over the partners or partnership. It was uncontradicted that Grannis Bros., Inc. was a nonexistent corporation and that the defendants had at all times traded under the firm name of "E. W. Grannis Co." The Supreme Court recognized the general rule, quoting "that where individuals are doing business as partners under a firm name and such firm is described or designated in an action, as a corporation, and the process is served on a member of the partnership, the members of the partnership may be substituted by amending the process and allowing the pleadings to be amended." *Id.* at 719, 58 S.E. 2d at 750. Nevertheless, the Supreme Court held under the facts above that "the plaintiff is not entitled to have the partnership substituted as the defendant in lieu of the corporation under the theory or doctrine of misnomer. Substitution in the case of a misnomer is not considered substitution of new parties, but a correction in the description of the party or parties actually served." *Id.* at 720, 58 S.E. 2d at 751. The corporation which was designated a party-defendant was not the firm name of the partnership, and the court had no jurisdiction over the partnership or its partners.

[2] Because G.S. 1A-1, Rule 4(i) of the Rules of Civil Procedure has a specific rule on amendment of summons, we will scrutinize it. This rule grants discretionary power to the trial judge to "allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." Here, the plaintiff did not move to amend the defective summons until the hearing on the motion to dismiss on 11 June 1982. As set out in Judge Albright's Order:

> 5. Following the announcement by the Court of the rulings set forth above, plaintiff through counsel moved orally to amend the summons served upon the defendant W. F. Maready by deleting the name "C. Roger Harris" and inserting in lieu thereof the name "W. F. Maready," and to amend the summons served upon the law firm by deleting the letters "P.A." or alternatively to treat these letters as surplusage, which motions are denied.

Through these oral efforts to amend the summons, plaintiff was seeking to have all her process relate back to 11 January 1982.

We hold that the trial judge did not abuse his discretion in denying the plaintiff's oral motion to amend summons. The amendments would have constituted material prejudice to the defendants. The statute of limitations had run and substantial rights of the defendants had intervened. *Electric Membership Corp. v. Grannis Brothers, supra.* The defendant's motion to dismiss through a special appearance had been timely made on 1 March 1982. The statute of limitations ran on 18 January 1982, three years from the termination of the attorney-client relationship on 18 January 1979.

By analogy, we also note that the oral motion to amend the summons cannot be treated as an alias or pluries summons or an endorsement by the Clerk so as to relate back and overcome the statute of limitations. Alias, pluries and endorsed summons are good for later service within an extended time frame to prevent the statute of limitations from running only as against parties who are actually and correctly denominated as parties in the original process.

A similar case which denied an amendment relating back is *McLean v. Matheny,* 240 N.C. 785, 84 S.E. 2d 190 (1954). Plaintiff McLean originally sued W. B. Matheny, trading as Matheny Motor Company. Upon discovery of his error, plaintiff tried to have an amendment which would show the true defendant to be Matheny Motor Company, a corporation. The corporation neither consented to the change nor made a general appearance, and hence the amendment created a new cause of action from the date of amendment which was barred by the statute of limitations. The amendment did not constitute correction of a misnomer, but was an attempt to add the defendant corporation as a new party. *Id.* at 787, 84 S.E. 2d at 191.

[3] Alternatively, plaintiff argues that by serving William H. Petree, a general partner in the law firm, she obtained jurisdiction over the law firm itself. On the facts before us, we disagree.

The jurisdictional requirements for a proper summons are expressed in simple English in G.S. 1A-1, Rule 4(b) of the Rules of Civil Procedure. The rule explicitly states that the summons "shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him." The summons which was marked as served on

14 January 1982 by "leaving copies with William H. Petree (General Partner)" was not addressed to the partnership but was issued to "Petree, Stockton, Robinson, Vaughn, Glaze & Maready, P.A." (and the Petree summons was addressed to him personally). As noted earlier, such a corporation was nonexistent. *See Electric Membership Corp. v. Grannis Brothers, supra.* Only after the trial court had ruled on 11 June 1982 against the plaintiff on the defendants' motion to dismiss for lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process, did plaintiff move orally to amend the summons to bring in the legal entity, the partnership. The various cases on partnership law, such as *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892 (1949), relied upon by plaintiff in her brief, are not applicable here. Those cases relate to service upon a general partner being sufficient to bring in the partnership, but only when the original summons and process named the partnership as a true party. The fact that William H. Petree was properly named in a summons as an individual defendant does not make service upon his person sufficient process to bring in a partnership not named as a party in the summons.

To counter plaintiff's further contention that the amended complaint designated the partnership as a party-defendant coupled with the prior service of process upon an individual who was a member of the partnership, that the partnership received actual knowledge of plaintiff's intent to sue them, and that these things in combination should be treated as proper service, we refer to *Hogsed v. Pearlman*, 213 N.C. 240, 242, 195 S.E. 789, 790 (1938). The Supreme Court in *Hogsed* considered similar points as raised earlier in *Jones v. Vanstory*, 200 N.C. 582, 157 S.E. 867 (1931) and *Plemmons v. Improvement Co.*, 108 N.C. 614, 13 S.E. 188 (1891), and summarized as follows:

> In the last named cases, in which individuals were sued and it was sought by amendment *to bring in the corporation with which the individuals were connected without the issuance and service of summons on the corporation*, it was held that the corporation could not be brought into court "in this shorthand manner by amendment" without the service of process. (Emphasis added.)

Where there is an amended summons which does add a new party-defendant, the new summons must be served upon each of the new defendants. *See Bray v. Creekmore,* 109 N.C. 49, 13 S.E. 723 (1891).

In keeping with the law of *Hogsed, supra,* our court recently held that actual notice of a lawsuit was inadequate and that the service of process requirements of G.S. 1A-1, Rule 4(j) of the Rules of Civil Procedure were mandatory when it dismissed for insufficiency of process the case of *Park v. Sleepy Creek Turkeys,* 60 N.C. App. 545, 299 S.E. 2d 670 (1983). In *Park,* the plaintiff intended to include David K. Nitta as one of the multiple defendants. Mr. Nitta signed the registered mail receipt for another person and was presumed to have acquired actual notice of the lawsuit. However, actual notice did "not remedy the failure of plaintiff to address the complaint and summons to D. K. Nitta personally as required by Rule 4(j)(1)." *Id.* at 548, 299 S.E. 2d at 672. The complaint had alleged a breach of a contract by David K. Nitta trading as American Chick Sexing Association (Amchick). The failure of plaintiff to serve process upon defendant Nitta, trading as Amchick, was fatal.

The plaintiff cites *Wiles v. Construction Co.,* 295 N.C. 81, 243 S.E. 2d 756 (1978), as controlling. We disagree. In *Wiles,* the plaintiff sued only one defendant, a corporation, "Welparnel Construction Company, Inc.," and so named it in the caption of the summons. The directory part of the summons was to "Mr. T. T. Nelson, Registered Agent, Welparnel Construction Company, Inc." Service of process was had upon T. T. Nelson. Attorneys for the corporate defendant obtained extensions of time to file answer and did subsequently answer, thus making a general appearance. In the case before us, the partnership law firm has not made a general appearance, but a special appearance, and no answer has been filed for the partnership.

The Supreme Court in *Wiles* went on to reevaluate its consideration of the sufficiency of service of process on corporate defendants when process was addressed to "Agent for" or "President of" a named corporation. The court noted that "[i]n the instant case, Welparnel Construction Company, Inc. was properly named as the defendant in the complaint, as well as in the caption of the summons," and that the only alleged error before it was

"the process here is asserted to be defective is the direction of the summons to the corporation's registered agent rather than to the corporation." *Id.* at 84, 243 S.E. 2d at 758. The situation before us is different. Here, the caption of the summons, complaint, and the Delayed Service of Complaint, along with the language of the directory in the delayed service document, is all addressed to the law firm as a corporation. Paragraph 6 of the original complaint, deleted in the amendment, refers to defendants Maready and Petree as "stockholders" and not as partners.

Another part of *Wiles* acknowledged that our rules require a summons to be directed to a defendant, but then agreed, as we do, with a statement of the late Judge John J. Parker: " 'A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose . . . .' " *Id.* at 84-85, 243 S.E. 2d at 758, *quoting United States v. A. H. Fischer Lumber Co.*, 162 F. 2d 872, 873 (4th Cir. 1947). The *Wiles* court then announced a new rule: "[W]hen the name of the defendant is sufficiently stated in the *caption* of the *summons* and in the *complaint*, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction." *Id.* at 85, 243 S.E. 2d at 758 (emphasis added). But this is not our case. In the present case, the caption of the summons and the original complaint made it clear that a corporation was being sued and not a partnership. Also, although the plaintiff filed an amended complaint and had the newly acquired knowledge that the law firm was not a corporation, the plaintiff did not seek to amend her summons or service of summons.

We are aware that *Wiles* overrules several cases, including *Plemmons v. Improvement Co., supra*, which we have cited earlier. Yet, in its overruling, the court specifically declares that "a number of decisions citing the cases overruled above involved situations in which the complaint as well as the summons were directed to the corporate officers or agents." *Wiles, supra*, at 86, 243 S.E. 2d at 759. Whereupon, it cites, among others, *Hogsed v. Pearlman, supra*, [also discussed earlier in this opinion] and adds:

"[T]hese latter holdings remain *undisturbed* by this decision." *Id.* (emphasis added). We hold that *Wiles* provided no benefit to our plaintiff.

We believe that the case of *Crawford v. Surety Co.*, 44 N.C. App. 368, 261 S.E. 2d 25 (1979), *disc. rev. denied*, 299 N.C. 329, 265 S.E. 2d 394 (1980), also supports our decision. In *Crawford* the summons and complaint named one of the defendants as "Michigan Tool Company, A Division of Ex-Cell-O Corporation." Service was upon Michigan Tool Company. In fact, these were two different companies. Our court held that service upon " 'MICHIGAN TOOL CO., A Division of Ex-Cell-O Corporation' is not service on the entity Ex-Cell-O Corporation even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O." *Id.* at 370, 261 S.E. 2d at 27. In essence, no service or jurisdiction had been obtained on Ex-Cell-O in Crawford's case and no service or jurisdiction was obtained against the would-be defendant partnership in the case before us.

The defendant law firm had a substantial right to make a special appearance and not to respond to the merits of the complaint unless it first be made a proper party according to law. It is more than a mere nominal right. It involves the court's jurisdiction to proceed to judgment. Because some may look upon this as a surface technicality, it is appropriate to remember the words of the English jurist in *Chesterfield & Midland Silkstone Colliery Co., Ltd. v. Hawkins*, 3 H. & C. 677, 691 (1865), as quoted in 5 Words and Phrases Legally Defined 171 (2d ed. Butterworths, London 1970):

> "A technical rule of law is invoked on behalf of the [defendants]. A technical rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon and only discussed as regards its application—in truth is 'the law'."

Sufficiency of process is jurisdictional. Discretion cannot be a basis for a trial court or appellate court's ruling on a motion to dismiss for lack of jurisdiction over the person. An amended complaint, even where deemed done as a matter of right, does not relate back or substitute for, or correct an error in a summons which has never been amended.

North Carolina enacted its Professional Corporation Act in 1969, G.S. 55B-1, *et seq.* Use of the designation "P.A." in the corporate name is authorized by G.S. 55B-5. The particulars of the formation of "a professional corporation" are set out in G.S. 55B-4. In the case before us the plaintiff designated as a party-defendant a professional corporation in the original summons and original complaint. No partnership has ever been named in any summons. The purported service upon a "general partner" who is a partner in a partnership that is not named as a defendant cannot bring in the partnership. As was said in *Hogsed, supra,* at 242, 195 S.E. at 790, "The plaintiff is seeking by this motion not to correct a mistake in the name of a party, nor to show the true name of a party when there was a misnomer [citations omitted], but to add by *substitution* as a party defendant one who has never been served with summons. *While the individual defendant sued had been doing business for several years prior to the institution of this action and prior to the organization of the corporation, using a name similar to that of the corporation, the latter was a new and separate entity . . . .*" (Emphasis added.) It avails the plaintiff nothing that the present law firm is a successor of another partnership.

The defendant's motion to dismiss on 1 March 1982 was equivalent to giving the plaintiff a roadmap of deficiencies existing in her pleadings. Now that the statute of limitations has run, it is prejudicial to the defendant law firm, a partnership, to allow any construction of this process to constitute a revision of parties. It would be an injustice to the defendant firm to allow the plaintiff "one more turn at bat." As concluded by our Court in *Stone v. Hicks,* 45 N.C. App. 66, 67, 262 S.E. 2d 318, 319 (1980), "While it is true that the conduct of a lawsuit is not a game between counsel, process must be sufficient in order to give the court jurisdiction over the parties."

PROCESS PROBLEMS AGAINST W. F. MAREADY

[4] The issue is: Was Maready served with summons? The facts show that on 11 January 1982 a summons was issued naming W. F. Maready individually. On 27 January 1982 a summons addressed to defendant C. Roger Harris was served upon Maready. Delayed service of complaint on Maready was by certified mail, delivery to addressee only, signed for by "Bonnie Lawson, au-

thorized agent." Date of receipt is illegible. It is undisputed that no summons directed personally to W. F. Maready has ever been served upon him.

What happened? The officer served defendant Harris' summons upon Maready. A yellow copy of the summons, the only summons presented to and served upon W. F. Maready was directed to "C. Roger Harris, Chairman of the Board, United Citizens Bank."

To rebut the presumption of the possibility of proper service, Mr. Maready presented three supporting affidavits. The plaintiff has conceded in the brief that the presumption of proper service has been overcome. However, plaintiff argues that the defect is latent, that if the defendant Maready had checked the case file at the courthouse he could have seen that a summons directed to him was in the file, and that the cases of *Stone v. Hicks, supra,* and *Philpott v. Kerns,* 285 N.C. 225, 203 S.E. 2d 778 (1974), cited by defendant, do not apply. We disagree for reasons about process discussed earlier, and for these additional reasons.

No defendant is required to check the case file at the courthouse to see if he is properly served. Yet, the record reveals that if plaintiff had checked the court file to verify service of summons, she could have seen that the yellow copy of the Maready summons, designated as the defendant's copy, was still in the court file—and thus not delivered to Maready. ["It is stipulated that a yellow copy of the summons directed to W. F. Maready remains in the Court file."] In *Stone, supra,* at 67, 262 S.E. 2d at 319, the summonses were not served on the individual defendants to whom they were directed. Apparently, the officer serving the papers gave each of two defendants the opposite defendant's papers. Each defendant knew he was listed as a party to the lawsuit, but our court held that the process as served was not sufficient to give the court jurisdiction over the parties. In *Philpott,* the summons was patently defective in that it was not directed to the defendants but to the Commissioner of Motor Vehicles and was served only on the Commissioner. *Philpott, supra,* at 228, 203 S.E. 2d at 780. The summons as served on Maready is patently defective, Maready being a different person from Harris, and nothing in this record cures the defect.

Plaintiff contends that an application of the liberal rule concerning whether the defendant was misled, as discussed in *Wash-*

ington County v. Blount, 224 N.C. 438, 440, 31 S.E. 2d 374, 376 (1944), should be applied. We disagree and find that the facts are substantially different. In *Washington County*, the summons was properly directed to the defendants. The defects were that the copies served were not dated or signed by the Clerk. The court said that "[a]ll the material information contained in the original summons appeared in the copies served on the defendants." *Id.* Here, we deem it more than an irregularity when the summons does not direct or command the person served as a named defendant to be served or to appear and answer. C. Roger Harris and W. F. Maready are two distinct individuals, and Maready is not required by law to answer or respond to a summons served on him, but directed to C. Roger Harris.

We hold that the plaintiff has failed to comply with the statutory rules for service of process which are necessary to obtain valid service and jurisdiction against W. F. Maready individually.

THE VIOLATION OF RULE 8(a)(2)

[5] By cross-assignment of error the defendants argue that the trial court erred by denying the motion to dismiss on the ground that plaintiff violated G.S. 1A-1, Rule 8(a)(2) of the Rules of Civil Procedure by wrongfully pleading damages in the complaint. This is an alternative ground for dismissal within the defendants' motion of 1 March 1982. The trial court ruled:

> 3. Although the Court finds and determines that the Complaint violated Rule 8(a)(2) of the Rules of Civil Procedure clearly and unequivocally . . . the Court denies the motion . . . to dismiss . . . upon said ground.

Rule 8(a)(2) states as a general rule of pleading that:

> [I]n all professional malpractice actions . . . wherein the matter in controversy exceeds . . . ten thousand dollars ($10,000), *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 ($10,000): . . . Provided, any statement of "the amount of monetary relief sought" which is served on an opposing party may be amended in the manner and at the time provided by G.S. 1A-1, Rule 15. (Emphasis added.)

In violation of this rule, the complaint contains a demand in the prayer for relief for "$5 million as money damages" against defendants Maready and the law firm, "arising from the *legal malpractice* claims . . . in the First, Second, Third, Fourth, and Seventh Counts of this Complaint." (Emphasis added.) Also, plaintiff seeks recovery for punitive damages of $5 million against "all defendants."

Also, in the body of the complaint plaintiff labels paragraphs 77 and 78 as "Damages." In paragraph 77 plaintiff sues for $5 million general damages against all defendants. In paragraph 78 she seeks $5 million in punitive damages against all defendants.

The plaintiff purported to amend her complaint as a matter of right on 4 March 1982 by deleting only the offending parts of the prayer for relief and substituting "a sum in excess of $10,000.00" in both the general damages and punitive damages paragraphs. Paragraph 1 of the prayer for relief, as amended, says "damages arising from legal malpractice claims." However, plaintiff's amended complaint did not change paragraphs 77 and 78 of the original complaint. Thus, the action remains on its face, as against all defendants, a claim and demand for monetary relief in excess of the value of $10,000 [to wit, still $5 million in paragraphs 77 and 78]. From the wording of paragraphs 77 and 78 of the complaint, from a contextual reading of the complaint as a whole, and from both the original and amended prayer for relief, the complaint remains a pleading based upon professional malpractice, demanding monetary relief of five million dollars against each defendant.

We find that *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983), the only case to date which has interpreted Rule 8(a)(2), is dispositive on this issue. In *Jones*, an attorney malpractice action, the plaintiff's complaint prayed for one million dollars as compensatory damages and two million dollars as punitive damages. After defendant had served a responsive pleading, plaintiff sought by motion to amend the *ad damnum* allegations and was denied. Our court held that the trial court did not abuse its discretion in denying the motion to amend and in dismissing the action in its entirety, and it related Rule 8(a)(2) to Rule 41(b) of the Rules of Civil Procedure.

Judge Whichard, writing for our Court in *Jones*, pointed out that

> The General Assembly enacted G.S. 1A-1, Rule 8(a)(2), in response to a perceived crisis in the area of professional liability insurance. A study commission thereon recommended "elimination of the ad damnum clause in professional malpractice cases [to] avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded.

Jones, supra, at 587, 299 S.E. 2d at 300.

We hold that the trial judge abused his discretion by failing to allow the defendant's motion to dismiss for a violation of Rule 8(a)(2). On the facts before us, the action should have been dismissed in its entirety against the defendants W. F. Maready and Petree, Stockton, Robinson, Vaughn, Glaze & Maready, a partnership.

The results are that the entire action is dismissed as to the individual defendant W. F. Maready and as to the law firm of Petree, Stockton, Robinson, Vaughn, Glaze & Maready, a partnership.

The order below is affirmed as to the plaintiff's appeal and is reversed as to the defendants' cross-assignment of error.

Judges ARNOLD and WEBB concur in part and dissent in part.

Judge WEBB concurring in part and dissenting in part.

I dissent from the majority's holding that it was error not to dismiss the action for violating G.S. 1A-1, Rule 8(a)(2). I believe the Superior Court was within its discretion in not ordering a dismissal. *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983) held it was not error to dismiss an action for the violation of this rule. I do not believe that case holds it is error not to dismiss for a violation of the rule. I vote with the majority on the other aspects of the case.

Judge ARNOLD, concurring in part and dissenting in part.

I concur in holding that plaintiff's action should have been dismissed for violation of Rule 8(a)(2). However, I respectfully dissent from that part of the opinion holding that plaintiff sued and served the wrong party.

It is true that the defendant law firm has always been a partnership and never a corporation. It is also true that plaintiff meant to sue the law firm, Petree, Stockton, Robinson, Vaughn, Glaze and Maready. A summons was even served on "William H. Petree (General Partner)" as is pointed out by the majority.

Under the facts of this case there could be no possible misunderstanding as to the exactitude of the party defendant being sued. In my view the identity of the defendant was sufficiently stated to bring the law firm within the trial court's jurisdiction. The common sense reasoning by which our Supreme Court reached its result in *Wiles* seems to apply to the facts of this case. I would reverse as to plaintiff's appeal.

ALEX M. TRASK, ALLEN N. TRASK, GEORGE ANNE McCARTY, RUTH TRASK GORE, JOHN POLLARD, JIM FARLOW, WILLIAM KNOX TRASK, PINE VALLEY WATER COMPANY, L. T. DAVIS, SUNSHYNE DAVIS, JAMES TYNER, JACQULINE TYNER, CHARLES L. TYNER, JANE TYNER, BRYANT SEVERT, BERLINE SEVERT, CHARLES REAVES, GEORGIE REAVES, FLOYD SMITH, HAZEL SMITH, LUCILLE ELLIOTT, WILLIAM A. ROURK, ETHEL ROURK, HORACE PREVATT, MARY PREVATT, CHARLES SCHELLER, GRACE SCHELLER, BRUCE CRABBS, LINDA CRABBS, RUPERT STRICKLAND, NANCY STRICKLAND, MILDRED BARFOOT, LEON BARFOOT, STEVE BARFOOT, TERESA BARFOOT, WILBER B. BARFOOT, MINNIE BARFOOT, EARL N. OXENDINE, DELTON OXENDINE, LENA OXENDINE, JAMES A. OXENDINE, DOROTHY OXENDINE, DORENDA LONG, SAMUEL LONG, VERTISE DUNCAN, GRACE DUNCAN, KENNETH MILLIGAN, JEAN MILLIGAN, SALLY FOUNTAIN, TRAVIS FOUNTAIN, LUTHER K. MINCEY, EDNA MINCEY, BLANNIE NEAL, JOHN NEAL, BILL ROBERTS, JOSEPH CHARLES WILLIAMSON, LEE ROY COOMBS, MARY LEE COOMBS, LOUIS COOMBS, MAGGIE D. COOMBS, ARTHUR RAMSEY, ALICE RAMSEY, ROBERT J. WILLIAMS, EULENE WILLIAMS, CARL D. PARKER, ALLIE MAY PARKER, JOE M. SMITH, JESSIE NEAL, ISABELL NEAL, KELLEY LYYOD, JAMES G. SPELL, GLADYS SPELL, JOHN HENRY CLEMMONS, THELMA CLEMMONS, RHODNEY MINTZ, HELEN MINTZ, FLOSSIE BRYAN, MAGGIE BRYAN, MRS. BRYAN NEWKIRK, LEON FUTRELLE, BERRY WILLIAMS, ELIZ-

ABETH WILLIAMS, MRS. MAYZELLE JONES, DR. NELSON C. KLAUS, MRS. NELSON C. KLAUS, MR. BOB R. PRESSLEY, MRS. BOB R. PRESSLEY, MR. NORMAN EFTING, MRS. NORMAN EFTING, MR. JACK L. PHILLIPS, MRS. JACK L. PHILLIPS, MR. THOMAS PARKER, MRS. THOMAS PARKER, MR. DAN R. PARHAM, MRS. DAN PARHAM, MR. L. MURRIE LEE, MRS. L. MURRIE LEE, MR. DENNIS MASSENGILL, MRS. DENNIS MASSENGILL, MR. E. W. CALDWELL, MRS. E. W. CALDWELL, MR. ROBERT K. PENTZ, MRS. ROBERT K. PENTZ, MR. STANLEY D. HOLLINGSWORTH, MRS. STANLEY D. HOLLINGSWORTH, MR. C. R. WOOD, MRS. C. R. WOOD, DAVID A. SOLOMON, RICK STEWART, JIM FARLOW, JAMES F. ROBERTS, CURTIS E. PALMER, MARVIN E. AUTRY, JOHN M. POLLARD, JR., A. C. PALMER, CURTIS W. SMITH, RUSSELL EDMONDSON, ROBERT FRANK LEE, JOHN W. KAISER, AMOCO OIL COMPANY, CLARENCE W. HARRELSON, NORMAN H. MELTON, DOUGLAS J. MORGAN, F. RICHARD McDERMOTT, JACK N. L. EVERETT, JOHN E. MIDGETT, JR., APEX OIL COMPANY, W. HAROLD GRIFFIN, WILLIAM J. LYNCH, JR., EDGAR V. SELLERS, PRESTON L. HASSON, GEORGE G. JONES, ROBERT E. CONNELLY, CLIFFORD WINEFORDNER, RUSSELL BARKER, ROBERT J. JENSKI, WILLIS E. MANNING, ASPHALT AND PETROLEUM COMPANY, CARL MITCHELL, TONY SPICER, MIKE L. HARRIS, JR., WILLIAM S. COOKE, MRS. BRENDA HODGES, BABCOCK AND WILCOX, MR. DON SCHMITT, MRS. DON SCHMITT, MR. K. E. SARVIS, MRS. K. E. SARVIS, MR. DON KNOWLTON, MRS. DON KNOWLTON, MR. EUGENE A. LEES, MRS. EUGENE A. LEES, MRS. IRENE WALSH, CAROLINA POWER AND LIGHT COMPANY, WILLIAM R. DAVIS, FLOYD PALMER, HERBERT FRANCIS MINTZ, MARIAN CONSELENO MINTZ, JACK C. MYRICK, EDITH G. MYRICK, PAUL E. MAAG, ANN L. MAAG, W. LEE JOHNSTON, CATHERINE H. JOHNSTON, CONSTANCE M. TANVERDI, REX B. SEAL, BETTY W. SEAL, LEON E. SULLIVAN, NAOMI S. SULLIVAN, HENRY B. JENKINS, GEORGIA K. JENKINS, JOHN H. BOWEN, JR., SARAH P. BOWEN, CHARLES E. CARRAWAY, JUDY W. CARRAWAY, JESSE E. McLAWHON, JUDY C. McLAWHON, CHAMPION PARTS REBUILDERS, JERRY A. EDWARDS, RACHEL I. EDWARDS, LINWOOD W. ROGERS, JR., JESSIE D. ROGERS, ROBERT L. SIESEN, E. JEAN SIESEN, THOMAS J. MUNO, SALLY J. MUNO, RALPH T. WALLACE, JIMMY H. WALLACE, CHARLES L. HAAS, MARTHA P. HAAS, CLARENCE A. ALFORD, JEAN G. ALFORD, ROBERT L. HOUSTON, BILLIE S. HOUSTON, JEROME E. PINCKNEY, II, SANDRA F. PICKNEY, JESSE C. PAGE, DORIS W. PAGE, JAMES R. EDWARDS, RUTH B. EDWARDS, WALTER CHIMIAK, WANDA K. CHIMIAK, WARREN W. RICH, LORRAINE Q. RICH, CURTIS L. SCHACHER, EILEEN B. SCHACHER, CHARLES T. MARSHALL, SYLVIA H. MARSHALL, ERIC M. FARR, ANNE L. FARR, JAMES H. COLEY, JR., BONITA H. COLEY, DONALD T. WHITMIRE, CAROLYN P. WHITMIRE, MICHAEL J. BARRETT, GAIL B. BARRETT, ARTHUR D. YAUSSY, HELEN L. YAUSSY, THOMAS I. JONES, EVELYN S. JONES, WENDELL L. TRIPLETT, ADRIAN H. TRIPLETT, BLAYNE B. BURMAHL, SARAH S. BURMAHL, JOHN D. HALLENBECK, ELOISE S. HALLENBECK, DONALD M. GOWDY, JEANNE S. GOWDY, DONALD R. WEDGEWORTH, PHYLLIS C.

WEDGEWORTH, VICTOR E. SIZEMORE, GLORIA M. SIZEMORE, CAPE FEAR BONDED WAREHOUSE, CHESTER J. MALLEY, MARY K. MALLEY, BILLY F. NARRON, KATHERINE M. NARRON, RICHARD S. RENNINGER, HELEN J. RENNINGER, J. MANLY POLLARD, M. ELIZABETH POLLARD, J. RYDER LEWIS, MARY ANNE LEWIS, CHARLES REGISTER, JR., GERALDINE P. REGISTER, PETER H. KODER, GRACE T. KODER, WESLEY C. JONES, BETTY RUTH JONES, NORMAN E. GRAY, EUNICE E. GRAY, ROGER A. HEATH, FAYE F. HEATH, CHARLES O. JEREMIAS, VIRGINIA C. JEREMIAS, JAY T. GILLOGLY, SHARON L. GILLOGLY, WALTER A. GAWLOSKI, PAULINE M. GAWLOSKI, JAMES J. HAVIARAS, JOANNE V. HAVIARAS, ELWYN E. PALMER, MARTHA S. PALMER, CLYDE M. SIKES, MARJORIE F. SIKES, HANSEL W. COUVILLION, R. M. WILLIAMS, MOBIL OIL COMPANY, THOMAS E. BROWN, ANN W. BROWN, TIMOTHY J. GALLIVAN, CAROL J. GALLIVAN, FREDRICK M. HORNACK, M. KATHERINE HORNACK, SINGER OIL COMPANY, CECIL E. TURNER, JEAN S. TURNER, JESSE W. FIELDER, PAULINE F. FIELDER, RAYA A. OSCARSON, WALTER F. WEIS, JR., LOUISE S. WEIS, DAVIS E. WARNER, JR., CATHERINE S. WARNER, OTIS H. JOHNSON, JR., KATHRYN B. JOHNSON, WILLIAM D. LATHAM, BEATRICE R. LATHAM, EMERY I. HORVATH, HELEN HORVATH, SUN OIL COMPANY, LARRY W. ALLMAN, PEGGY H. ALLMAN, HAROLD L. RUNION, MARY L. RUNION, JOHN R. PERDUE, CATHERINE C. PERDUE, EDWARD A. WILSON, MABRY C. WILSON, BENJAMIN P. KENNEDY, ENID H. KENNEDY, ULDIS BIRZENIEKS, JANE H. BIRZENIEKS, MARVIN L. KEARNEY, ANNA M. KEARNEY, ROBERT K. JARRET, JOANNE W. JARRET, WILLIAM H. MELTON, BETTY M. MELTON, CLAUDE B. JONES, MARGARRET F. JONES v. CITY OF WILMINGTON, NORTH CAROLINA; BENJAMIN B. HALTERMAN; MARGARET FONVIELLE; JOSEPH DUNN; LUTHER JORDAN; WILLIAM SCHWARTZ; TONY PATE; AND RALPH W. ROPER

No. 825SC534

(Filed 20 September 1983)

1. Municipal Corporations § 2.6— annexation—failure to show proposed sewer interceptor on map

G.S. 160A-47 does not require an annexation report to include a map showing proposed sewer interceptors for sewer extensions into the area to be annexed. Moreover, the failure to include a proposed sewer interceptor on a map of the proposed water and sewer extensions into the area to be annexed was not of such character as to invalidate the annexation ordinance where the annexation report (1) described in detail the proposed interceptor and its role in the proposed water and sewer extension, (2) included the interceptor among those facilities legally required to be under construction within twelve months of annexation, and (3) made available the detailed engineering maps and plans for the construction of the interceptor.

2. Municipal Corporations § 2.6— annexation—provision of sewer facilities—necessity for cooperation with other governmental units

A city's plan for providing sewer facilities to an area to be annexed was not dependent on a doubtful contingency and did not delegate the performance of this duty to others because the plan depended on a county's construction of a sewer interceptor project and a town's construction of a sewer connector pursuant to a federally financed regional plan and agreements by the various governmental units involved in the regional plan.

3. Municipal Corporations § 2.2— annexation—use of natural topographic features in setting boundaries—failure to include golf course

The fact that the boundaries of an area to be annexed did not encompass an adjacent golf course did not constitute a failure to use natural topographic features "wherever practical" in violation of G.S. 160A-48(e) where the inclusion of the golf course in the area would have had the effect of lowering the population density below the level required by G.S. 160A-48(c)(1).

APPEAL by petitioners from *Collier, Judge*. Judgment entered 13 November 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 May 1983.

This is a civil action wherein petitioners, pursuant to G.S. 160A-49(h), seek review of an annexation ordinance enacted and adopted by respondent city on 24 March 1981. Petitioners are residents of the area to be annexed.

On 13 January 1981, the Wilmington City Council adopted a resolution expressing its intent to annex a certain area outside its limits. On or about this date, respondent city published its annexation report, *Annexation 1981*. After appropriate notification, a public hearing was held pursuant to G.S. 160A-49 on 24 February 1981. The City Council thereafter adopted the ordinance.

Petitioners initiated this action by filing a petition in Superior Court, pursuant to G.S. 160A-50 seeking, *inter alia*, to have the ordinance declared invalid. Petitioners also asked for a stay of the operation of the ordinance while judicial review was pending. An order granting the stay was entered by Strickland, Judge, on 19 May 1981. On 19 June 1981, an order was entered by Strickland, Judge, disallowing petitioners' challenge to the constitutionality of the statutory annexation procedure.

Review of the ordinance in Superior Court occupied several days. On 13 November 1981, the court announced judgment in

favor of respondents. That judgment, signed on 27 November 1981, contained the following findings of fact:

1. The record of the annexation proceedings submitted in compliance with G.S. 160A-50, including the annexation report adopted by the Wilmington City Council on January 27, 1981, demonstrates *prima facie* compliance with all of the statutory requirements for annexation by cities over 5,000 set forth in Chapter 160A, Article 4A, Part 3 of the North Carolina General Statutes.

2. No evidence has been presented that the area annexed by the City of Wilmington in the annexation ordinance adopted March 24, 1981 failed to comply with the requirements of G.S. 160A-48, "Character of the Area to be Annexed," and the Court therefore finds that the annexed area does meet all the requirements of G.S. 160A-48.

3. No evidence was presented of any failure by the City of Wilmington to comply with any of the procedures for annexation required by Chapter 160A, Article 4A, Part 3 of the General Statutes, except for failure to comply with G.S. 160A-47 (annexation report and plans) as more particularly set forth in subparagraph (4) below, and the Court therefore finds as a fact that all such other procedural requirements were complied with.

4. There was evidence presented, and the parties stipulated, that the Report, as compiled, failed to include a map indicating the precise location of the proposed Northeast Sewer Interceptor, and integral part of the proposed sewer extensions. However, the petitioners failed to meet their burden of showing that the City had failed to substantially comply with the requirements of G.S. 160A-47. Petitioners further failed to show that they would be materially or substantially injured by any failure on the part of the City to comply.

5. Save and except for the exclusion of a map depicting the location of the Northeast Sewer Interceptor, the City has fully complied with the statutory requirements of Chapter 160A, Article 4A, Part 3 of the North Carolina General Statutes.

6. Petitioners have also failed to meet their burden of showing by the greater weight of the evidence that the City would or could not provide to them the major services as required by G.S. 160A-47 on substantially the same basis and in the same manner as such services are provided within the City prior to annexation.

7. Petitioners have failed to show by the greater weight of the evidence that the City would or could not provide to them water and sewer service required by G.S. 160A-47 according to the policies in effect within the City at the time of annexation.

8. There is no evidence that Petitioners lack an adequate remedy at law in the event the City fails to comply with its plans, since the petitioners are entitled to seek a writ of mandamus pursuant to G.S. 160A-49.

Based on these findings, the court concluded that the City had complied with the annexation procedure set out in the statutes; that petitioners had failed to show any injury resulting from a failure to comply with the statutory procedure; that the area to be annexed met the statutory requirements regarding the characteristics of such areas. The court then declared that the ordinance was valid in its entirety and in full effect. From this judgment, petitioners appealed.

Burney, Burney, Barefoot and Bain, by Auley M. Crouch, III, and John J. Burney, Jr., for petitioner appellants.

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

JOHNSON, Judge.

Petitioners assign as error the trial court's findings of fact and conclusions of law that the record of the annexation proceedings, specifically including the annexation report, demonstrates compliance with the applicable statutes governing annexation by municipalities with more than 5,000 persons. Our Supreme Court has held that the record of annexation proceedings must demonstrate *prima facie* "complete and substantial" compliance with the statutes as a condition precedent to the right to annex.

In re Annexation Ordinance (Goldsboro), 296 N.C. 1, 249 S.E. 2d 698 (1978).

[1] Petitioners' assignments of error deal with both G.S. 160A-47 (regarding the annexation plan) and G.S. 160A-48 (regarding the character of the area to be annexed). With regard to the annexation plan, petitioners first point out that the map of the proposed water and sewer extensions into the area to be annexed does not show the proposed Northeast Interceptor sewer line. Petitioners contend that a map showing proposed sewer interceptors is required in the annexation report, as a statutory prerequisite to annexation, and that the omission thereof is fatal to the ordinance. By failing to include such a map, petitioners contend, the respondents have not demonstrated the required level of compliance with the statute.

In pertinent part, the statute relied upon reads as follows:

> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, . . . prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> (1) A map or maps of the municipality and adjacent territory to show the following information:
>
> . . .
>
> b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls as required in subdivision (3) of this section.
>
> . . .
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> . . .
>
> b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be

> annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.

G.S. 160A-47.

Respondent concedes in its brief, as it did in the annexation report and at trial, that the map in question does not show the proposed Northeast Interceptor. Respondent contends, however, that the statute makes no such requirement.

We agree with respondent. G.S. 160A-47 specifically requires that certain items be shown on maps in the report. Among these items are presently existing sewer interceptors. Also required to be shown are presently existing and proposed water mains and sewer outfalls. Not included among those things required to be shown are proposed sewer interceptors. Therefore, the omission of the proposed Northeast Interceptor was neither a fatal failure of complete and substantial compliance with the statute nor a "slight irregularity" as respondent, and apparently the court, would characterize it. Rather, it is simply a literal adherence to the requirements of the statute.

Petitioners nevertheless contend that the omission of the proposed interceptor is an error of such a character as to invalidate the annexation proceeding and the ordinance. Petitioners note the "central importance" of adequate water and sewer facilities to sound urban development. This importance, they contend, makes the complete and accurate inclusion on maps of all proposed facilities crucial to the general public's understanding of what is involved in a particular annexation. It is the policy of the state, in providing for municipal annexation, to promote "sound urban development" and in so doing to provide for the delivery of quality urban services to the developed area. G.S. 160A-45. We recognize the importance of adequate water and sewer facilities to the legislative end of sound urban development. The legislature has recognized the same and specifically required that certain present and proposed water and sewer facilities be shown in the report. That the legislature did not include proposed sewer interceptors among those certain facilities is a matter of legislative concern. We cannot infer from our reading of G.S. 160A-47 that

proposed sewer interceptors must be included on the maps that accompany annexation reports.

Moreover, the report: (1) does mention and describe in detail the proposed Northeast Interceptor and its role in the proposed water and sewer extension; (2) includes the interceptor among those facilities legally required to be under construction within twelve months of annexation; and (3) makes available the detailed engineering maps and plans for the construction of the interceptor. The failure to include the interceptor on the small and considerably less detailed exhibit maps in the annexation report does not amount to an omission of such a character that petitioners can claim they were thereby denied access to information vital to their cause. Our Supreme Court has considered the sufficiency of annexation proceedings on several occasions and has held:

> The central purpose behind our annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents [of the area to be annexed] receive the benefits of all the major services available to municipal residents. [Citations.] The minimum requirements of the statute are that the city provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a non-discriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services.

In re Annexation Ordinance (Charlotte), 304 N.C. 549, 554, 284 S.E. 2d 470, 474 (1981); *see also Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980), *reh. denied*, 301 N.C. 728, 274 S.E. 2d 230 (1981). Petitioners' contention in this regard is without merit.

[2] Still challenging the city's level of compliance with G.S. 160A-47, petitioners next point out that the entire plan for providing sewer facilities to the area to be annexed depends on the construction by New Hanover County of the Northeast Interceptor. The interceptor, in turn, will only work if connected to the proposed Wrightsville Beach connector to be constructed by the town of Wrightsville Beach.

G.S. 160A-47, quoted above in pertinent part, specifically requires that the annexation report set forth plans by the city for

providing water and sewer facilities to the area to be annexed. With respect to the annexing municipality's duty to provide urban services, our Supreme Court has said, "The performance of this duty may not be made to depend upon a doubtful contingency and may not be delegated to others so as to relieve the city of the duty." *In re Annexation Ordinance (Jacksonville)*, 255 N.C. 633, 646, 122 S.E. 2d 690, 700 (1961).

Petitioners argue that the plan for extending the required sewer services into the area to be annexed is dependent on a doubtful contingency and embodies a delegation of the city's duty to provide those services. Therefore, petitioners contend that the city has not met its burden of complete and substantial compliance with the requirements of G.S. 160A-47 and the annexation ordinance is, therefore, invalid.

Petitioners apparently contend that complete and substantial compliance with the statute requires that the annexation plans provide for the extension of municipal services without reference to regional plans, federally financed and supervised projects, or dependence on the cooperation of other local units of government. We find nothing in the applicable statutes or case law to support this contention.

We first refer back to our discussion of the purpose of the annexation report and point out, as has our Supreme Court, that the statute requires only that the city provide the information necessary to determine whether a commitment has been made to provide the required level of service to the annexed area. *In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 284 S.E. 2d 470 (1981).

Respondents point out that the Northeast Interceptor project, including the Wrightsville Beach connector, is part of a regional 201 Facilities plan for the greater Wilmington area, *see* 33 U.S.C. §§ 1251 *et seq.* (Federal Water Pollution Control Act), including Wrightsville Beach and New Hanover County. This plan was previously agreed to and approved by the governmental units involved. Implementation of the plan, including the construction and financing of the interceptor project, is provided for in a series of interlocal agreements, submitted into evidence by respondents. These agreements are authorized under our statutes, G.S. 160A-461, and are legally binding on the parties

thereto. Such an agreement is neither a doubtful contingency nor a delegation of the city's duty to provide the necessary services. Furthermore, petitioners' contention runs counter to the emphasis on regionalism and intergovernmental cooperation that characterizes recent legislation in this area. *See, e.g.*, G.S. 160A-460 *et seq.* (Interlocal Cooperation); G.S. 113A-100 *et seq.* (Coastal Area Management). Petitioners' contention is without merit.

[3] Petitioners' remaining challenge to the ordinance concerns the fixing of the boundaries of the area to be annexed. Petitioners argue that the method used by the city to establish the boundaries was not in complete and substantial compliance with the applicable statute, G.S. 160A-48. G.S. 160A-48(c) provides that the area to be annexed must be "developed for urban purposes." One criterion for determining whether an area is so developed is that it have "a total resident population equal to at least two persons for each acre of land included within its boundaries." G.S. 160A-48(c)(1). The statute further prescribes certain guides for determining the boundaries of the area:

> 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.

G.S. 160A-48(e).

In the present case, the boundaries of the area to be annexed do not encompass an adjacent golf course. The inclusion of the golf course, by definition an expanse of unpopulated land, in the area would have the effect of lowering the population density of the area below the statutorily required level. Petitioners contend that this failure to include the golf course was "gerrymandering" of the boundary lines in direct disregard of the topographic features of the area and, therefore, a failure to comply with the statute. Petitioners cite the dissent of Justices Carlton and Exum in *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E. 2d 630 (1982) (interpreting G.S. 160A-36(d), virtually identical to G.S. 160A-48(e), involving annexation by towns of less than 5,000 population), for

the proposition that the use of natural topographic features in establishing boundaries is "a limitation on annexation and not merely a suggestion." *Id.* at 89, 291 S.E. 2d at 637 (Carlton, J., dissenting).

G.S. 160A-48(e) is self-limiting in that it requires that natural topographic features be used "wherever practical." We agree with the majority view in *Greene v. Town of Valdese*:

> Where, however, to follow natural topographic features would convert an area which would otherwise meet the statutory tests . . . into an area that no longer satisfies those requirements, the drawing of boundaries along topographic features is no longer "practical," . . . within the meaning of the language of the statute.

Id. at 85, 291 S.E. 2d at 634. Petitioners' reliance on the language of G.S. 160A-48(e) and the dissent in *Greene v. Town of Valdese* is misplaced and their argument is without merit.

In determining the validity of an annexation ordinance, the court's review is limited to the following inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners suffer material injury thereby? (3) Does the area to be annexed meet the requirements of G.S. 160A-48? *In re Annexation Ordinance (New Bern)*, 278 N.C. 641, 180 S.E. 2d 851 (1971). Our review is limited to determining whether the court below properly answered those inquiries. We have determined that the court below incorrectly found that the city did not comply with G.S. 160A-47. Its consideration of the second inquiry was unnecessary but harmless. The third inquiry was properly answered below. In any event, the trial court's conclusions of law regarding the city's compliance with the statutes are correct.

Petitioners' remaining arguments do not address specifically the challenged annexation ordinance or the city's compliance with the statutes. Rather, they present questions of a more general nature that have already been settled in this jurisdiction. Petitioners have not convinced us that these questions warrant reconsideration in this case and to do so would serve no useful purpose.

The judgment appealed from is

Affirmed.

Judges HILL and PHILLIPS concur.

GASTON BOARD OF REALTORS, INC., A NORTH CAROLINA CORPORATION v. CHARLES A. HARRISON

No. 8227SC642

(Filed 20 September 1983)

1. **Declaratory Judgment Act § 3— action involving actual controversy—denial of motion to dismiss proper**

The trial court properly failed to dismiss plaintiff's declaratory judgment action on the basis of a lack of a case or controversy between the parties since the evidence tends to show that plaintiff intended to expel defendant from its membership as soon as the legality of the expulsion hearings were established, and since defendant stated in a letter to plaintiff that expulsion would deprive him of his rights under the law, and that he would take action to protect himself.

2. **Brokers and Factors § 8— expulsion from private real estate board**

There was no merit to defendant's contention that a private real estate board's case had been pre-empted by State action in creating the North Carolina Real Estate Licensing Board since there is no language in the real estate licensing statutes that can be construed as pre-empting reasonable self-regulation by private real estate boards. G.S. 93A-1 *et seq.*

3. **Brokers and Factors § 8; Constitutional Law § 23— expulsion from board of realtors—no entitlement of substantive due process review**

In a declaratory judgment action brought by plaintiff board of realtors in which plaintiff sought a judgment that the hearings in which it expelled defendant had not violated defendant's rights, the trial court did not err in failing to review the substantive aspects of plaintiff's decision to expel defendant. Defendant had no substantive due process right to membership in the plaintiff's organization since the relationship between a private voluntary association and its members is contractual in nature and defendant's substantive rights are derived solely from his contract with plaintiff. Art. I, § 19 of the North Carolina Constitution and XIV Amendment to the U. S. Constitution.

4. **Brokers and Factors § 8; Constitutional Law § 24.1— expulsion from local real estate board—necessity for procedural due process**

Given the fact that expulsion from a local real estate board may harm a defendant professionally and economically, such an expulsion must be done with some procedural due process. The procedures followed by plaintiff real estate board were adequate to protect defendant's constitutional rights where

defendant received timely notice of the complaint, was given an opportunity to present evidence and cross-examine opposing witnesses, and was represented by counsel.

Judge JOHNSON dissenting.

APPEAL by defendant from *Owens, Judge.* Judgment entered 28 January 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 22 April 1983.

Plaintiff brought this action seeking a declaratory judgment that it had conducted disciplinary proceedings against defendant in a lawful manner. Plaintiff, a voluntary trade association, had conducted hearings to determine if defendant, a realtor, violated its Code of Ethics in refusing to return a $2,090.00 deposit to Mr. and Mrs. Hamrick, prospective home buyers. The hearings were conducted in accordance with plaintiff's written procedures. Defendant received notice of the complaint, presented evidence, cross-examined witnesses, and was represented by counsel. Plaintiff decided to expel defendant from its membership until he repaid the disputed deposit to his former clients.

Plaintiff suspended its decision to expel defendant until it obtained a declaratory judgment that the hearings had not violated defendant's rights. The declaratory judgment was sought because defendant had stated, "I plan to take such actions as are necessary to protect myself . . . from harm by the actions of individuals involved in this matter." Both the plaintiff and the trial court construed this as a threat to take action and grounds for a declaratory judgment.

After making findings of fact and conclusions of law, the trial court declared that plaintiff had rendered due and proper process to the defendant, and could proceed with its disciplinary action.

Mullen, Holland & Cooper, by Graham C. Mullen and William E. Moore, Jr., for plaintiff appellee.

Lloyd T. Kelso for defendant appellant.

Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr. and Thomas R. Miller, for North Carolina Real Estate Licensing Board, amicus curiae.

Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr. and Peter J. Covington, for North Carolina Association of Realtors, Inc., amicus curiae.

PHILLIPS, Judge.

[1] Defendant first contends the trial court should have dismissed the declaratory judgment action due to lack of a case or controversy between the parties. Whether an actual controversy exists must be determined on the facts of each case, but reported decisions do provide some guidelines. Declaratory judgment actions must focus on real and present problems; they must adjudicate the rights, status, or other legal relations of antagonistic litigants. *Adams v. N.C. Dept. of N.E.R. and Everett v. N.C. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978). Additionally, "it is necessary that the Courts be convinced that the litigation appears to be unavoidable." (Citation omitted.) *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E. 2d 178, 189 (1974).

The controversy in the present case is whether expulsion proceedings have been conducted against defendant without violating his legal rights. The controversy is real and present because (1) plaintiff intends to expel defendant as soon as the legality of the hearings is established; and (2) defendant stated in a letter to plaintiff that expulsion would deprive him of his rights under the law, and that he would take action to protect himself. The present declaratory judgment action clearly adjudicates the rights of antagonistic litigants. Defendant's threat to take action is substantial evidence that litigation appeared unavoidable. Consequently, we hold the declaratory judgment action did involve an actual controversy, and the trial court correctly denied defendant's motion to dismiss.

[2] The defendant's contention that the plaintiff's case had been pre-empted by State action in creating the North Carolina Real Estate Licensing Board, which has taken no action against him, is likewise without merit. The lack of action by the North Carolina Real Estate Licensing Board relates to defendant's qualifications for a state license and is distinct from the right of a voluntary association to regulate conduct of its members. There is no language in the real estate licensing statutes that can be construed as pre-empting reasonable self-regulation by private real estate boards. G.S. 93A-1 *et seq.*

Defendant next contends the trial court erred in denying defendant's Rule 12(b)(6) motion to dismiss without making find-

ings of fact. The order denying defendant's motion to dismiss shows that the trial court considered matters outside the pleadings. Consequently, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ." Rule 12(b), N.C. Rules Civil Proc. Rule 56(d) states that if summary judgment is not rendered on the whole case, then the trial court shall, "if practicable," ascertain what material facts exist without substantial controversy, and shall make an order specifying those facts. Defendant has not shown that it was practicable for the trial court to find what facts were uncontroverted. Since defendant did not even file an answer until a week before the trial court ruled on the motion to dismiss, the trial court's refusal to make premature findings of fact is understandable and consistent with the requirements of Rule 56.

[3] Defendant also contends the trial court erred in not reviewing the substantive aspects of plaintiff's decision to expel him. Defendant claims he is entitled to substantive due process review because expulsion from the plaintiff organization would harm his right to pursue his occupation.

The Fourteenth Amendment of the United States Constitution expressly requires due process of law when a state deprives a person of property. However, private action does not require due process even though it may involve a business subject to extensive state regulation. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L.Ed. 2d 477, 95 S.Ct. 449 (1974). In distinguishing between state and private action, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (Citation omitted.) *Id.* at 351. The disciplinary proceedings brought by plaintiff were intended to maintain high integrity and professionalism among Gaston County realtors through enforcement of the plaintiff's Code of Ethics. The Code of Ethics and proceedings against defendant do not involve state action since they serve the interests of plaintiff and not, in any direct manner, the State. Defendant's expulsion did not occur pursuant to state law or at the request of the State. There was no joint venture between plaintiff and the State. Consequently, defendant has no claim to Fourteenth Amendment due process.

Though the law of the land clause in Article I, § 19, of the North Carolina Constitution is synonymous with Fourteenth Amendment due process—*Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc. and Bulova Watch Co., Inc. v. Motor Market, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974)—federal court interpretations of due process, though highly persuasive, are not binding on North Carolina courts. *Id.* Thus an independent determination of defendant's constitutional rights under the law of the land provision must be made.

Defendant has no substantive due process right to membership in the plaintiff organization, and therefore the trial court properly refused to review all the substantive aspects of defendant's expulsion. The relationship between a private voluntary association and its members is contractual in nature. *Bright Belt Warehouse Assn., Inc. v. Tobacco Planters Warehouse, Inc.*, 231 N.C. 142, 56 S.E. 2d 391 (1949). Defendant's substantive rights are derived solely from his contract with plaintiff. By virtue of his membership, defendant is deemed to have consented to all reasonable rules of plaintiff. *Id.* Plaintiff's Code of Ethics and disciplinary procedures are terms of the contract between plaintiff and defendant. Accordingly, defendant's expulsion is subject to judicial review to determine, first, that the contract terms were not contrary to public policy, *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971), and, second, that the expulsion was conducted according to plaintiff's rules which are the terms of the contract with defendant. The trial court conducted this scope of judicial review when it declared that plaintiff acted within its rights and followed its rules in conducting disciplinary proceedings against defendant.

[4] The trial court also declared that plaintiff had rendered due process in disciplining defendant. Defendant contends he did not receive due process because he lacked subpoena power and he received inadequate notice. We agree that defendant deserved some degree of procedural due process. Expulsion from plaintiff organization may harm defendant professionally and economically. He will lose the right to use the established trade name of "realtor," as well as access to the plaintiff's Multiple Listing Service, a valuable instrumentality in the sale of real estate. Given these adverse effects on defendant's standing and business, his expulsion must be done with some procedural due process.

Without attempting to define how much due process is due, we hold the procedures followed by plaintiff were adequate to protect defendant's constitutional rights. Defendant received timely notice of the complaint, was given an opportunity to present evidence and cross-examine opposing witnesses, and was represented by counsel. The hearing panel consisted of impartial persons. Subpoena power, which is part of the state's police power not available to private associations, and formal rules of evidence are not constitutionally required by private disciplinary proceedings. Although defendant claims the notice he received misled him as to what was the complaint, a letter from plaintiff to defendant expressly referred to the actual complaint. Defendant received notice that enabled him to fully respond to the complaint. The trial court properly declared that defendant had been accorded procedural due process.

Decisions in other jurisdictions are in accord with the scope of review set forth in the case *sub judice*. *Bullard v. Austin Real Estate Board, Inc.*, 376 S.W. 2d 870 (Tex. Civ. App. 1964), affirmed the expulsion of a real estate broker from a local real estate board, where the board's rules were followed and the rules satisfied procedural due process. The court observed that a voluntary association can set its own standards as long as they are not contrary to public policy, and that those standards contractually bind members.

In *Multiple Listing Service of Jackson, Inc. v. Century 21 Cantrell Real Estate, Inc.*, 390 So. 2d 982 (Miss. 1980), suspension of a realtor was affirmed where disciplinary proceedings were in conformity with board bylaws and procedural due process was given. The court noted that a private association can set its own standards as long as they are not against public policy.

Kendler v. Rutledge, 78 Ill. App. 3d 312, 396 N.E. 2d 1309 (1979), involved a declaratory judgment action by a real estate broker to challenge sanctions imposed on him by a local real estate board. The court stated it would not substitute its judgment for that of the board since associations should have considerable discretion to conduct their internal affairs; however, the court did review the board action to determine that it followed its own rules and gave fair hearing rights in disciplining the broker.

Cunningham v. Burbank Board of Realtors, 262 Cal. App. 2d 211, 68 Cal. Rptr. 653 (1968), held that a member of a real estate board was entitled to a hearing on charges leading to expulsion, and that the hearing must be conducted in accordance with the rules of the board and the law of the land.

Since the proceedings in this case were fairly conducted in accordance with rules that do not violate public policy, the judgment appealed from is

Affirmed.

Judge HILL concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I am troubled by the majority's opinion in a number of respects, but most of all by that portion which holds that the law of the land clause in Article I, § 19 of the North Carolina Constitution guarantees a member of a private voluntary association "procedural due process" when that association undertakes disciplinary proceedings pursuant to its by-laws or rules of membership. In my opinion, such a novel departure in our constitutional jurisprudence is wholly unnecessary to decide the merits of this appeal and unwise as a matter of constitutional law and public policy. Furthermore, after having initially concluded that the defendant in this case has no *substantive due process* right to membership in the plaintiff organization, the majority reasoned that, nevertheless, defendant is entitled to *procedural due process* when that organization seeks his expulsion, noting that expulsion may harm the defendant professionally and economically. It would appear that either the law of the land clause of the North Carolina Constitution mandates that defendant is entitled to *both* procedural and substantive due process in a case such as this, or that he is entitled to none at all. However, it is impossible to separate the two aspects of the due process guaranty of "fundamental fairness," and, in my opinion, the guarantees of the law of the land clause simply do not apply when a private organization seeks to expel one of its members.

Art. I, § 19 of the North Carolina Constitution states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, or religion, or national origin.

Noticeably absent from the language of the law of the land clause is the phrase "by the State," which is contained in both the equal protection clause of Art. I, § 19 and, by similar language, in the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, giving rise to the "state action" requirement. However, my research has disclosed no prior North Carolina decision in which Art. I, § 19 has been interpreted to bind private citizens in their relations with one another. *See e.g. State v. Avent*, 253 N.C. 580, 118 S.E. 2d 47 (1961), *vacated on other grounds*, 373 U.S. 375, 10 L.Ed. 2d 420, 83 S.Ct. 1311 (1963). Moreover, in the case of private associations, such an interpretation would give rise to serious constitutional questions regarding freedom of association under the First and Fourteenth Amendments to the United States Constitution.

As a preliminary matter, there is some doubt in my mind as to whether the defendant's threat to take action to protect himself creates a controversy sufficient to invoke jurisdiction of the court under the declaratory judgment statutes. Section 20(i) of the plaintiff's Code of Ethics and Arbitration Manual states that, "A decision of the Directors is final and each member by becoming and remaining a member agrees not to seek review in any court of law." For purposes of the declaratory judgment act, a "controversy" exists, and jurisdiction will lie, where the court is convinced that litigation appears to be unavoidable. *Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974). Inasmuch as defendant is actively seeking to *retain* his membership in plaintiff association, it would appear that the likelihood of defendant seeking judicial review of the Board's decision, at the cost of his membership, is significantly diminished by Section 20(i).

Furthermore, the admitted factual basis for defendant's expulsion is the defendant's alleged failure to comply with his contract of 23 October 1978 with the Hamricks. Specifically, because of his failure to make "full restitution" to the Hamricks of their $2,090.00 down payment. Thus, resolution of the dispute between plaintiff and defendant turns, as a factual matter, almost exclusively on the question of whether or not defendant breached his contract with the Hamricks. If defendant did not breach the 23 October 1978 contract, he was entitled by its terms to retain the Hamricks' down payment, or at least that portion of the deposit which represents the costs defendant incurred in attempting to procure the loan. Subsequent to the filing of the declaratory judgment, but prior to the hearing before Judge Owen, defendant filed an interpleader action against the Hamricks (*Harrison Realty of Gastonia, Inc. v. General Homes Corp., and Larry E. Hamrick and Phyllis M. Hamrick*, 81CVD 2662). Pursuant to that action, defendant deposited the disputed $2,090.00 sum with the Clerk of Superior Court, Gaston County. The payment to the clerk in the interpleader action is irrevocable. Therefore, the issue of whether the Hamricks or the defendant breached the contract, and whether restitution is due, was before a court of competent jurisdiction. The hearing panel's recommendation, adopted by the Board, stated that defendant be "expelled from membership until such times as he makes full restitution to the Complainants, Larry E. Hamrick and Phyllis M. Hamrick, at which time he may be automatically reinstated." In his brief, defendant argues that the outcome of the subsequent interpleader action will render moot the question presented by plaintiff's complaint in this action, that is, whether "plaintiff's decision to expel the defendant is lawful and proper."

Assuming for the moment that our courts do have subject matter jurisdiction to review the Board's decision, in my view, a proper review must at least encompass a determination that the decision was rational, that is, reasonably related to the legitimate professional purposes of the Board, and not contrary to public policy. Should it be determined in the interpleader action that defendant is not legally obligated to make restitution to the Hamricks, I would be unable to conclude that the Board's substantive decision to expel defendant *until* he made such restitution was a rational one, which was, therefore, "lawful and proper."

These considerations may not necessarily render the question of whether the Board properly followed its own disciplinary procedures in this case moot, but an adjudication of defendant's rights under his contract with the Hamricks would certainly answer the factual question before the Board and the court. Therefore, the better procedure to follow in a case such as this would be to retain jurisdiction of the declaratory judgment action pending the outcome of defendant's interpleader action against the Hamricks.

Returning to the question of subject matter jurisdiction, it would appear that the larger questions presented by this appeal concern the legal basis for the defendant-member's right to judicial review of the acts of plaintiff-professional association and the degree to which the courts of this state may intervene in the internal affairs of a private professional association. The traditional theories for judicial review of disputes involving associations are extensively discussed in *Developments in the Law, Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983, 998-1006 (1963). These include: (1) the deprivation of a property interest; (2) the existence of a consensual relationship between the member and the group, the group's rules serving as the terms of a contract; (3) the fiduciary duties of associations to both members and non-members; and (4) tort theories which focus on the group decision's impact on the member's reputation and its interference with advantageous economic relations. In *Bullard v. Austin Real Estate Board, Inc.*, 376 S.W. 2d 870 (Tex. Civ. App. 1964), cited by the majority, the court stated that one of the bases for judicial intervention in expulsion proceedings before a professional association is the fact that an expulsion was in "violation of the principles of natural justice." 376 S.W. 2d at 874. *See also* Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 Cal. L. Rev. 1247, 1251-1254 (the proper legal basis for judicial intervention is the "status" relationship between the individual and a "public service" enterprise).

Although there is a divergence of opinion as to the precise legal basis for judicial intervention, there is a general agreement that membership in a professional society, trade or business association, including a board of real estate brokers, is a valuable right, and such membership cannot be terminated or interfered

with contrary to the fundamental requirements of the common law. *See e.g. Cunningham v. Burbank Board of Realtors*, 68 Cal. Rptr. 653, 262 Cal. App. 2d 211 (1968); *Swital v. Real Estate Commissioner*, 116 Cal. App. 2d 677, 254 P. 2d 587 (1953); *McCune v. Wilson*, 237 So. 2d 169 (Fla. 1970); *Multiple Listing Service of Jackson, Inc. v. Century 21 Cantrell Real Estate*, 390 So. 2d 982 (Miss. 1980). *See also* Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993, 1021-1029 (1930) (there are four basic policies to consider when determining whether judicial interference in the affairs of a particular type of association is warranted: the Strangle-hold Policy, the Dismal Swamp Policy, the Hot Potato Policy, and the Living Tree Policy; the first favors intervention, the last three weigh against it).

There is also general agreement that the need for group autonomy from unwarranted judicial intrusion and the desirability of group self-regulation mandates limiting the scope of judicial review generally to the enforcement of the association's own rules and to questions involving the basic fairness of the procedure whereby the member was disciplined. *See e.g. Cunningham v. Burbank Board of Realtors, supra; McCune v. Wilson, supra; Terrell v. Palomino Horse Breeders of America*, 414 N.E. 2d 332 (Ind. App. 1980).

In *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P. 2d 253 (1974), the California Supreme Court reasoned that professional associations which wield monopoly power and affect sufficiently significant economic and professional concerns are clothed with a "public interest," even though it cannot be said that membership is a strict "economic necessity." The court, following a thorough review of common law precedents in this area, concluded that the overriding principle is that "once it is determined the judicial scrutiny of a particular decision is justified to protect against arbitrary action, such overview includes an evaluation of both the substantive and procedural aspects of the association's decision." 526 P. 2d at 261. In other words, the proscription of "arbitrary" expulsions or rejections prohibits such actions pursuant to unfair procedure as well as actions based on irrational or improper reasons. *Accord Dietz v. American Dental Association*, 479 F. Supp. 554 (E. D. Mich. 1979). In *Dietz*, the court stated the rule as follows:

> Where a professional association has monopoly power and membership in the association significantly affects the member's practice of his profession, courts will hold the association has a fiduciary duty to be substantively rational and procedurally fair. The association must exercise its powers according to its by-laws and constitution; it cannot decide to exclude or expel a member or deny rights of membership for arbitrary, capricious, or discriminatory reasons. (Citations omitted.)

479 F. Supp. at 557.

The defendant in this case is alleged to have violated Article 3 of plaintiff's Code of Ethics by his failure to return the Hamricks' deposit. Article 3 states, in pertinent part:

> It is the duty of the REALTOR to protect the public against fraud, misrepresentation, and unethical practices in real estate transactions.

In my opinion, the trial court failed to conduct a proper judicial review of the substantive rationality of the Board's decision. Such a determination would, of course, either be made simpler or would be completely obviated by the resolution of the interpleader action between defendant and the Hamricks. The rule that a court should not reweigh the facts and substitute its judgment for that of the association, implicit in the majority opinion, is not directly applicable to this case. The rationale for this rule is to prevent the court from deciding certain types of issues which are best left to the membership of the association whose competence exceeds the court's with regard to that particular issue. *See Pinsker, supra; Blende v. Maricopa County Medical Society,* 96 Ariz. 240, 393 P. 2d 926 (1964). Professor Chaffee, in his seminal article on private associations, has characterized judicial review in such cases (e.g. intra-church disputes) as "an appeal from a learned body to an unlearned body," and hasty judicial intervention as an eager rush into the "Dismal Swamp of obscure rules and doctrines." 43 Harv. L. Rev. at 1024. Certainly a higher degree of judicial scrutiny of association decisions is justifiable and permissible when the question is whether a breach of a real estate contract constituted a violation of Article 3 of the plaintiff's Code of Ethics. In view of the substantial economic control the Board exerts over this defendant's ability to practice his

profession, the Board owes him a fiduciary duty and he is, therefore, entitled to a judicial determination that the Board's substantive decision was based upon substantial evidence, was rational, that is, reasonably related to legitimate professional purposes of the Board, was made in good faith, and was not contrary to public policy.

In conclusion, the proper legal basis for judicial review of the decision of plaintiff Board to expel defendant from membership lies in the common law rule that such private professional associations must refrain from arbitrary action and the proper scope of judicial review that the action taken or proposed is both substantively rational and procedurally fair. The trial court refused to consider evidence relative to the substantive rationality of the Board's decision and made no findings or conclusions on that issue. For this reason, I would vacate the court's judgment and remand the case to the trial court for a new trial.

BARBARA ANN BUSH v. BASF WYANDOTTE CORPORATION, BERMIL INDUSTRIES, D/B/A WASCOMAT OF AMERICA, ELECTROLUX, AB, CTC AKTIEBOLAGET, CORONAVERKEN AKTIEBOLAGET, UNIMAX GROUP, INC., MAGNETIC DEVICES, LTD., AND BOGGS AND COMPANY, INC.

No. 8227SC840

(Filed 20 September 1983)

1. Process § 14— jurisdiction over Swedish corporations—statutory basis

In an action to recover for personal injuries received by plaintiff while operating a washing machine manufactured by defendant Swedish corporations, an allegation that products manufactured by defendants were being used in North Carolina in the ordinary course of trade at the time of the injury was sufficient to give the courts of this State personal jurisdiction over defendants under G.S. 1-75.4(4)b.

2. Process § 14— service on Swedish corporations

Plaintiff's method of service of process on defendant Swedish corporations was sufficient where the clerk of superior court sent the summons and complaint to the North Carolina Secretary of State, and the Secretary of State then sent the summons and complaint to defendants' business address in Sweden by registered mail, return receipt requested.

3. Constitutional Law § 24.7; Process § 14.3— assertion of personal jurisdiction over Swedish corporations—due process

The assertion of personal jurisdiction over defendant Swedish corporations in an action to recover for personal injuries received by plaintiff while operating a washing machine manufactured by defendants did not violate due process since defendants, by injecting its products into the stream of national commerce by selling them to a distributor in New York without any indication that they desired to limit the area of distribution so as to exclude North Carolina, had sufficient minimum contacts with North Carolina and could reasonably expect to be subjected to the jurisdiction of the courts of this State.

APPEAL by plaintiff, Barbara Ann Bush, and defendant, BASF Wyandotte Corporation, from *Cornelius, Judge*. Judgment entered 10 March 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 20 May 1983.

Plaintiff-appellant, Barbara Ann Bush, filed an action on 27 April 1981 seeking damages for personal injuries she received while operating a washing machine for her employer, Kings Mountain Convalescent Center. Among the party-defendants named in the complaint was BASF Wyandotte Corporation (hereinafter BASF), a Michigan corporation which allegedly programmed and prepared the washing machine's program card so that the machine could utilize BASF's detergent products. Also named as defendants were CTC Aktiebolaget (hereinafter CTC) and Coronaverken Aktiebolaget (hereinafter Coronaverken), Swedish corporations who allegedly manufactured the washing machine plaintiff was operating at the time of her injury. The complaint alleged that CTC and Coronaverken had sold this washing machine to Bermil Industries, an independent distributor with its principal place of business in New York, who in turn sold the machine to plaintiff's North Carolina employer.

Defendant-appellant BASF answered and filed cross-claims for contribution and indemnification from the other defendants, including CTC and Coronaverken. On 11 June 1981 defendants CTC and Coronaverken moved to have plaintiff's claim against them dismissed for lack of personal jurisdiction. A sworn affidavit in support of the motion to dismiss stated that:

> 2. Both of said corporations were incorporated in Sweden and neither of them maintain any agents or employees in the United States of America.

3. The only contact CTC had with the United States of America is the sale prior to 1974 of certain machinery manufactured by it which was conducted through an independent distributor, Bermil Industries. The terms of sale for all machines operated by the corporation was F.O.B. Gothenbourg, Sweden and all agreements between the corporation and Bermil Industries were negotiated in Europe as were all extensions and modifications of the agreement.

4. CTC never shipped equipment into the State of North Carolina nor has it had any contacts with the State of North Carolina.

Answers to plaintiff's interrogatories further tended to show that CTC and Coronaverken had had no purposeful direct contact with North Carolina at any time or in any manner whatsoever.

On 10 March 1982 the trial court allowed CTC's and Coronaverken's motion to dismiss. From a judgment entered pursuant to that motion, plaintiff and defendant BASF appeal.

Roberts & Planer, by Joseph B. Roberts, III, for plaintiff-appellant Barbara Ann Bush.

Hollowell, Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Jeffrey M. Trepel, for defendant-appellant BASF Wyandotte Corporation.

Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick and F. Lane Williamson, for defendant-appellees CTC-Aktiebolaget and Coronaverken-Aktiebolaget.

EAGLES, Judge.

I.

The issue involved here is whether, by placing their product into the stream of American commerce so that it reaches consumers in North Carolina by means of the commercial distribution activity of others, CTC and Coronaverken have sufficient contact with North Carolina so that exercise of jurisdiction is lawful when a North Carolina resident is injured by defects in that product. We hold that the North Carolina courts may lawfully assert jurisdiction over the Swedish manufacturers, CTC and Coronaverken.

The question of personal jurisdiction over a foreign corporation must be resolved through a bifurcated inquiry. We must first determine whether a North Carolina statute permits the exercise of jurisdiction over the defendant and, secondly, whether the exercise of that statutory power will violate the due process clause of the United States Constitution's Fourteenth Amendment. *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).

[1] We begin by noting that, under the holding in *Marshville Rendering Corp. v. Gas Heat Engineering Corp.*, 10 N.C. App. 39, 177 S.E. 2d 907 (1970), G.S. 55-145(a)(4) does not provide a statutory basis for assertion of jurisdiction over defendant-appellees on the facts of this case. But the language of G.S. 1-75.4(4)b permits the assertion of personal jurisdiction over CTC and Coronaverken under the facts in this case.

That statute provides that

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> (4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this state arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either
>
> . . .
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

The unverified complaint stated:

> 4. That the defendants CTC Aktiebolaget, Coronaverken Aktiebolaget and Electrolux AB are Swedish corporations doing business in this state and which manufacture and/or sell goods for use in the ordinary course of business in this state.

The allegation that products manufactured by CTC and Coronaverken were being used in North Carolina in the ordinary course of trade at the time of the injury was sufficient to satisfy the statutory requirements of G.S. 1-75.4(4)b. 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.* The plaintiff met his initial burden of proving the existence of jurisdiction by a *prima facie* showing that the statutory requirements had been met, and defendant-appellees did not contradict plaintiff's allegations in their sworn affidavit or their verified answers to plaintiff's interrogatories. *Hankins v. Somers, supra.* We hold that G.S. 1-75.4(4)b permits the exercise of jurisdiction over defendant-appellees and that the first requirement for assertion of personal jurisdiction over a foreign corporation has been met.

II.

[2] CTC and Coronaverken also assert that plaintiff's method of service of process was insufficient. G.S. 1A-1, Rule 4(j3)(iv) provides that

> Where service is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made . . . or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served.

The original record reveals that the Clerk of the Superior Court addressed and dispatched the civil summons and complaint against CTC and Coronaverken to the North Carolina Secretary of State, the defendant-appellees' agent for the purpose of service of process under G.S. 55-145(c). *See* Shuford, North Carolina Civil Practice and Procedure § 4-12 (2nd ed. 1981). That statute provides

> In any case where a foreign corporation is subject to suit under this section and has failed to appoint and maintain a registered agent upon whom process might be served, or whenever such registered agent cannot with reasonable diligence be found at the address given, then the Secretary of State shall be an agent of such corporation upon whom any process in any such cause of action may be served.

The Secretary of State sent the summons and complaint to CTC's and Coronaverken's business addresses in Sweden by registered mail, return receipt requested. This procedure met the service of process requirements of G.S. 1A-1, Rule 4(j3)(iv). We therefore reject defendant-appellees' allegation of insufficient service of process.

III.

[3] We now address the issue of whether, under the facts of this case, assertion of jurisdiction over defendant-appellees pursuant to G.S. 1-75.4(4)b violates the due process clause. Our courts may exercise personal jurisdiction over defendant-appellees only upon a determination that the requirements of due process have been met. In making this determination we gain guidance from decisions in other jurisdictions considering fact situations similar to ours in light of the United States Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980).

We note that the situation presented in *World-Wide* is dissimilar to the one we face in this case, but we recognize, as have other courts, that *World-Wide* contains instructive language suggesting when jurisdiction may be lawfully asserted. *See Svendsen v. Questor Corp.*, 304 N.W. 2d 428 (1981), *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So. 2d 1305, *cert. denied* 452 U.S. 901, 69 L.Ed. 2d 401, 101 S.Ct. 3024 (1981). The Supreme Court held in *World-Wide* that the exercise of personal jurisdiction over an automobile retailer and regional distributor, whose sole connection with the forum state consisted of the fact that the automobile-related injury had occurred there, was incompatible with the due process clause. In so holding that Court stated

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko v California Superior Court*, supra, at 97-98, 56 L Ed 2d 132, 98 S Ct 1690; *Shaffer v Heitner*, 433 US, at 216, 53 L Ed 2d 683, 97 S Ct 2569; and see id., at 217-219, 53 L Ed 2d 683, 97 S Ct 2569 (Stevens, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of

> the laws," *International Shoe Co. v Washington*, 326 US, at 319, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v Denckla*, 357 US, at 253, 2 L Ed 2d 1283, 78 S Ct 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare *Gray v American Radiator & Standard Sanitary Corp.*, 22 Ill 2d 432, 176 NE 2d 761 (1961).

444 U.S. at 297-98, 62 L.Ed. 2d at 501-02, 100 S.Ct. at 567.

To appreciate fully the significance of this language it is necessary to review the Court's earlier holding in *Gray*. There an Ohio-manufactured safety valve had been incorporated into a water heater in Pennsylvania prior to the water heater being sold to a consumer in Illinois. The defendant-Ohio manufacturer had not carried on any other business in Illinois, either directly or indirectly. The Supreme Court held that a manufacturer engaged in interstate commerce which expects its products to be used in other states, can reasonably expect to be held amenable to the jurisdiction of these other states' courts. The Court, having distinguished the *Gray* situation from the one encountered in

World-Wide, leaves us to infer that *Gray's* precedential value remains undisturbed by the holding in *World-Wide*. Justice Brennan and Justice Marshall, in their dissenting opinions in *World-Wide*, give support to the inference that the precedential value of *Gray* remains undiminished. 444 U.S. at 306-307, 315, 62 L.Ed. 2d at 507-08, 513, 100 S.Ct. at 584, 569.

A review of lower court decisions following *World-Wide* supports our view that by selling its products to a *distributor* in New York, defendant-appellees could clearly expect that their products would be used in other states, and thus could reasonably expect to be subject to the jurisdiction of the courts of those states. "We note at this juncture that so far as the issues in this case are concerned there is no difference between an alien corporation and that of one of our sister states." *Shon v. District Ct. In And For City, Etc.*, 199 Colo. 90, 92, 605 P. 2d 472, 474 (1979).

Le Manufacture Francaise v. District Court, --- Colo. ---, 620 P. 2d 1040 (1980), presents a fact situation very similar to ours. Michelin of France, a tire manufacturer, was sued in Colorado for injuries sustained by a couple when a tire manufactured by Michelin of France allegedly failed. Although the defendant-manufacturer in that case, similar to the case *sub judice*, had no manufacturing facilities outside of France, had no facilities of any kind in the United States and owned no property in this country, did not have an appointed agent for service of process, a bank account, or a telephone listing in the United States and did not engage in the advertising of its products in the United States, the court held that Colorado could assert jurisdiction over the French manufacturer without violating the due process clause. The court adopted language from *Gray, supra*, in support of its holding.

> [I]t is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from [their] laws is an indirect one, however, does not make [those laws] any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his products, to say that the use of such products in the ordinary course of commerce is sufficient contact with [such states] to justify a requirement that he defend [there]. [Citations omitted.]

--- Colo. at ---, 620 P. 2d at 1045. The court found the minimum contacts requirement espoused by the Supreme Court in *World-Wide* to be met under the facts of *Le Manufacture Francaise.* "A manufacturer may be found to have engaged in the requisite purposeful activity even when title and control of its products pass outside of the forum state to middle-men who eventually resell the products to consumers within the state." *Id.* The court also noted the difficulties plaintiffs would confront if the Colorado courts were found to be without jurisdiction and plaintiffs were forced to pursue the litigation in France.

McCombs v. Cerco Rentals, 622 S.W. 2d 822 (1981), supports an assertion of jurisdiction over CTC and Coronaverken by our state's courts. There the court decided "whether the due process clause of the Fourteenth Amendment of our Federal Constitution permits a Tennessee state court to exercise personal jurisdiction over a French manufacturer where its only connection with Tennessee is that one of its cranes entered this country through its wholly-owned subsidiary and was sold to an independent middleman which, while under contract to become the manufacturer's exclusive North American distributor, leased the crane to a Tennessee corporation for use in Tennessee, where damage occurred." 622 S.W. 2d at 824. The relevant facts are that defendant manufactured a crane in France. It shipped the crane to its distributor in New York. The distributor sold the crane to a North Carolina corporation. The North Carolina corporation leased the crane to a Tennessee corporation for use in Tennessee. While operating the crane in Tennessee plaintiff was injured as the result of an alleged defect in the crane. As in the case *sub judice,* the French manufacturer exported its products to this country for distribution throughout the United States. The record in that case, as here, did not reveal any evidence that the foreign defendant either intended or anticipated distribution to be limited to a particular state or states or attempted to so limit its distribution. The court concluded that the defendant had "indirectly availed itself of the laws of Tennessee by injecting its product into the stream of national commerce" and could therefore "reasonably anticipate being haled into a Tennessee court to answer to a product liability claim." 622 S.W. 2d at 827.

In *Svendsen, supra,* an Iowa state court held that personal jurisdiction could be exercised by the Iowa courts over a Missouri

pool table manufacturer who placed its allegedly defective product into the stream of commerce by selling it to a dealer in Nebraska who ultimately sold it to the bowling alley in Iowa where plaintiff was injured when the pool table fell on her foot. That court stated that "when a manufacturer voluntarily places his product in the stream of commerce, the constitutional requirement of minimum contacts will be satisfied in all states where the manufacturer can foresee that the product will be marketed." 304 N.W. 2d at 431.

Cases involving parts manufacturers whose product entered the forum state with which it had no direct contacts by way of the parts' incorporation into a finished product also support the exercise of jurisdiction over defendant-appellees in the present case. *See Ford Motor Co. v. Atwood Vacuum Machine Co., supra, State ex rel. Hydraulic Servocontrols v. Dale,* 294 Or. 381, 657 P. 2d 211 (1983). Other cases have held that a foreign manufacturer cannot shield itself from liability for injuries caused by its defective product in the forum state with which it has no direct contacts simply by funnelling its products through a domesticated, wholly owned, but completely separate and uncontrolled subsidiary, or through an exclusive agent or distributor. *Mac Millan-Bloedel v. Canada,* 391 So. 2d 749 (Fla. Dist. Ct. App. 1980); *Coons v. Honda Motor Co., Ltd., of Japan,* 176 N.J. Super. 575, 424 A. 2d 446 (1980).

The Supreme Court in *World-Wide* reaffirmed the proposition that "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state." 444 U.S. at 291, 62 L.Ed. 2d at 498, 100 S.Ct. at 564. But the court also pointed out that

> [T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum state's interest in adjudicating the dispute [citation omitted]; the plaintiff's interest in obtaining convenient and effective relief [citation omitted], at least when that interest is not adequately protected by the plaintiff's power to choose the forum [citation omitted]; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies, [citation omitted].

Id. at 292, 62 L.Ed. 2d at 498, 100 S.Ct. at 564-65.

In this case, it is alleged that the cause of action arose directly from the intended use of defendant-appellees' product in North Carolina, by which a North Carolina resident was injured. The tort occurred in North Carolina, the majority of the prospective witnesses are presumably in North Carolina, and North Carolina substantive law is applicable. Taking into consideration all of the above factors, and in light of the fact that defendant-appellees purposefully injected their product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina, we hold that the courts of North Carolina may lawfully assert personal jurisdiction over defendant-appellees CTC and Coronaverken.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

RAY LIVINGSTON JONES v. MATT GWYNNE, CHRISTAL NEWTON, RAMONA GALARZA AND McDONALD'S CORPORATION

No. 8212SC1086

(Filed 20 September 1983)

1. Malicious Prosecution § 11.1— indictments after action filed as evidence of probable cause

In an action for malicious prosecution of embezzlement charges, two judges of the three-judge panel of the Court of Appeals were of the opinion that the trial court erred in instructing the jury that it could not consider the grand jury's return of embezzlement indictments against defendant as evidence of probable cause since the indictments were returned after plaintiff's action was filed. However, such instruction did not require reversal because one judge was of the opinion that the instruction was not erroneous and a second judge was of the opinion that the error was not prejudicial.

2. Malicious Prosecution § 15— punitive damages—insufficient evidence of actual malice

In an action for malicious prosecution of embezzlement charges, evidence of comments made by the individual defendant to plaintiff at a softball game in which they were both participating and evidence of the individual defendant's conduct of the investigation into defendant's alleged embezzlement of money

from a fast food restaurant was insufficient to show actual malice by the individual defendant which would support an award of punitive damages. Therefore, the corporate defendant cannot be said to have acted out of actual malice based on the acts of the individual defendant.

3. **Malicious Prosecution § 15— punitive damages—insufficient evidence of reckless disregard of plaintiff's rights**

In a malicious prosecution action, plaintiff failed to show that defendants instituted a prosecution against plaintiff for embezzlement in reckless and wanton disregard of plaintiff's rights so as to warrant an award of punitive damages where the evidence showed that the individual defendant interviewed witnesses who claimed to have seen defendant take money from the corporate defendant's cash register, that he examined records indicating large numbers of "no-sales," and that he consulted with the police and his superiors before instituting proceedings against plaintiff.

Judge HILL concurring in the result.

Judge WEBB dissenting in part and concurring in part.

APPEAL by defendants, Matt Gwynne and McDonald's Corporation, from *Herring, Judge.* Judgment entered 25 January 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 1 September 1983.

This is a civil action for malicious prosecution. Evidence presented at trial tended to show the following. On 9 May 1979 Ramona Galarza, a cashier at McDonald's Restaurant, told the second assistant manager, Sheila Stewart, that she had seen Ray Jones, the plaintiff, take money from customers and deposit it in the cash register without reporting the sale on the cash register. Galarza said the plaintiff did this by ringing "no sale" instead of the purchase amount on the register. Sheila Stewart reported this to the first assistant manager, Steve Winstead, and to the Fayetteville Area Supervisor, Paul Craddock who in turn called his supervisor, J. D. Bell, and McDonald's Regional Security Manager, Matt Gwynne.

On 16 May 1979 Gwynne and Craddock conferred with Detectives Post and Kraus of the Fayetteville Police Department and requested assistance in the investigation. Craddock and Gwynne then took written statements from three McDonald's cashiers, Ramona Galarza, Christal Newton and Stephanie Williams, who said they had seen Jones take money from customers and ring up "no sales." Gwynne and Craddock did not take statements from

two other McDonald's employees, Pam Lawson and Hazel Bido, who testified that they had never seen Jones take money without recording the sale in the cash register. During their investigation Craddock and Gwynne reviewed the store records and register tapes and found a number of "no sales" on the register tapes from the days Jones was managing the restaurant. On 18 May 1979 Detectives Post and Kraus went to McDonald's and observed Jones at work for about an hour. They saw nothing unusual, and they reported this to Gwynne and Craddock. Gwynne, Craddock, Kraus and Post returned to McDonald's on 18 May 1979 where they arrested Jones and took him to the Fayetteville Law Enforcement Center for questioning. He cooperated fully with the police and denied embezzling any money from McDonald's.

After questioning Jones, Detective Post again conferred with Gwynne and Craddock. According to his testimony at trial, he told them that Jones denied any wrongdoing and that ". . . if we were going to act, we would have to act on whatever we have, and that we had enough probable cause to go to court already." Detective Post then spoke with Assistant District Attorney Michael Winesette. Winesette testified at trial regarding their conversation:

> I did not tell him [Post] he had real problems with the case. Based on what he told me, I told him it sounded like he had a good case, but that he needed evidence of the conversion of the money. That is one of the elements of the case. I told them they needed more evidence. I don't know if those were the exact words, but basically I told him that he should try to get as much evidence as he could on the fourth element.

Detective Post informed Gwynne of his conversation with Winesette. After discussing the matter with his superiors, Gwynne told Post that McDonald's wanted to prosecute Jones. Warrants were then taken out against Jones charging him with embezzlement of $1.50 on or about 15 May 1979 and "an indeterminant amount" [sic] on or about 14 April 1979.

On 26 June 1979 the assistant district attorney took voluntary dismissals on both charges. Plaintiff filed the present action three days later. After this action was filed but prior to trial, the grand jury indicted the plaintiff on three counts of embezzlement from McDonald's Restaurant. Plaintiff was tried on these charges

in February, 1980. After hearing the State's evidence on one of the charges, the trial judge dismissed the case and the assistant district attorney took voluntary dismissals as to the remaining charges.

The present action came to trial in January, 1982. At the close of plaintiff's evidence motions of defendants Christal Newton and Ramona Galarza for a directed verdict were allowed. The motions of defendants Matt Gwynne and McDonald's Corporation for a directed verdict were denied. The following issues were submitted to and answered by the jury as indicated:

1. Did the Defendant, Matt Gwynne, maliciously prosecute criminal charges of embezzlement, issued on May 18, 1979, against the Plaintiff, Ray Jones?

Answer: Yes.

2. Did the Defendant, McDonald's Corporation, maliciously prosecute criminal charges of embezzlement, issued on May 18, 1979, against the Plaintiff, Ray Jones?

Answer: Yes.

3. If so, what amount, if any, is the Plaintiff, Ray Jones, entitled to recover for actual damages?

Answer: $200,000.

4. What amount of punitive damages, if any, should be awarded to the Plaintiff, Ray Jones?

Answer: $100,000.

From a judgment entered on the verdict, defendants appealed.

Teague, Campbell, Conely & Dennis, by G. Woodrow Teague and Dayle A. Flammia, and Smith, Dickey & Parish, by W. Ritchie Smith, Jr. for the plaintiff, appellee.

Hunton & Williams, by Odes L. Stroupe, Jr. and David Dreifus for defendants, appellants.

HEDRICK, Judge.

In order to succeed in an action for malicious prosecution, the plaintiff must show "that defendant initiated the earlier pro-

ceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E. 2d 611, 625 (1979). The defendants argue that the trial court erred by excluding evidence of probable cause. They contend the court erred by (1) instructing the jury that it could not consider the grand jury indictments of Jones as evidence of probable cause, (2) excluding Matt Gwynne's testimony that he had been told the assistant district attorney believed probable cause existed to prosecute Jones and (3) refusing to admit into evidence the warrants issued for Ray Jones' arrest.

[1] Defendant first assigns error to the court's charge to the jury that "you may not consider the evidence of the return by the Grand Jury of the bills of indictment as true bills on this question [of probable cause] because it occurred after the filing of this action." Defendants assert that "[t]he three grand jury indictments of Ray Jones on August 13, 1979 are prima facie evidence that probable cause existed for Jones' arrest and prosecution."

Defendants are correct in their contention that a bill of indictment has been characterized by our Supreme Court as "prima facie evidence" of probable cause in cases involving malicious prosecution. *Young v. Hardwood Co.*, 200 N.C. 310, 312, 156 S.E. 501, 502 (1931); *Kelly v. Shoe Co.*, 190 N.C. 406, 410, 130 S.E. 32, 35 (1925); *Stanford v. Grocery Co.*, 143 N.C. 419, 426, 55 S.E. 815, 817 (1906). In discussing this rule, Prosser notes:

> [W]here the accused is committed or held to bail by a magistrate, or indicted by the grand jury, it is evidence that there was probable cause for the prosecution. It is very often said that this establishes a "prima facie" case; but since the plaintiff has the burden of proving lack of probable cause in any case, and is free to do so, this apparently means nothing more than that the commitment is important evidence on the issue.

W. Prosser, Handbook of the Law of Torts Sec. 119, at 846 (4th ed. 1971). While competent, evidence of indictment by a grand jury is not conclusive on the issue of probable cause; it is to be considered by the jury along with all the other evidence in the case. *Mitchem v. Weaving Co.*, 210 N.C. 732, 735, 188 S.E. 329, 330

(1936); *Young v. Hardwood Co.*, 200 N.C. 310, 312, 156 S.E. 501, 502 (1931).

While the general rules governing the admissibility of grand jury indictments in malicious prosecution cases are clear, it is true, as defendants concede in their memorandum of additional authority, that "[t]he factual situation in this case has never been ruled upon by a North Carolina appellate court." In this case, the indictments defendants sought to introduce were issued after the present action for malicious prosecution was commenced. Plaintiff in the present case based his complaint not on the indictments, but rather on the arrest warrants issued months before. When the district attorney took a voluntary dismissal on the warrants, the criminal proceedings against Jones terminated for the purpose of this action, and the tort was complete. *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948); *Perry v. Hurdle*, 229 N.C. 216, 49 S.E. 2d 400 (1948). *See also* W. Prosser, Handbook of the Law of Torts Sec. 119, at 839 (4th ed. 1971). While we could avoid deciding the question by agreeing with plaintiff that the challenged instruction, if error, was not prejudicial, we choose to be more definitive and declare that the better rule in such a case bars consideration of later indictments on the issue of probable cause. We note that the inquiry into probable cause seeks to establish whether there existed "such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution." *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E. 2d 375, 379 (1978) (citation omitted). We do not believe that a grand jury determination of the existence of probable cause, issued after the alleged tort is complete and the complaint filed, is relevant to this inquiry. We thus hold that the trial judge did not err in giving the challenged instructions.

Defendants also contend that Gwynne should have been allowed to testify that "he knew, before warrants were sworn out against Jones, that Assistant District Attorney Winesette believed probable cause existed to prosecute Jones." We do not believe defendants were prejudiced by the exclusion of this testimony. Mr. Winesette testified that he told Detective Post that Post had "a pretty good case" but needed evidence of the conversion of money to make a case of embezzlement. Also, the following testimony by Gwynne, allowed into evidence, indicated Gwynne's awareness of Post's conversation with Winesette:

MR. JOHNSON [defendant's attorney]: What, if any, conversation did you have with Detective Post about contacting the District Attorney's Office?

A. I asked him, let's contact the District Attorney's office and discuss the case with them. And at that point Detective Post called the District Attorney's Office and talked with a District Attorney about the case. He was on the telephone for ten or fifteen minutes, I suppose. And following the telephone conversation, he came back in the room . . . and told me that he had talked with the District Attorney's Office. . . .

. . .

MR. JOHNSON: After Detective Post contacted the District Attorney's Office, did he advise you of the District Attorney's response—yes or no?

GWYNNE: Yes. He did.

Detective Post also testified:

I talked to the District Attorney staff and explained to them exactly what I had, what the evidence tended to show and what testimony would appear to be from the employer's standpoint. . . . We felt that we had plenty to go on as far as the charges, or I wouldn't have signed a warrant.

The substance of the conversation between Post and Winesette and Gwynne's knowledge of that conversation were allowed into evidence. Therefore, the exclusion of Gwynne's statement that Detective Post told him the assistant district attorney thought there was probable cause in no way prejudiced the defendants.

We also find no error in the court's exclusion of the two warrants issued for Jones' arrest on 18 May 1979. Both arrest warrants were identified at trial and read into evidence by Lloyd Clifford Brisson, an assistant district attorney. Furthermore, Brisson explained the notations, "V-O-L" "D-I-S" "to go to GJ," which he had made on the shucks containing the warrants. He testified the notations meant he had taken a voluntary dismissal and the cases would go to the grand jury. The judge also instructed the jury it could consider the warrants relevant to the

issue of probable cause. This assignment of error is overruled.

The defendants next contend that "the issue of punitive damages should not have been submitted to the jury because there was insufficient evidence as a matter of law to justify an award of punitive damages." The rule governing recovery of punitive damages in an action for malicious prosecution is as follows:

> . . . legal malice, which must be present to support an action for malicious prosecution, may be inferred by the jury from the want of probable cause, and . . . it is sufficient as a basis for the recovery of compensatory damages, but . . . when punitive damages are claimed, the plaintiff must go further and offer evidence tending to prove that the wrongful act of instituting the prosecution was done from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right.

Brown v. Martin, 176 N.C. 31, 33, 96 S.E. 642, 643 (1918) (citation omitted). *See also Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964).

[2] Defendants' first contention is that there was insufficient evidence of actual malice to warrant awarding punitive damages. We first consider the evidence relating to Gwynne. Plaintiff argues that actual malice on the part of Gwynne was demonstrated in two ways. First, he points to his testimony regarding interactions with Gwynne at a softball game a few weeks prior to plaintiff's arrest. Plaintiff testified that he collided with another player while sliding into home plate, and that

> Mr. Gwynne made a comment to me when he came in from the outfield that I certainly wouldn't do that to him. Later on in the game another incident happened on second base and Mr. Gwynne tried to accuse me of playing rough. He said that he wished it would have been him sliding in there, and that he could take care of me.

We find this testimony to be insufficient as a matter of law to support an award of punitive damages based on actual malice. The record contains no other evidence of personal animosity be-

tween Mr. Gwynne and plaintiff. This exchange of words between players at a competitive sporting event is simply inadequate, standing alone, to support a finding of actual malice.

Plaintiff also argues that evidence of Mr. Gwynne's conduct of the investigation supports a finding of actual malice on the part of Mr. Gwynne. This evidence is relevant to the issues of probable cause and legal malice, as well as to the question whether punitive damages may be supported on the basis of "reckless and wanton disregard of the plaintiff's right." This evidence bears no relation, however, to actual malice "in the sense of personal ill will" on the part of Mr. Gwynne.

We next turn to the question whether the evidence is sufficient to permit a finding under a theory of *respondeat superior* that McDonald's Corporation acted out of actual malice in instituting proceedings against the plaintiff. The law is clear that "[p]unitive damages may be awarded . . . from [sic] a corporation for a tort wantonly committed by its agents in the course of their employment." *Clemmons v. Insurance Co.*, 274 N.C. 416, 424, 163 S.E. 2d 761, 767 (1968) (citations omitted). In the present case, the jury found that Gwynne had committed a tort, and that he was acting in the course of his employment when he did so. We have concluded, however, that the evidence of Gwynne's actual malice is insufficient to permit imposition of punitive damages on that basis. It follows that McDonald's cannot be said to have acted out of actual malice based on the acts of Gwynne. While plaintiff argues that there were other employees of McDonald's who bore him ill will, we note that only Gwynne was found to have committed a tort. While a corporation may be liable for torts committed by its employees, punitive damages based on actual malice may not be predicated on the non-tortious acts of its employees.

[3] The defendants also contend that there was insufficient evidence that the prosecution was instituted "in a manner which showed the reckless and wanton disregard of the plaintiff's right," the second asserted ground for imposition of punitive damages. That the defendants instituted the prosecution without probable cause was established by the evidence to the satisfaction of the jury and has not been successfully contested on appeal. But plaintiff must show more than a lack of probable cause to be entitled to jury consideration of punitive damages. The evidence

must show "reckless and wanton disregard" of the rights of the plaintiff. We hold that there was insufficient evidence of such aggravated conduct to permit the jury to consider the issue of punitive damages. We note the undisputed evidence that Gwynne examined records that indicated large numbers of "no-sales," that he interviewed witnesses who claimed to have seen plaintiff take money from the register, and that he consulted with the police and with his superiors before instituting proceedings. Although sufficient to permit a finding that defendants acted without probable cause, the evidence was insufficient as a matter of law to establish reckless and wanton conduct on the part of the defendants.

The result is: in the trial for malicious prosecution and compensatory damages, we find no error; that portion of the judgment awarding plaintiff punitive damages must be vacated.

No error in part, vacated in part.

Judge HILL concurs in the result.

Judge WEBB dissents in part, concurs in part.

Judge HILL concurring in the result.

[1] I concur in the result. In my opinion there was insufficient evidence to support the award of punitive damages. While I believe it was error for the trial judge to instruct the jury not to consider the return of true bills of indictment as evidence of probable cause, nevertheless, I believe such instruction was harmless under the facts of this case.

Judge WEBB dissenting in part and concurring in part.

[1] I dissent because I believe it was error for the court to instruct the jury they could not consider the grand jury's return of true bills of indictment as evidence of probable cause. The cases cited by the majority hold that such evidence is admissible. The majority opinion distinguished these cases on the ground that the tort was complete when the indictments were returned. I believe this is a distinction without a difference.

Evidence that a grand jury has returned a true bill is some evidence that a reasonable man would have commenced a prosecution. I do not see why it makes a difference that the grand jury did not act until after the tort was complete.

I concur in the holding that there was not sufficient evidence to support an award of punitive damages.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL v. THE UNKNOWN AND UNASCERTAINED HEIRS, IF ANY, OF LILLIAN HUGHES PRINCE, DECEDENT

No. 8215SC972

(Filed 20 September 1983)

1. **Trusts § 4— finding of general charitable intent in bequest**

The evidence was sufficient to support a trial court's finding that a testator manifested a general charitable intent in a bequest in which she left a sum of money to the University of North Carolina at Chapel Hill for the purpose of erecting a building for the Carolina Playmakers. The testatrix did not indicate that only a particular purpose was intended by her, or that she would have preferred to have the whole trust fail if the purpose was impossible to accomplish. She made several bequests to charity related to the University, the residuary estate was bequeathed to the University, and there was no provision for reversion or gift over if the trust failed.

2. **Trusts § 4— finding that charitable trust rendered impracticable or impossible of fulfillment—supported by evidence**

A trial court's finding that a change of circumstances rendered a charitable trust impracticable or impossible of fulfillment was supported by the evidence where the express purpose of the trust was the construction of "a building for the Carolina Playmakers," and where the General Assembly allotted a large sum of money to the University for the purpose of erecting a new building for the University's dramatic art department, and the allocation was sufficient without the addition of the charitable trust. The need for the building contemplated by the charitable trust was eliminated by these events, and that constituted changed circumstances rendering the trust impracticable or impossible of fulfillment.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Martin (John C.), Judge.* Judgment entered 9 June 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 23 August 1983.

Plaintiff brought this action for Declaratory Judgment under N.C. Gen. Stat. Sec. 1-253 and for reformation of the charitable trust established under Article IX of the will of Lillian Hughes Prince pursuant to the court's statutory power of cy pres as authorized by N.C. Gen. Stat. Sec. 36A-53. Defendants, by and through their court ordered guardian ad litem, answered and counterclaimed for a declaration of resulting trust. Included within the parties' stipulations are the following:

(d) The defendants are all the known, unknown and unascertained persons, if any, and the heirs, devisees, or personal representatives of such persons, who possess or hereafter acquire an interest in any property formerly comprising the Estate of Lillian Hughes Prince.

(e) Lillian Hughes Prince died February 25, 1962, and pursuant to Article IX of her Last Will and Testament bequeathed the residue of her estate in the following manner:

Article IX

All of the rest, residue and remainder of my property of whatsoever kind and wheresoever located, I give and bequeath to the University of North Carolina at Chapel Hill, in trust nevertheless, to accumulate the income until such time as the University shall determine to use said principal and any accumulated income together with such other funds as may be available to it, for the purpose of erecting a building for the Carolina Playmakers. I ask that a suitable recognition of this gift be placed in or on the building, and it is my hope, without attaching any condition, that the building will be named the "Lillian Prince Theatre."

. . .

(g) Pursuant to Article IX above, the plaintiff originally received approximately $135,000.

(h) As a result of a special appropriation by the General Assembly in 1971, there was constructed on the campus of The University of North Carolina at Chapel Hill a new building, designated as the Paul Green Theatre, to be used for the production activities of The University's Department of Dramatic Art.

The Carolina Playmakers are a part of the Department of Dramatic Art and now make use of the Paul Green Theatre. The funds bequeathed to the University by Mrs. Prince were not used in the construction of this theatre.

The court made the following pertinent findings of fact:

> 12. The appropriation in 1971 by the General Assembly of sufficient funds to construct a dramatic arts building to the campus of The University of North Carolina at Chapel Hill and the subsequent use thereof by The Carolina Playmakers and related organizations constitute changed circumstances rendering Article IX of the Last Will and Testament of Lillian Hughes Prince impracticable or impossible of fulfillment in that the need for construction of a building for The Carolina Playmakers has been eliminated.
>
> 13. The testatrix possessed a general charitable intent to benefit and advance dramatic arts, programs and activities at The University of North Carolina at Chapel Hill as evidenced by her longstanding and close associations with the theatrical and dramatic activities conducted by The University, by the presence within her Will of other bequests to The University or for the benefit of its students; and as evidenced by the fact that the bequest set forth within Article IX of her Will leaves all her residuary estate to The University with no alternative plan or further gift over should the trust set forth therein fail.
>
> 14. There is no evidence of any intention on the part of the testatrix to benefit those persons who would take by intestacy as reflected by the absence of any bequests to them in the decedent's Will and as reflected by the absence of any provision for a reversion if the trust created within the residuary clause were to fail.
>
> 15. The general charitable intent of the testatrix would be best served by a modification of the trust created under Article IX of the decedent's Will.

Pursuant to N.C. Gen. Stat. Sec. 36A-53, the court ordered that the terms of the trust be modified as requested by plaintiff. From this judgment, defendants appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan for the plaintiff, appellee.

Northen, Little & Bagwell, by O. Kenneth Bagwell, Jr., for the defendants, appellants.

HEDRICK, Judge.

Defendants contend that the court erred in reforming, pursuant to N.C. Gen. Stat. Sec. 36A-53, the Lillian Hughes Prince Charitable Trust. N.C. Gen. Stat. Sec. 36A-53(a), the Charitable Trusts Administration Act, provides in pertinent part that:

> [i]f a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment . . . and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may . . . order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator.

It is not disputed that the trust created by Mrs. Prince is a charitable trust as it is created for a lawful purpose which promotes the well being of mankind and does not contravene public policy. Rather, defendants contend in Assignment of Error Nos. 1 and 2 that the court erred in finding that the charitable bequest was impractical and impossible of fulfillment, and in finding that Mrs. Prince manifested a general charitable intent in said bequest.

[1] In support of their contention that the court erred in finding Mrs. Prince manifested a general charitable intent in her bequest, defendants cite *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973), the only case in which the Supreme Court has addressed the issue of whether a testator has manifested general charitable intent. In *Wilson*, the Court said the Superior Court has authority to modify a charitable trust that has become impracticable to fulfill only when "the instrument creating the trust, interpreted in the light of all the circumstances known to the settlor or testator, manifests a general intention to devote the property to charity." *Id.* at 300, 200 S.E. 2d at 779 (citations omitted). Thus, in the present case, we must determine if Mrs. Prince manifested such intent in her will construed as a whole. The Court in *Wilson* held that where the testatrix bequeathed property to the First

Presbyterian Church of Reidsville to be used to build a new Presbyterian church at a specified location as a memorial to her deceased brother and where the purpose of that trust failed, the trust may not be modified pursuant to the cy pres doctrine since the testatrix had only a specific and limited charitable intent. There, the testatrix had the twofold purpose of establishing a memorial to her brother at the specified location and promoting religious activities in this part of her native city. *Id.* at 296, 200 S.E. 2d at 776.

We find the case cited by defendant distinguishable from the present one. Unlike the testator in *Wilson*, Mrs. Prince did not manifest a narrow and particular charitable intent in her will. She did not indicate that only a particular purpose was intended by her, or that she would have preferred to have the whole trust fail if the purpose was impossible of accomplishment.

The evidence tends to show that Mrs. Prince was closely involved with the Carolina Playmakers, which is a University organization whose purpose is the production and performance of dramatic art. Both Mrs. Prince and her husband actively participated in the productions of this organization. Mrs. Prince had leading roles in at least five of these productions. Throughout its history and extending beyond the time of Mrs. Prince's death, the Carolina Playmakers suffered from a lack of adequate theatre facilities.

In reviewing the will of Mrs. Prince, we see she made several bequests to charity. Mrs. Prince bequeathed to the Friends of the Library of the University her property rights arising from a book written by her husband. She left to the University's Art Department all of her husband's illustrations, correspondence, art books, proofs, sketches and other memorabilia. She established at the Boston Museum School of Art a perpetual fund to provide graduate scholarships to students enrolled in the Art Department at the University of North Carolina. Mrs. Prince also made specific bequests to her mother, her sister, and certain friends, all of which were conditioned on such persons surviving her. The residuary estate was bequeathed to the University as provided in Article IX, and there is no provision for reversion or gift over if the trust fails. This evidence is sufficient to support the court's finding that Mrs. Prince manifested a general charitable intent in her will.

[2] Defendants also challenge the court's finding that changed circumstances rendered the Prince Trust impracticable or impossible of fulfillment. The express purpose of the Trust was the construction of "a building for the Carolina Playmakers." The evidence shows that the initial amount in the trust was $135,000, and that by 1973 the amount had grown to approximately $210,000. Part of this sum was used to pay for plans for a new theatre building. In 1971 the General Assembly allotted $2,250,000 to the University of North Carolina for the purpose of erecting a new building for the University's Department of Dramatic Art. This allocation was eventually used to construct the new theatre, and was sufficient without the addition of the Prince Trust. The new building is used by the Carolina Playmakers as well as by related organizations. The court found that the need for the building contemplated by the Prince Trust has been eliminated by these events, and that this constitutes changed circumstances rendering the Trust impracticable or impossible of fulfillment. The court's finding is supported by the evidence. We uphold its judgment in full.

Affirmed.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the reformation of the trust provision involved in this appeal is not authorized by G.S. 36A-53, and if it was that reformation nevertheless should not be granted at plaintiff's behest, because of its unequitable conduct in the premises.

Article IX of testatrix's will, as I read it, manifested the intention to devote the funds involved only to constructing a building for the Carolina Playmakers, and I see nothing in the provision, as distinguished from other provisions of the will, which manifested "a general intention to devote the property to charity," as the statute requires. The *cy pres* doctrine "may not be used to turn a narrow and particular charitable intent into a general charitable intent." Bogert, Trusts and Trustees, 2d Ed.,

§ 431. And, in my view, the finding that the trust became "impossible or impracticable of fulfillment," as the statute also requires, is not supported by the record, but is contrary to it. The record shows that: The University could have used the trust funds, along with other funds received from the General Assembly, in constructing the new Dramatic Arts Building, plainly within the terms of the trust, but deliberately decided not to do so, after telling the Advisory Budget Commission that the funds were available and would be so used; and that this was done for no purpose other than to reduce the amount of construction monies that the University would have to refund to the State in connection with that project. Because of its refusal to use the funds for the purpose devised and its duplicitous conduct in dealing with both the State and the trust in regard to the Dramatic Arts Building, the University did not come into equity with clean hands.

My vote, therefore, is to reverse the judgment appealed from and to direct the plaintiff appellee to convey the funds involved to the defendants.

DR. THOMAS A. LITTLE v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

No. 8210SC1035

(Filed 20 September 1983)

Physicians, Surgeons and Allied Professions § 5— revocation of dentist's license— substantial supporting evidence

There was substantial evidence in the whole record to support a decision by the Board of Dental Examiners revoking a dentist's license to practice dentistry for violations of the North Carolina Dental Practice Act, G.S. Ch. 90, Art. 2, by the improper delegation of professional duties to dental assistants, by the unauthorized prescription of Valium to family members, and by dental malpractice in the treatment of two patients.

APPEAL by petitioner from *Lee, Judge*. Order entered on 21 May 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 25 August 1983.

Kenneth Hill for petitioner appellant.

Bailey, Dixon, Wooten, McDonald & Fountain by Ralph McDonald and Carson Carmichael, III for respondent appellee.

BRASWELL, Judge.

Dr. Thomas A. Little, a licensed dentist, seeks appellate review of the trial court order affirming final agency decision of the North Carolina State Board of Dental Examiners which revoked Dr. Little's license to practice dentistry. The Board of Dental Examiners found that the evidence supported the charges that Dr. Little had violated the North Carolina Dental Practice Act, G.S. 90, Article 2: by improper delegation of professional duties to dental assistants Linda D. Horton, David Terry Maness, and Connie Watts Verricchia; by unauthorized prescription of Valium to family members; and by dental malpractice in the treatment of patients Hubert J. McNeil and Ellen Rommel. We affirm.

Dr. Little brings forward eight questions for review from his assignments of error. The first six questions address the issue of whether the findings of fact and conclusions of law of the Board, adopted by the trial judge, are supported by substantial evidence in view of the entire record as submitted. The seventh question, being derivative of the first six, challenges the Board's order of 23 November 1981 as being arbitrary and capricious. The eighth question similarly challenges the trial court's order of 21 May 1982 as being arbitrary and capricious. The scope of our judicial review is controlled by the Administrative Procedure Act, G.S. 150A, Art. 4. The standard of our review is chartered by G.S. 150A-51(5) which requires us to determine whether the findings and conclusions are supported "by substantial evidence . . . in view of the entire record as submitted." By case law an insignificant variation of the words "entire record" has become "whole record," and this is the test we must apply. *A & T University v. Kimber*, 49 N.C. App. 46, 270 S.E. 2d 492 (1980); *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

In an administrative proceeding, it is the prerogative and duty of that administrative body, once all the evidence has been presented and considered, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw

inferences from the facts, and to appraise conflicting and circumstantial evidence. [Citations omitted.] The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E. 2d 547, 565 (1980).

When the Agency decision is on review before the superior court judge, his consideration of the case is that of an appellate court. *In re Faulkner*, 38 N.C. App. 222, 247 S.E. 2d 668 (1978). The reviewing court, both trial and appellate, "while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusion on the merits." *Savings and Loan Assoc. v. Savings and Loan Comm.*, 43 N.C. App. 493, 497, 259 S.E. 2d 373, 376 (1979). The "whole record" test demands that "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." *Id.* at 497-98, 259 S.E. 2d at 376. In this context substantial evidence has been held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977). Therefore, in reaching its decision, the reviewing court is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to them to be, so long as substantial evidence of those findings exist in the whole record. *In re Appeal of Amp., Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975).

By his recourse to the appellate division of our courts, the petitioner also seeks to have the action of both the trial tribunal and administrative agency set aside by alleging that the action was both arbitrary and capricious. *See* G.S. 150A-51(6). These imposing terms apply "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." *Comr. of Insurance v. Rate Bureau, supra*, at 420, 269 S.E. 2d at 573, *reh. denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980). In asserting his position Dr. Little argues, in substance, as to each question

presented for review that there was contradictory evidence in the entire record which materially conflicted with the evidence found and accepted as credible by the Board of Dental Examiners, that this contradictory evidence was substantial and overlooked or not considered by the Board, and that by rejecting other evidence the order reflects that the Board reached its decision in an arbitrary and capricious way. We disagree and hold that material, relevant, and substantial evidence in the whole record support the final Agency decision and the decision of the superior court.

An examination of three of the questions presented will suffice to demonstrate the basis for our conclusion.

As to the charge that Dr. Little improperly delegated duties to Connie Watts Verricchia which constituted the practice of dentistry, the unchallenged evidence shows the following. Ms. Verricchia was employed as a dental assistant in Dr. Little's office from July through December 1980. During this period she was not licensed as a dentist or dental hygienist, nor had she received the necessary formal training or experience to qualify as a Dental Assistant II under the rules and regulations of the Board. She did not qualify to take dental X rays until October 1980. Her first employment in any dental office was in January 1980.

The evidence received from Ms. Verricchia which is challenged by approproiate exceptions is in the Agency's order as fact-finding paragraphs 18 through 23. In each instance the opening words of the paragraphs are: "Having considered conflicting evidence, the Board finds that Respondent directed and allowed Ms. Verricchia during the term of her employment with him to . . . ." The descriptive words that follow this introduction indicate the extent to which Ms. Verricchia was allowed to practice dentistry. For instance, she was permitted: to remove from the oral tissues of his patients, including Ellen Rommel, bone splinters and on occasion root tips which had surfaced after extractions by respondent; to apply topical anesthetic and then to remove the bone particle with cotton pliers if possible, and if not, with Rongeur's forceps; to diagnose and treat dry sockets; to adjust and grind down full dentures; to adjust partial dentures; to take impressions of edentulous patient's mouths; to perform "hot" or chair-side relines of dentures; and to take X rays.

These findings of ultimate facts are fully supported by a reading of the evidentiary facts in the transcript. For example, the transcript reveals that Ms. Verricchia took 80% of the X rays that were taken during her period of employment and this included taking panorexes X rays of the patient Ellen Rommel in her first month of employment. It also shows that when patients returned after extractions complaining of pain, Dr. Little delegated solely to her care those patients he had labeled as problem patients. Her testimony in the transcript details the procedure she used when attending a patient with bone splinters. She would take a Q-tip and rub a topical anesthetic on the area, then take cotton pliers to try to lift the bone spicules, or would use a Ronguers instrument which trimmed the bone. With dry or infected sockets she would clean it out and pack it with sterile gauze and put some medication on it. She performed these procedures with respect to bone splinters on patient Ellen Rommel several times. As for the total patients for the office, Ms. Verricchia saw about 20% on a daily basis. The testimony of Ms. Verricchia was supported and corroborated in various parts by the testimony of Ellen Rommel, David Terry Maness, and Jane Venters.

Dr. Little testified himself and offered evidence through several witnesses. He refuted the fact that Ms. Verricchia was authorized to take X rays before she had completed her technical course in October 1980 and that he permitted her to remove splinters and root tips or to diagnose or treat dry sockets. The substance of Dr. Little's testimony was corroborated by testimony from James Bradley, Susan Summerlin and Jane Venters. Ms. Venters also testified that Ms. Verricchia had attempted to enlist her help in various legal actions against Dr. Little.

The crux of Dr. Little's argument is that "[i]n assessing the weight and credibility of Connie Watts Verricchia's testimony, the Board completely disregarded the testimony of Appellant that she was the organizer of a group of disgruntled employees whose purpose was to ruin Dr. Little's practice." He contends that "Ms. Verricchia's attempts to organize various forms of legal action to harass [him] renders her testimony or that of her colleagues concerning her duties in the clinic inherently suspect and unreliable." Dr. Little also argues that the testimony of David Terry Maness and Linda Horton was similarly impeached by evidence which

revealed that Maness had unsuccessfully sued Dr. Little after being discharged from the lab and that Horton had conducted a meeting of fellow employees to review a book listing all violations of statutes which a dentist could be charged with before a dental board.

Thus, the real challenge in the appeal becomes the credibility of the witnesses. We hold there was sufficient substantial evidence to support the findings of fact and sufficient findings of fact to support the conclusions of law of the Board and of the trial court on all the issues. Certainly conflicts in the evidence existed. Impeachment testimony appears in abundance, but the quality and believability of the evidence is solely for the fact-finder to determine and not the reviewing court. The Board has resolved the conflicts in the testimony of all the witnesses and evidence before it, and their findings, being supported by competent evidence and not arbitrary or capricious, are conclusive in the appellate division. *In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978).

As to the charge of unauthorized prescription of Valium to family members, the Board found: that Valium is a Controlled Substance, according to G.S. 90-92, Schedule IV; that Dr. Little purchased Valium by mail, totaling 3,000 ten milligram tablets on 9-12-79, 1-24-80, 7-24-80, 12-1-80, and 3-13-81 (a span of about 681 days); and that he dispensed the Valium to his wife, his sister-in-law, and his mother-in-law. It was dispensed to his wife for agoraphobia, vertigo and stress, and it was cheaper to order in quantity. Appellant did not except to any of the above findings, but did except to the following findings: (1) "Respondent does not dispense Valium to patients in connection with his dental practice;" and (2) "Respondent ordered Valium and dispensed it to Ms. Rinnert [his sister-in-law] and Mrs. Miles [his mother-in-law] to ease stress. Respondent does not take care of either Ms. Rinnert's or Mrs. Miles' teeth and thus has no treatment records."

As to the first exception in the above paragraph, the transcript reveals this uncontradicted exchange:

"Q. Now you do not dispense valium in connection with your dental practice, do you?

A. Not with my dental practice, no."

As to the second exception above, the transcript clearly indicates that Dr. Little does not have treatment records for Ms. Rinnert, or Mrs. Miles, but does have records that he bought the pills and the number of pills distributed to his wife, sister-in-law, and mother-in-law, even though he does not take care of their teeth. Because the evidence fails to support this assignment of error, it is overruled.

As to the charge of dental malpractice in the treatment of patient, Ellen Rommel, the findings of fact by the Board, to which no exceptions were made, show that Ellen Rommel became Dr. Little's patient for the first time on 29 July 1980. She complained of pain in the upper left part of her mouth. She asked Dr. Little to "fix my teeth and pull what needed to be pulled." He conducted a clinical examination, caused X rays to be taken, and "advised [her] that she had periodontal disease (pyorrhea) and advised her that all of her teeth should be pulled." Dr. Little did not offer any treatment option other than extraction of all her teeth. Dr. Little did not note on his record of treatment any diagnosis of either periodontal disease or rampant caries to an extent necessary to require extraction of all her teeth.

Upon Dr. Little's advice Ms. Rommel consented to the extraction of all her teeth. On 29 July 1980, her upper teeth were extracted and an immediate denture delivered. On 17 October 1980 her lower teeth were extracted and an immediate denture delivered.

Dr. Little contests the Board's findings that Ms. Rommel did not have periodontal disease so extensive as to require extraction of all her teeth. He also challenges the findings that X rays taken by him indicate substantial bone support and only moderate periodontal disease, and that most of her teeth, with the exception of four which were badly decayed, could have been restored.

The Board found that "[t]he standard of practice on July 29, 1980 through October 17, 1980, for general dentists licensed to practice in North Carolina was that having clinically examined a patient and reviewed that patient's x-rays indicating caries and moderate periodontal disease the patient should have been advised of treatment options available, including restoration of carious lesions, extraction of nonrestorable teeth, treatment of periodontal disease and replacement of extracted teeth with cast

partials." The Board concluded that "most of her teeth could have been saved if properly treated," so that Dr. Little's advice to Ms. Rommel that she had periodontal disease requiring immediate extraction of all her teeth "did not comply with the standard of practice in North Carolina and was a dereliction from professional duty resulting in injury, loss or damage to Ms. Rommel, thereby constituting negligence and malpractice in the practice of dentistry."

Dr. Harry Rickenbacker, a duly licensed dentist, testified as an expert witness for Dr. Little. Dr. Rickenbacker's opinion that Dr. Little had not violated any standards of care was based on the fact that he had "no idea what that patient asked for," such as whether or not she wanted him to try to save her teeth. Yet, even he recognized that several of Ms. Rommel's teeth could have been saved if properly treated.

The argument presented before us by Dr. Little is that there is no basis in the record for the Board's findings and conclusions of law, that since Dr. Rickenbacker was the only expert to testify concerning the treatment of Ms. Rommel by Dr. Little, the findings by the Board are unsupported by any evidence and must be reversed. We disagree. Dr. Michael J. Noonan, a dentist in Wilmington, the same area of practice of Dr. Little, testified before the Board that Ms. Rommel had slight to moderate periodontal disease and that extraction of only four teeth was indicated. In his opinion, [Dr. Noonan had treated Ms. Rommel after Dr. Little had pulled her teeth and delivered dentures] the advice and actions taken by Dr. Little with this patient was "not a good way to do it." It was not in accordance with good and accepted practice in North Carolina and particularly the community of Wilmington to advise her that all her teeth should be extracted and not to inform her that some teeth could be saved. Further, since Mrs. Rommel's X rays were received in evidence, there did exist substantial evidence that her periodontal disease was moderate and that removal of all her teeth was not indicated.

We hold that the testimony of Dr. Noonan was sufficient to constitute independent opinion evidence from an expert witness taken with all the other evidence to justify the Board, as judge of the credibility of the witness, to find that Dr. Little was negligent in his care and treatment of his patient, Ms. Rommel. In addition,

the Board of Dental Examiners, being composed of licensed dental professionals, was qualified within itself to judge whether Dr. Little met the standard of proficiency of due care of a licensed dentist practicing in the Wilmington area. It is within the province of the Board as an administrative agency to apply its own expertise in its conduct and evaluation of a disciplinary hearing. In the process of accepting or rejecting expert testimony the law does not require the Board to identify its method of reasoning or its method of determining credibility. *See In re Hawkins*, 17 N.C. App. 378, 194 S.E. 2d 540, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 275, *cert. denied*, 414 U.S. 1001, 94 S.Ct. 355, 38 L.Ed. 2d 237 (1973); *Jaffe v. Department of Health*, 135 Conn. 339, 64 A. 2d 330 (1949).

We have reviewed all of the appellant's assignments of error and find each of them to be without merit. The Board's final decision is supported by substantial and material evidence on the whole record as submitted, and therefore the decision was not arbitrary or capricious. The decision of the North Carolina Board of Dental Examiners is

Affirmed.

Judges ARNOLD and WEBB concur.

DUKE UNIVERSITY v. AMERICAN ARBITRATION ASSOCIATION AND R. B. BRUNEMANN & SONS, INC.

No. 8214SC1061

(Filed 20 September 1983)

Contracts § 6.1— finding that defendant not general contractor supported by evidence

A finding that defendant was not a general contractor required to be licensed under G.S. 87-1 was supported by the evidence where defendant did not contract with plaintiff to "erect a building," but rather, contracted to construct a relatively small portion of an extensive construction project. It had no control over the work of the other contractors nor over the construction project as a whole.

APPEAL by plaintiff from *Lee, Judge*. Order entered 11 June 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 29 August 1983.

This appeal presents the question of whether a parallel prime contractor contracting directly with an owner to construct a portion of a building that costs more than $30,000.00 is a general contractor required to be licensed under G.S. 87-1.

The facts are as follows: Plaintiff contracted with more than 50 separate trade contractors to build Duke Hospital North in Durham, North Carolina at a total cost of approximately $62 million. On 6 August 1976, plaintiff and defendant entered into a written contract under which defendant agreed to fabricate and erect the stucco wall panel system and to perform related lath and plastering work for the sum of approximately $1.5 million. The contract between plaintiff and defendant contained an arbitration clause covering all claims, disputes and other matters arising out of the contract. When defendant bid upon and was awarded the contract, there was no structure already existing at the Duke Hospital North site.

The construction of the entire hospital was under the supervision and management of Turner Construction Company, the construction manager. The contract required defendant to perform its work to the entire satisfaction of both plaintiff and the construction manager.

Defendant was responsible solely for the stucco wall panel system and related lath and plastering work. Defendant exercised control over its own work, subject to the approval and supervision of the construction manager. Defendant exercised no control over the construction of the hospital as a whole nor over any other contractor other than subcontractors it used to complete its own portion of the contract.

It is a common construction industry practice throughout the nation and in Durham, North Carolina for the general contractor of a project to obtain all required building permits. The construction manager in this case procured the necessary building and construction permits. The contract also required that each trade contractor obtain all permits and licenses necessary for the completion of its work. Defendant was never licensed as a general contractor under G.S. 87-1, *et seq.*

Defendant performed work under the contract from 1976 to 1979. In 1979, defendant submitted a claim to plaintiff for additional compensation in the amount of $1 million. Following plaintiff's denial of defendant's claim, defendant filed a demand for arbitration, seeking damages in excess of $1.5 million.

On 13 March 1981, plaintiff filed a complaint and a motion for a stay of arbitration, contending that defendant was precluded from pursuing its arbitration claim under the contract since it was not licensed pursuant to G.S. 87-1, *et seq.*

On 3 April 1981, defendant filed a petition for removal to federal court and on 23 February 1982, the court issued an order staying federal court proceedings pending disposition of the matter in state court.

On 11 June 1982, the trial court denied plaintiff's motion for a stay of arbitration proceedings and ordered the parties to proceed to arbitration, finding that defendant was not a general contractor required to be licensed under G.S. 87-1. The court then stayed its order compelling arbitration pending final resolution on appeal.

Powe, Porter and Alphin, by E. K. Powe and Patricia H. Wagner, for plaintiff-appellant.

Briggs and Morgan, by David B. Sand; and Stubbs, Cole, Breedlove, Prentis and Poe, by G. Jona Poe, Jr., for defendant-appellees.

VAUGHN, Chief Judge.

This appeal presents the question of whether defendant, who was one of more than fifty parallel trade contractors contracting with plaintiff, and who constructed a portion of Duke Hospital North costing more than $30,000.00 was a general contractor under G.S. 87-1. Plaintiff contends that defendant was an unlicensed general contractor and, therefore, cannot enforce the arbitration clause in its contract with plaintiff. We affirm the order of the trial judge and hold that defendant was not a general contractor under G.S. 87-1.

Under G.S. 87-1, a general contractor is one who, "for a fixed price, commission, fee or wage, undertakes to bid upon or to con-

struct any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000.00) or more . . ." Our holding turns on our construction of this statute. Although this case presents a novel situation involving parallel prime contractors, today is not the first time we have interpreted G.S. 87-1.

In finding that defendant is not a general contractor under G.S. 87-1, we adhere to precedent set in two prior Supreme Court cases. In *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968), the court explained that the purpose of G.S. 87-1 is to protect the public from incompetent builders. "When, in disregard of such a protective statute, an unlicensed person contracts with an owner *to erect a building* costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract." *Id.* at 270, 162 S.E. 2d at 511 (emphasis added). Pursuant to *Midyette*, protecting plaintiff from defendant's possible incompetency is not contemplated by the statute. Defendant did not contract with plaintiff to "erect a building," but rather, contracted to construct a relatively small portion of an extensive construction project.

In *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970), the Supreme Court defined the words "building," "structure" and "improvement" in G.S. 87-1. "Building" and "structure," according to *Vogel*, are synonymous and "do not embrace parts or segments of a building or structure . . . Improvement . . . presupposes the prior existence of some structure to be improved." 277 N.C. at 132, 177 S.E. 2d at 281, 282. Defendant, in this case, did not undertake to build the hospital in its entirety, nor did it undertake to improve an already existing building.

Plaintiff urges us to construe G.S. 87-1 as applying to *any* construction contract for $30,000.00 or more. In light of *Midyette*, *Vogel* and several recent decisions of this court, we decline to do so. In *Helms v. Dawkins*, 32 N.C. App. 453, 456, 232 S.E. 2d 710, 712 (1972), we stated: "Not every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds $30,000.00 . . . . [T]he principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with

respect to a portion of a project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project." In *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E. 2d 446 (1981), we cited *Helms* for the general principal that a general contractor has control over a construction project. Even more recently, in *Phillips v. Parton*, 59 N.C. App. 179, 296 S.E. 2d 317 (1982), affirmed without opinion, 307 N.C. 694, 300 S.E. 2d 387 (1983), we reiterated the "control test." In all three cases cited we concluded that defendant, who had contracted to build a house for plaintiff, had control over the construction project and, therefore, should have been licensed under G.S. 87-1. Defendant's contract in this case, while it amounted to $1.5 million, was only about 2% of the total project cost of approximately $62 million. Defendant had control solely over construction of the stucco wall panel system and related lath and plastering work; it had no control over the work of other contractors nor over the construction project as a whole.

We do not find any conflict among prior decisions of this court. In *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971), the contractor's original estimate was less than the statutory amount and the cost of the completed building was more. We concluded that the cost of the initial undertaking, not the cost of the completed building, determined whether the defendant was a general contractor. Nothing in the *Fulton* opinion contradicts the control test developed in later opinions. In *Hickory Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976), we reversed summary judgment for plaintiff, finding a material issue of fact as to whether defendant was a general contractor. We cited *Fulton, supra*, for the proposition that the cost of the undertaking determines initially whether defendant falls under G.S. 87-1; however, we also cited *Vogel, supra*, for the proposition that the "fact that a subcontractor erects the walls and roof, puts in a subfloor, installs doors, windows, siding and shelves, and paints the building, does not make him a general contractor." 31 N.C. App. at 631, 230 S.E. 2d at 612. Although the defendant's undertaking in *Burns* was in excess of the statutory amount, we questioned whether defendant had the control of a general contractor. Similarly, while defendant's contract, in this case, was well in excess of the statutory amount, defendant did not have the requisite control.

Plaintiff urges this court to disregard the interpretation of G.S. 87-1 in *Vogel, supra*, as "obiter dictum"— words "entirely unnecessary for the decision of the case." Black's Law Dictionary, 5th Ed. In *Vogel*, a subcontractor sued to recover damages for breach of its contract. The Supreme Court analyzed and construed G.S. 87-1 to find that a subcontractor was not required to be licensed under the statute. The construction of G.S. 87-1 was central to the *Vogel* decision and cannot be disregarded as mere dicta.

"In construing statutes, . . . the rule is almost universal to adhere to the doctrine of stare decisis," *Hill v. R.R.*, 143 N.C. 406, 430, 55 S.E. 854, 866 (1906). We do not have the prerogative to do other than follow what we interpret as the meaning of the *Vogel* decision. *See, Insurance Co. v. Insurance Co.*, 9 N.C. App. 193, 175 S.E. 2d 741 (1970), *reversed*, 279 N.C. 240, 182 S.E. 2d 571 (1971).

Under the doctrine of stare decisis, we uphold the rule developed by this court that a general contractor is one with control over a construction project. *See, Phillips, supra; Roberts, supra; Burns, supra; Helms, supra.* The need for certainty and stability in the law requires that past decisions deliberately made after ample consideration not be disturbed except for the most cogent reasons. *Williams v. Hospital*, 237 N.C. 387, 391, 75 S.E. 2d 303, 305 (1953). Plaintiff, in this case, does not present cogent reasons for reversing settled law.

The consequences to plaintiff by allowing defendant to enforce the contract will not perpetuate palpable error. *See Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 206 S.E. 2d 141 (1974). Plaintiff hired a construction manager to supervise the entire construction project. Defendant's work was subject to the approval of the construction manager, who had necessary building and construction permits. The supervision of the construction manager over each separate trade contractor was ample protection for plaintiff against the possible incompetency of any of its trade contractors. The consequence of allowing defendant to enforce the contract is that the parties will proceed to arbitration to settle their dispute. By allowing defendant to enforce the contract, we do not perceive any grievous harm to plaintiff mandating a change in existing law.

It is a recognized principle of statutory construction to construe a statute which carries with it criminal penalties in favor of the party against whom the statute is being applied. *See, Vogel, supra; see also State v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567 (1940). A violation of the licensing requirements in G.S. 87-1 subjects the violating party to criminal penalties under G.S. 87-13. Construing the statute and judicial interpretation pursuant thereto in the light most favorable to defendant, we find that defendant was not a general contractor within the meaning of G.S. 87-1. We, therefore, affirm the order of the trial court.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. STEPHEN CHRISTOPHER HUNT

No. 8229SC1119

(Filed 20 September 1983)

1. Criminal Law § 75.2— confession—psychological coercion—continued interrogation after request for parents

Defendant's confession was the result of psychological coercion and was thus inadmissible in evidence where defendant was only sixteen years of age; from 10:30 in the morning when he was first picked up until approximately 4:30 in the afternoon, after he confessed, he only came in contact with police officers; though defendant repeatedly denied any involvement in the crimes, the police just as repeatedly told him they did not believe him and knew he was involved; defendant was given a voice stress test and was then told by several officers that the test showed he was lying; the officers told defendant that it would be easier on him if he told them about his involvement in the crimes; after defendant's repeated denials to white officers, his interrogators brought in a black officer who was not connected with the investigation of the case; this officer told defendant that he knew his father and that his father would want him to tell him about it; defendant asked for his mother, but did not get to see her before making the statement; and as he was waiting for his mother to come, the black officer told defendant that he was "wasting time." Furthermore, defendant's confession was improperly obtained for the additional reason that officers continued their interrogation of defendant after he stated that he did not want to answer further questions without his parents being present.

2. Constitutional Law § 30— denial of discovery requests—violation of right to fair trial

In a prosecution for murder, burglary and conspiracy to commit burglary in which the State's chief witness professed to recall the crimes and that defendant participated with him and two others in them only after undergoing hypnosis at the suggestion of the police, and in which the witness shortly thereafter underwent a court-ordered psychiatric evaluation, negotiated a plea, and received a recommendation of a light sentence, defendant's right to a fair trial was violated by the trial court's denial of his pretrial motions seeking to obtain (1) the written psychiatric evaluation; (2) an independent psychiatric examination of the witness; (3) disclosure of inducements to any prosecution witness or family of a witness; (4) disclosure of the full circumstances leading to the plea agreement; and (5) disclosure of the full circumstances leading to the witness's hypnosis.

APPEAL by defendant from *Seay, Judge*. Judgments entered 28 May 1982 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 13 April 1983.

The defendant, after trial, was found guilty of second degree murder, first degree burglary, and conspiracy to commit second degree burglary.

At approximately 10:45 o'clock on the morning of January 8, 1982, the pajama-clad body of 88-year-old Nannie Newsome was found lying face down in the yard immediately behind the building next door to where she lived. The distance between Ms. Newsome's body and her house was approximately 175 yards. Ms. Newsome lived alone. There is a ball field located about a hundred yards or more behind her house.

Police were called to the scene and arrived shortly thereafter. Upon their investigation of the scene, the police found that Ms. Newsome's house consisted of three levels, an upstairs, a downstairs and a basement. There was a screened porch in back of the house. The police discovered that the screen was torn back from the top and was falling down, with the bottom pushed out. They found one tennis shoe print in the dust and dirt in the basement. The dust and dirt had been tracked up the steps, the rear door was standing open, and the lock had been busted on it. Portions of the lock and the wooden portions of the door were lying inside the kitchen area of Ms. Newsome's house. The front door was locked.

Upon examination of the ball field behind the house, investigating officers discovered other footprints in the ball field. However, there were no footprints discovered between the house and the ball field. The prints in the ball field were of a tennis shoe and a barefoot print. The prints were found approximately 300 yards from Ms. Newsome's body.

The investigating officers processed the scene and lifted several fingerprints from inside of the house, including prints from the wooden door which had been knocked in. A plaster cast was made of the footprint found in the basement. An examination of the prints in the ball field revealed that there were two sets of footprints in the ball field, one belonging to a barefoot person, the other belonging to a person with tennis shoes on. The officers determined that the barefoot prints were those of Ms. Newsome, based upon a deformity in the toe print which was similar to her toe. The tennis shoe print in the ball field appeared to be similar to the tennis shoe print found in the basement of the house.

The plaster cast of the tennis shoe print and the fingerprint lifts were all submitted to the State Bureau of Investigation laboratory for analysis. In addition, hair fibers found on a sheet which covered Ms. Newsome's body, hair fibers from her body, and hair fibers from several suspects were also submitted for analysis.

The autopsy report confirmed that there were superficial cuts and bruises on the face, torso, arms, legs and lower extremities and feet of the body. There were tears in the vaginal canal and bruises in the vaginal area. In the opinion of the medical examiner, Ms. Newsome died from a heart attack during strangulation and sexual assault.

The investigating officers began questioning people in the surrounding community. Among those questioned were Otis Forney and his brother, Maurice Forney. Upon initial questioning, both Forney brothers denied any knowledge of any events at Ms. Newsome's house during the morning of January 8. However, the SBI laboratory analysis revealed that the hair fibers lifted from the sheet which covered Ms. Newsome were microscopically consistent with Otis Forney's head hair.

The police questioned Maurice Forney after Otis Forney was questioned. He continued to assert that he had no knowledge of

any events at Ms. Newsome's house. For a period of approximately two weeks after Ms. Newsome's body was found, Maurice Forney knew nothing of the details of her death.

After Forney had been questioned several times by the police, he took a polygraph examination. After that, someone convinced him that he was not telling the truth. Thereafter, he agreed to submit to hypnosis. He was hypnotized on two separate occasions and was asked questions about Ms. Newsome's death while under hypnosis. It was while under hypnosis that Maurice Forney first imagined that he was at Ms. Newsome's house on January 8th and had knowledge of the details of Ms. Newsome's death and imagined that he was involved. While under hypnosis, he thought that Lester Flack had come to his house and took him on his shoulder a mile up the road to Stephen Hunt's house and a mile back down the road to Nannie Newsome's house. After undergoing hypnosis, Forney implicated himself, Stephen Hunt, Lester Flack and Richard Flack.

Forney claimed to be an unwilling participant in a break in to the Newsome home and a physical and sexual assault upon Ms. Newsome during the early morning hours of January 8th. He testified that Lester Flack had come to his house and gotten him, and then had gone by Stephen Hunt's and gotten him, and the three of them had gone to Ms. Newsome's house.

Soon after the police obtained Maurice Forney's statement, members of the Rutherford County Sheriff's Department went to the school where Stephen Hunt was enrolled, picked him up, and took him to the Sheriff's Department for questioning. He was questioned there for several hours, at the end of which he made an oral statement implicating himself, Forney and the Flack brothers in a break in of Ms. Newsome's house and an assault upon her.

At the time defendant made his statement, he was sixteen years old, living at home with his parents, had requested their presence, had been told they were coming, but was wasting time by waiting on them. Immediately after he made the oral statement, he was asked to make a signed statement and to record the statement. He refused to do either one. Shortly afterwards, he was taken to the jail, where he wrote out a statement repudiating the oral statement that he had made.

Defendant testified that on the night of January 7th and through the morning of January 8th, he was at home with his mother and father. This testimony was corroborated by both his mother and father.

None of the physical evidence from the scene was in any way connected with Stephen Hunt.

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

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, by James E. Ferguson, II, for defendant appellant.

PHILLIPS, Judge.

[1] We are obliged to hold that defendant's confession was improperly received in evidence against him. The record reveals that it was obtained in violation of his right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. Though no physical force was involved, the circumstances recorded nevertheless indicate a coercively obtained, rather than a voluntarily given, statement, and though a *Miranda* warning was given at the beginning of the interrogation, the record shows beyond question that his rights were thereafter violated when the police continued their interrogation and obtained the statement after the inexperienced and youthful defendant told them he did not want to answer any more questions until his parents arrived.

This case is controlled by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). *Miranda* bars the use of statements stemming from custodial interrogation of the defendant if strict procedural safeguards are not met. *Id.* at 444. "Custodial interrogation" means questioning initiated by the police "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* North Carolina has adopted an objective test of "custodial interrogation" that asks whether a reasonable person would believe under the circumstances that he was free to leave. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). In the present case, the duration and location of the questioning, the number of police in-

volved, the defendant's youth and inexperience, and his request for his parents all indicate that defendant had no idea at all that he was free to leave, but rather believed that he was subject to the control of the officers and acted accordingly.

From 10:30 in the morning when he was first picked up until approximately 4:30 in the afternoon, after he had made his statement, he only came in contact with police officers. He did not see his parents, a lawyer, or other friendly adult. Though he repeatedly denied any knowledge of or involvement in the crime, the police just as repeatedly told him they did not believe him and knew he was involved. He was given a voice stress test and then told by several officers that the test showed he was lying. The officers told him that it would be easier on him if he told them about his involvement in the crime and that he would be wise to tell them about it. After his repeated denials to white officers, his interrogators brought in a black officer who was not connected with the investigation of the case. This officer told him that he knew his father and that his father would want him to tell him about it. A white officer had previously told him that if he were his son, he would tell him to go ahead and tell about it. The defendant asked for his mother, but did not get to see her before making the statement. As he was waiting for his mother to come, the black officer told him that he was "wasting time." Thus, not only was the interrogation "custodial," it was also psychologically coercive.

But even if that was not the case, it is clear that the defendant's statement was improperly obtained for another *Miranda* reason. Although defendant was initially given the required *Miranda* warnings, the police failed to respect his constitutional rights after he stated he did not want to answer further questions without his parents being present. Continuing with their interrogation, as they admittedly did, notwithstanding his request to the contrary, was a clear and direct violation of *Miranda*, *supra*, at 473-74:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be

other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Upon retrial, therefore, the statement obtained from defendant during the custodial interrogation cannot be used in evidence against him.

[2] With considerable justification, the defendant contends that his rights to a fair trial were also violated by several rulings of the trial court that unduly shielded the witness Maurice Forney from defendant's scrutiny and inquiry. A more justifiable basis for a defendant on trial for grave felonies being allowed wide latitude in discovering the mental status of a prosecuting witness, and how he came to be one, can scarcely be imagined. No physical evidence connected defendant with the crime and Forney was the main witness against him; but, according to the record, for two weeks after the crime, Forney truthfully maintained to the officers that he knew nothing whatever about the crime and was not involved in it. After undergoing hypnosis at the suggestion of the police, however, Forney professed to recall the crime and that defendant participated with him and several others in it; and shortly thereafter, he underwent a court-ordered psychiatric evaluation, negotiated a plea, and a light sentence was recommended for him. Obviously, information bearing upon Forney's mental and emotional stability, why hypnosis was needed to reactivate his memory, how he came to agree to it, and the circumstances that led to the plea bargain was essential to defendant's case and should have been made available to him upon request.

In pretrial motions, defendant sought to obtain (1) the written psychiatric evaluation; (2) an independent psychiatric examination of Forney; (3) disclosure of inducements to any prosecution witness or family of a witness; (4) disclosure of the full circumstances leading to the plea agreement; and (5) disclosure of the full circumstances leading to hypnosis. Each motion was denied, erroneously so, in our opinion.

The court apparently withheld the psychiatric evaluation report under the mistaken impression that it was required to do

so by statute. Though the examination was made for the purpose of establishing Forney's capacity to plead to the indictment against him pursuant to the provisions of G.S. 15A-1002, and that statute does require the hospital to give copies of its report only to the court and the examinee, it expressly authorizes the court to handle its copy as it sees fit and to reveal its contents to others under such conditions as are deemed appropriate. But even if the statute required that Forney's privacy be kept inviolate, since he had negotiated a plea and his fair trial rights were no longer involved, it would have to yield to the superior constitutional rights that are here involved. *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973).

This case is similar to and governed by *Chavis v. North Carolina*, 637 F. 2d 213 (4th Cir. 1980). In that case the trial court granted the motion for production of a psychiatric report of a prosecuting witness, but the State failed to provide the defendant with a copy. In holding that the defendant's due process rights were violated, the Court noted, however, that the report, which was in the record, contained information helpful to defendant. The State attempts to distinguish *Chavis* from this case for that reason, pointing out that the defendant has not shown that he has been prejudiced by his failure to obtain the report. Yet the defendant did move that the report be sealed and included in the record for appellate review, but the trial judge refused to do so, which was error. *State v. Hardy*, 293 N.C. 105, 128, 235 S.E. 2d 828, 842 (1977). Since defendant's only means of showing prejudice was erroneously barred by the trial court, prejudice is assumed.

The record reveals no reason for denying defendant's request for an independent psychiatric examination of Maurice Forney, and none was given. This witness was able to testify only through the aid of hypnosis, which on its face raised legitimate questions as to the witness's mental reliability, stability, and suggestibility—questions requiring qualified scientific appraisal, not only for the enforcement of defendant's due process rights, but also for the guidance of the court and jury in assessing such bizarre circumstances. The record contains no indication that Forney was unwilling to be examined again, but even if he was, since he and the State opened the psychiatric door by resorting to hypnosis, they cannot close it to the defendant without imping-

ing upon his constitutional rights to a fair trial, which, under these unusual circumstances, can be protected only in this way. For similar reasons, the other information requested by defendant in the several motions referred to should have been furnished.

This matter is returned to the Superior Court for a new trial in accord with this opinion.

New trial.

Judges HILL and JOHNSON concur.

FRED FRANKLIN BECK, JR. v. BARBARA TAVES BECK (WADE)

No. 821DC1085

(Filed 20 September 1983)

1. Divorce and Alimony § 23.3— child custody—jurisdiction over contempt proceeding

North Carolina properly had jurisdiction over a contempt proceeding where the original order of custody had been entered in this State, appellee's cause of action was a motion in the cause filed in the original action, it was filed prior to a Pennsylvania action in which visitation privileges were temporarily suspended, and where the Pennsylvania court made no finding on the record proper that it had jurisdiction or that jurisdiction had been exercised pursuant to the Uniform Child Custody Jurisdiction Act, or that the appellee had an opportunity to be heard prior to the entry of the temporary order pursuant to G.S. 50A-4. Under North Carolina case law, matters of custody, which include visitation rights under G.S. 50A-2(2), are pending until the death of one of the parties or the child reaches the age of majority. G.S. 50-13.3(a), G.S. 50A-14, and G.S. 50A-4.

2. Divorce and Alimony § 23.4— child custody—contempt proceeding—service of process sufficient

Service of process on defendant's attorney was sufficient to obtain personal jurisdiction on defendant by the North Carolina court where the attorney generally handled the legal affairs of defendant, and where the attorney appeared as counsel of record and where he had been properly served as attorney of record.

3. Divorce and Alimony § 25.12— child custody—contempt proceeding—failure to turn over child for visitation

There was no merit to defendant's argument that she could not be adjudged guilty of contempt for failure to turn over the minor child when the

father never came to visit him where the evidence tended to show that defendant had not allowed visitation pursuant to a custody order and the plaintiff was unable to exercise his visitation rights because of the willful, deliberate and wrongful acts of the appellant.

APPEAL by defendant from *Parker, Judge.* Judgment entered 2 July 1982 in District Court, DARE County. Heard in the Court of Appeals 1 September 1983.

Plaintiff moved the Court for an Order requiring defendant to appear and show cause, if she has any, why she should not be punished for contempt for failure to make the minor child born to the parties available for visitation as provided in an Order of the District Court of Dare County on 3 September 1981, and for attorney fees. Custody had previously been awarded to defendant. The trial judge denied defendant's Motion to Dismiss, received evidence, made findings of fact and conclusions, and thereupon entered an order punishing the defendant for civil contempt, stayed execution thereof to allow the defendant an opportunity to purge herself, fined defendant, directed the defendant to deliver the child to plaintiff and otherwise comply with the original Order entered in the cause. Defendant appealed.

Barbara Taves Wade, pro se, for the appellant.

G. Irvin Aldridge for the appellee.

HILL, Judge.

Appellant argues the trial judge erred in denying her Motion to Dismiss for lack of jurisdiction over the subject matter on the grounds that a prior order had been entered concerning the custody of the child in the State of Pennsylvania. We conclude, however, the trial court properly found that North Carolina had jurisdiction over this contempt proceeding.

The following facts appear. Appellant and appellee were married in 1978. Following a separation and divorce, the child was placed in the custody of the appellant mother on 3 September 1981, with visitation privileges and transportation responsibility allotted to the appellee father. On 18 September and 1 October following, the father visited with the child. On 14 October 1981 the mother and child moved to Pittsburgh, Pennsylvania. At that time the mother advised the father by telephone that the child

could be picked up for visitation at 1737 Noblestown Road in Pittsburgh. The mother further advised the father by letter nine days later the child could be picked up at this address.

The father subsequently called the Beachcomber Motel at Nags Head where his wife had previously stayed with the child and was advised the child was not there. He made telephone calls on at least two occasions to 1737 Noblestown Road and was advised the child would be in after 5:00 p.m., but that the child did not live there. At no time did the father go to Pennsylvania to pick up the child.

On 3 May 1982 the father caused this motion in the cause to be filed and served on Leonard Logan, a North Carolina attorney who had represented the mother in the previous action. Thereafter, in an action instituted six months and twenty days after the mother left North Carolina to reside permanently in Pennsylvania, the Court of Common Pleas of Allegheny County, Pennsylvania, entered the following Order on 17 June 1982:

ORDER OF COURT

AND NOW, this 17th day of June, 1982, upon ex parte argument by Bradley Gelder, Esquire and Robert Raphael, Esquire, and following the unsuccessful attempts of the court to communicate with Judge J. Richard Parker, Dare County, North Carolina, and based upon allegations of the possibility of serious emotional harm to the parties' son, Barrett Templeton Beck, if the defendant, Fred Beck, Jr., were to comply with the "visitation" granted to him by Judge Parker's Order of February 3, 1982, and it appearing further that the best interests of said child would be promoted with little or no accompanying harm to the defendant by the entry of this order;

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the plaintiff, Barbara Wade, shall not make the parties' son, Barrett, available for the aforesaid visitation until a further conciliation and, if necessary, hearing can be held which shall be scheduled before the undersigned at 2:30 P.M. June 25, 1982, which conciliation shall be in lieu of that originally scheduled before the undersigned on July 14, 1982. COUNSEL FOR PLAINTIFF ARE DIRECTED TO EFFECTUATE APPROPRIATE SERVICE OF THIS ORDER.

On 23 June 1982 Attorney Leonard Logan moved the North Carolina District Court to dismiss the appellee's motion as provided in Rule 12(b) of the Rules of Civil Procedure, contending that North Carolina is an "inconvenient forum" and the Family Division of the Court of Common Pleas in Allegheny County, Pennsylvania is "a more appropriate forum." Attorney Logan attached a copy of appellant's complaint for custody pending in the Pennsylvania court and the order set out above. The trial judge in North Carolina denied appellant's motion to dismiss, heard testimony, made findings of fact including the record docketing the Pennsylvania decree in the Dare County Clerk's Office, concluded that appellant had not made a good faith effort to comply with the Order entered in North Carolina, and entered judgment requiring appellant to be punished for contempt, but stayed execution on certain conditions. The appellant contends North Carolina is not the proper jurisdiction to determine custody of the child. We disagree.

[1] North Carolina and Pennsylvania each have enacted the Uniform Child Custody Jurisdiction Act. G.S., Chap. 50A. The Act mandates the recognition of out-of-state custody decrees, and encourages the continuing jurisdiction of the court which entered the original custody decree. G.S. 50A-14 provides:

> (a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

We must determine, therefore, whether the Dare County District Court, which entered the original custody decree, either lacks jurisdiction or has declined to assume jurisdiction to modify its decree.

There is no suggestion that the North Carolina court has ever declined to assume jurisdiction in this matter. The original order of custody had been entered in this state, and appellee's cause of action was a motion in the cause based on the original action, filed prior to the Pennsylvania action, which was *ex parte* and temporary in nature, and was not served on appellee. Nor

was appellee present in Pennsylvania when the action was taken. The Pennsylvania court made no finding on the record proper that it had jurisdiction or that jurisdiction had been exercised pursuant to the Uniform Child Custody Jurisdiction Act, or that the appellee had an opportunity to be heard prior to the entry of the temporary order pursuant to G.S. 50A-4. The Court simply found that it made unsuccessful attempts to communicate with the North Carolina judge in Dare County, that the father would not be harmed by the order, and that based on allegations of possible emotional harm to the child if visitation were granted the father, the mother should not make the child available until further hearing and conciliation made on June 25, 1982.

As to North Carolina's continuing jurisdiction, we look to North Carolina law. G.S. 50-13.3(a) provides that "[a]n order providing for the custody of a minor child is enforceable by proceedings for civil contempt . . . ." Under North Carolina case law, matters of custody, which include visitation rights under G.S. 50A-2(2), are pending until the death of one of the parties or the child reaches the age of majority. *Johnson v. Johnson*, 14 N.C. App. 378, 188 S.E. 2d 711 (1972). "[T]he hands of the courts would be effectively tied if they had no jurisdiction to enforce the orders they entered." *Morris v. Morris*, 42 N.C. App. 222, 256 S.E. 2d 302 (1979). North Carolina's continuing jurisdiction clearly satisfies "jurisdictional prerequisites substantially in accordance with this Chapter" as required by G.S. 50A-14 of the Uniform Child Custody Jurisdiction Act. Therefore, North Carolina properly had jurisdiction over the contempt proceeding, and appellant's first assignment of error is overruled.

[2] We next conclude that service of process on Leonard G. Logan, Jr. was sufficient to obtain personal jurisdiction on the appellant by North Carolina. It is undisputed that a copy of the motion to show cause was served on the attorney Leonard Logan by mail, and the order to show cause signed by the trial judge was served personally on the attorney as well. An attorney who generally handles the legal affairs for an individual is not an agent of that person for the service of process *unless* he makes an appearance in the lawsuit for him. The court found as a fact that Leonard G. Logan, Jr. appeared as counsel of record and that he had been properly served as attorney of record. No objection to service was raised. No exception appears in the records to these

findings. Therefore, the service on the attorney was the same as service on the appellant.

[3] Appellant argues she may not be adjudged guilty of contempt for failure to turn over the child when the father never came for him. We do not agree. The trial court found in its order of 23 June 1982 that the appellant had not allowed visitation pursuant to the order of 3 September 1981. The trial court's findings in this regard were supported by competent evidence. At the time of the entry of the original judgment the minor child was residing with his mother at the Beachcomber Motel in Nags Head. The appellee picked up the child at this location on alternate weekends. When he called to verify the pick up for the third visitation period, someone at the motel advised appellee the child was not in, and on the following day the appellant advised the appellee the child could be picked up at 1737 Noblestown Road in Pittsburgh, Pennsylvania, giving him a telephone number at the garage operated by a man to whom she is presently married. Appellee saw appellant after 27 October 1981 in Dare County, and the appellant advised him the child was with his grandparents. Appellee called the Beachcomber Motel as well as the telephone number given him by appellant and got no information as to the whereabouts of the child. On one occasion the appellant returned to North Carolina with the child but did not notify appellee. In fact, the residence of the child was first revealed by the grandmother during the contempt hearing held on 23 June 1982. It is apparent the appellee was unable to exercise his visitation rights because of the willful, deliberate and wrongful acts of the appellant. The record is replete with findings by the trial judges showing plaintiff's efforts to keep in touch with his son by mail, telephone calls, and otherwise. In contempt proceedings, findings are conclusive on appeal when supported by the record. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978); *Lee v. Lee*, 37 N.C. App. 371, 246 S.E. 2d 49 (1978). The appellant's assignment is overruled.

We have examined appellant's remaining assignments of error and find them without merit.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur in the result.

IN THE MATTER OF: CATHERINE DIANE THOMPSON

No. 8321DC370

(Filed 20 September 1983)

Infants § 4— neglected child—sufficiency of evidence

A 5-year-old child was a "neglected" child within the meaning of G.S. 7A-517(1) where the evidence showed that respondent mother, as a disciplinary measure against what she viewed as her child's improper sexual conduct, struck the child with a belt and, on at least three occasions while bathing the child, inserted her finger or a wash cloth into the child's vagina and washed with sufficient force to cause the child to bleed, and where a pediatrician who examined the child and a social worker recommended that the child be evaluated to determine if she was developing normally and to have the child treated if necessary, but respondent mother refused to permit evaluation of the child by the Child Guidance Clinic. Therefore, the trial court erred in dismissing a petition by a county department of social services for an order directing respondent mother to accept and cooperate with petitioner's Protective Services for Children and to permit evaluation and appropriate treatment of the child by the county Child Guidance Clinic.

APPEAL by Guardian ad Litem from *Tanis, Judge.* Order entered 16 December 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 26 August 1983.

Petitioner, Forsyth County Department of Social Services (DSS) filed a juvenile petition on 4 November 1982, alleging that Catherine Diane Thompson, a minor, is a neglected child as defined by G.S. 7A-517(21) in that the child does not receive proper care, supervision or discipline from her mother, the respondent. The petition alleged specifically that on or about 26 October 1982 the mother inflicted upon the child's face linear bruises, caused injuries to the child's vaginal area by excessive washing, and that the mother had admitted to DSS that such vaginal abrasion had also occurred during past washings of the child. The petition alleged further that upon investigation, DSS determined that in

order to insure that the child receives proper care and supervision the child would require evaluation and appropriate treatment at the Child Guidance Clinic of Forsyth County and that the mother would require evaluation at the Family Counseling Unit of the Department of Social Services.

A hearing on the merits of the petition was held on 16 December 1982. The testimony presented by the petitioner tended to show that on 27 October 1982, Daisy Chambers, principal of Latham School, called the Forsyth County Department of Social Services and reported that Catherine Thompson, a five year old pre-kindergarten student, had a bruised face and had complained that the mother had been "digging into" her vagina with her finger or a washcloth during baths. Mrs. Chambers checked the child's underwear and observed some spots of blood.

Stephanie Hayes, a social worker from the Child Protective Service of the Forsyth County Department of Social Services, went to Latham School and spoke with the child. Catherine repeated the complaint, stating that her mother was angry with her for straying down the street; that her mother hit her on the face with a belt and threw her on the floor. The child was then given a doll and she demonstrated the treatment she had received. Catherine told Ms. Hayes that after being struck, her mother placed her in the bathtub, opened her legs and "dug into" her with a washcloth. Further, that although she was crying at the time, her mother proceeded to lay her on a towel on the bed to "check her" and "dig some more." Catherine stated that this happened at each bath and that she often bleeds.

After leaving Latham School, Ms. Hayes went to the child's home and talked with her mother, Marie Hynes. Ms. Hynes admitted that she had often bathed Catherine by scrubbing her vaginal area because she was concerned that the child was masturbating excessively. Ms. Hynes also acknowledged that she had been upset with Catherine the night before, had struck the child with her hand and then scrubbed her because she had been flirting with some of the little boys in the neighborhood. Ms. Hynes stated that she felt this was an appropriate disciplinary measure to curb her child's sexual exploration.

Later that afternoon, with the consent of her mother, Catherine was taken to Reynolds Health Center where she was ex-

amined by Dr. Michael Lawless, a pediatrician. Dr. Lawless testified that his examination revealed a linear bruise on the child's forehead, a second oval bruise on the side of her face, a third bruise on her chest, and significant irritation and abrasion of the internal genital area which oozed blood easily. Dr. Lawless testified that it was not likely that the linear forehead bruise had been caused by a human hand, but rather was consistent with being hit with a belt.

Dr. Lawless also testified that he discussed proper methods of feminine hygiene with Ms. Hynes and recommended that Catherine be evaluated by the Child Guidance Clinic to be sure she was developing normally. He also discussed Ms. Hynes' background and she revealed to the doctor that she had been sexually abused as a child. Dr. Lawless then indicated that Ms. Hynes might be overreacting to her child's sexual development in light of her own childhood experience and suggested that she accompany Catherine to the Child Guidance Clinic, and that both could benefit from some counseling. He then made a referral for the child to the Clinic.

In following up on her initial investigation, Ms. Hayes found that Ms. Hynes had not taken the child to be evaluated. Ms. Hynes stated to her that she did not feel it was necessary to take Cathy to the Clinic since she had already discussed proper hygiene with Dr. Lawless. During this visit, Mr. Cordell Roudy, Ms. Hynes' boyfriend, told Ms. Hayes that Catherine's mother did not need to be told how to raise her child and ordered the social worker from the home with a curse after threatening to hit her.

The respondent mother offered the testimony of several neighbors to show that they had no knowledge of any abuse of the child, that the child was well fed and clothed, that the Hynes' home was very neat and that Ms. Hynes was a good mother.

After hearing the testimony of all parties and the arguments of counsel, the district court found as a fact that Catherine's mother had become upset with her, struck her with a belt, and had washed her genital area with sufficient force to cause the child to bleed on at least three occasions. The court also found that the pediatrician had reported several bruises on the child; that he had observed internal abrasions of the child's genitals which oozed blood easily; that he had referred the child to the

Child Guidance Clinic for evaluation, but that Ms. Hynes refused to follow through with that recommendation. In addition, the court found that Ms. Hynes' home was usually well kept and Catherine was well fed and well clothed.

Finally, the court found that the petitioner and the child's guardian ad litem both recommended that the child be evaluated to determine if the child was developing normally and to have the child treated if necessary; that Ms. Hynes accept and cooperate with Protective Services for Children of Forsyth County DSS; and that Ms. Hynes receive counseling with the Family Counseling Unit of DSS, in order to better cope with her child's sexual development.

Based upon these findings, the court concluded as a matter of law that Catherine was not a neglected child as defined by G.S. 7A-517(21) and the petition was dismissed. The child's guardian ad litem appeals the dismissal of the petition on the grounds that the facts as found by the court do not support its conclusions of law and consequent dismissal of the petition.

Connolly, O'Toole & Sherman, by Daniel E. O'Toole, for the juvenile appellant.

No brief filed, for the respondent appellee.

JOHNSON, Judge.

It is unchallenged, and the court found, that the five year old child Catherine was struck with a belt by her mother and then scrubbed until she bled into her bath water, as a disciplinary measure against what her mother viewed, correctly or incorrectly, as her child's improper sexual conduct. Ms. Hynes, the child's mother, stated that she felt this was an appropriate disciplinary measure, and the court found that the child bled from this rough handling on at least three occasions. The results of these disciplinary measures were multiple bruises and abrasions. The child's examining pediatrician, guardian ad litem, and the petitioner DSS all recommended that the child be evaluated by the Child Guidance Clinic of Forsyth County to determine if the child was developing normally and to have the child treated if necessary and the respondent mother, after being so advised, failed to take the child to be evaluated. However, the court concluded

that Catherine was not a neglected child as defined by G.S. 7A-517(21).

The issue presented in this appeal is whether a child who is found to have been disciplined so severely that bruises and internal abrasions result is a "neglected" juvenile within the meaning of G.S. 7A-517(21). A neglected child is defined by that statute, in pertinent part, as a "juvenile who does not receive proper care, supervision, or discipline from his parent . . . 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 . . ." We conclude that Catherine is a neglected juvenile under this definition and hold that, on the facts found, the court erred by dismissing the petition.

At the outset, it must be noted that this is not a petition seeking termination of the respondent mother's parental rights. It appears from the juvenile petition and the court's order that the Department of Social Services sought an order primarily directing the respondent mother to accept and cooperate with the petitioner's Protective Services for Children and to have the child evaluated by the County's Child Guidance Clinic.

The district court's findings of fact establish that the respondent mother struck her child with a belt and, on at least three occasions while bathing the child, inserted her finger or a washcloth into the child's vagina and washed with sufficient force to cause the child to bleed. Under G.S. 7A-517(21), a child who does not receive proper care, supervision or discipline is a neglected juvenile. In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful. *See In re Huber*, 57 N.C. App. 453, 291 S.E. 2d 916, *disc. rev. denied*, 306 N.C. 557, 294 S.E. 2d 223 (1982); *In re Cusson*, 43 N.C. App. 333, 258 S.E. 2d 858 (1979); *In re McMillan*, 30 N.C. App. 235, 226 S.E. 2d 693 (1976) (willful failure and refusal to send children to school constitutes neglect). Should the mistreatment rise to the level of an injury which creates a substantial risk of impairing the health of the child, it would constitute abuse under G.S. 7A-517(1). The injuries sustained by Catherine Thompson were not found by the court to have been of a serious nature. However, the bruises and abrasions resulting from Ms. Hynes' disciplining of her five year old

child against what she perceived as her child's improper sexual conduct show methods of care and discipline which are below normal standards, and therefore, establish neglect under G.S. 7A-517(21).

Moreover, decisions of courts in other jurisdictions support the view that "neglect" does not necessarily require a finding of nonfeasance by a parent; malfeasance just as readily qualifies as improper care or discipline. *See In re Jackson*, 81 Ill. App. 3d 136, 400 N.E. 2d 1087 (1980) (physical abuse alone would have supported the finding of neglect); *In Interest of Jones*, 59 Ill. App. 3d 412, 376 N.E. 2d 49 (1978) (a conclusion of neglect sustained upon findings that child had burns on his feet inconsistent with his parents' explanation); *In Interest of S.W.*, 290 N.W. 2d 675 (N.D. 1980) (child found to be "deprived" rather than abused as a result of sustaining multiple bruises from her father's excessive punishment; such punishment falling below minimum standards of care tolerable by the community); *see generally* 17 Ariz. L. Rev. 1055 (1975).

Furthermore, the facts as found by the district court establish that a physician and social worker found the child in need of evaluation and that her mother refused to cooperate. Based upon the testimony of Dr. Lawless, the court found that the doctor examined the child, discussed her condition with her mother and recommended that the child be evaluated by the Child Guidance Clinic. The testimony indicates that the doctor's concern was twofold. First, the mother reported what she considered to be excessive self-manipulation by the child. Second, Ms. Hynes told Dr. Lawless that she had been abused as a child and he expressed his concern that the mother was overreacting to her five year old child's normal curiosity. He then suggested that she accompany the child to counseling and made a referral to the Clinic. The social worker, Ms. Hayes, attempted to facilitate the pair's visit to the Clinic, however, despite these efforts Ms. Hynes did not take Catherine to be evaluated.

This Court, in *In re Cusson, supra*, found that a mother's keeping of her son from therapeutic daycare would constitute a finding that the child was neglected under G.S. 7A-278(4), [predecessor to G.S. 7A-517(21)], in that the child did not receive proper care or discipline or was not provided necessary medical

care. 43 N.C. App. at 336, 258 S.E. 2d at 860. Similarly, in *In re Huber, supra*, a child was held to be a "neglected child" within the meaning of G.S. 7A-517(21) where the child had a severe speech defect which was treatable, but the mother refused to allow the child to receive the necessary medical and remedial care that would allow the child to develop to her full educational and emotional potential. In *Huber* this Court observed that to "deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child." 57 N.C. App. at 458, 291 S.E. 2d at 919. *See also In the Matter of Ray*, 95 Misc. 2d 1026, 408 N.Y.S. 2d 737 (1978) (a mother's failure to follow through on plans for psychological treatment for her child's hyperactivity as recommended by health officials constituted neglect).

The court's findings regarding the pediatrician and social worker's recommendations that Catherine be evaluated to determine if she is developing normally and be treated if necessary, and the respondent mother's failure to seek the recommended treatment for her child support the conclusion of neglect by reason of the respondent's failure to provide necessary medical care which would consequently deprive the child of the opportunity for normal growth and development. While they are certainly important, findings that the child's home is clean and that she is well fed and clothed are not dispositive on the issue of neglect. Any child whose physical, mental or emotional condition has been impaired or is in danger of becoming impaired as a result of the failure of his or her parent to exercise that degree of care consistent with the "normative standards imposed upon parents by our society," *In re Huber, supra*, may be considered neglected under G.S. 7A-517(21).

Accordingly, the district court erred by concluding as a matter of law, upon the facts found, that Catherine was not a neglected juvenile, and the order entered must be vacated. This cause is remanded to the district court for further proceedings not inconsistent with this decision.

Vacated and remanded.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. LLOYD ALFRED CANIPE

No. 8213SC1217

(Filed 20 September 1983)

1. **Criminal Law § 138— evidence used to prove aggravating factors different from evidence used to prove crime—improper to use same evidence to prove two aggravating factors**

In a prosecution for larceny by an employee, it was proper for the trial court to use the value of the items taken to prove an aggravating factor since the value of the property was not necessary to prove an element of the crime of larceny by an employee; however, it was not proper for the trial court to use the value of the property stolen to prove more than one aggravating factor. G.S. 15A-1340.4(1) and G.S. 14-74.

2. **Criminal Law § 138— sentencing hearing—prior conviction—no indication defendant indigent or represented by counsel**

The trial court erred in finding as an aggravating factor that the defendant had a prior conviction of driving under the influence of some intoxicating beverage, which was punishable by more than 60 days confinement, since the trial court did not determine whether the defendant was indigent at the prior proceeding, and if so, whether he was represented by counsel or properly waived assistance. G.S. 15A-1340.4(e) and G.S. 15A-980.

APPEAL by defendant from *Preston, Judge.* Judgment entered 1 April 1982 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 1 September 1983.

The defendant was tried on a bill of indictment charging him with larceny by an employee. It was shown at trial that on 30 August 1981, while an employee of Marsh Harbor Golf Club, the defendant took wearing apparel valued at $4,614 from the club's pro shop with the intent to convert it to his own use. The jury found the defendant guilty as charged.

At the sentencing hearing, the State noted that during his testimony at trial the defendant admitted that he had been convicted one time of driving under the influence of some intoxicating beverage, an offense punishable by more than 60 days imprisonment. There was no evidence as to whether he was indigent at that time, whether he was represented by counsel or whether he waived counsel with respect to that prior conviction. The defendant, in turn, offered evidence of his good character and evidence that he had a good reputation in the community.

From this evidence, the court found as aggravating factors: 1) that the offense was committed for hire or pecuniary gain, 2) that the offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband, and 3) that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. As a mitigating factor the court found that the defendant had been a person of good character or had had a good reputation in the community in which he lived.

The offense for which the defendant was charged, larceny by an employee, is a Class H felony, the presumptive prison term for a Class H felony being three years under G.S. 14-74. After weighing the various aggravating and mitigating factors the trial court sentenced the defendant to eight years imprisonment, a sentence from which the defendant appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney K. Michele Allison, for the State.

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

ARNOLD, Judge.

[1] The defendant first contends that the trial judge improperly considered evidence initially used to prove an element of the crime of larceny by an employee to also prove aggravating factors in violation of G.S. 15A-1340.4(a)(1), which states in part that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation."

In order to prove larceny by an employee it must be proved that: (1) the defendant was an employee of the owner of the stolen items, (2) the articles were taken without the assent of the employer, (3) the defendant embezzled the articles of his employer or converted them to his own use, and (4) the defendant had the intent to steal the articles or to defraud his employer thereof. *See* G.S. 14-74.

The evidence presented by the State to prove the element of larceny by employee was that a fellow employee, after seeing the defendant take assorted pants, coats, hats, sweaters and visors out of the pro shop and put them into the defendant's station wagon, subsequently reported what he had seen to Judy Young, vice-president of Marsh Harbor Golf Club. Young then made an inventory and discovered that merchandise totalling $4,614, including 11 jackets, 25 shirts, 43 pairs of pants, 53 sweaters, 15 sunvisors, and 58 caps, was missing from the shop. Young then alerted the sheriff's department of the theft. The defendant was later arrested, at which time his apartment was searched. During that search two or three pairs of pants and two or three shirts similar to those sold at Marsh Harbor were found. This evidence satisfied the requisite elements of larceny by employee as embodied in G.S. 14-74.

The evidence used by the trial judge to find that two aggravating factors had been proved was the testimony that $4,614 worth of merchandise had been taken from the shop, a fact not necessary to prove the crime of larceny by employee. G.S. 14-74 does not require that the value of the stolen property be established. *State v. Monk*, 36 N.C. App. 337, 244 S.E. 2d 186 (1978). Since the trial judge clearly indicated that he based his finding of aggravating factors on the fact that merchandise valued at $4,614 had been taken, the defendant's first contention is without merit.

The defendant also contends, however, that the trial judge improperly used the same item of evidence to prove more than one aggravating factor in violation of G.S. 15A-1340.4. Evidence that merchandise valued at $4,614 was taken was used to show not only that the offense was committed for pecuniary gain, but also to show that the offense involved the taking of property of great monetary value. Conversely, the State argues that the trial judge's finding that the offense was committed for pecuniary gain was based on the *quantity* of articles taken as *subsumed* by the $4,614 figure, while the finding that the merchandise constituted property of great monetary value went to the *value* of the merchandise as *represented* by that same figure. We agree with the defendant.

At the sentencing hearing, held 1 April 1982, the trial court found that:

> [T]he aggravating factor No. 3, the offense was committed for pecuniary gain, applies in that the defendant is convicted of larceny of $4,614 worth of golf visors and other wearing apparel;
>
> Item No. 13 applies in that the offense involved the taking of property of great monetary value, and the Court finds as a fact that $4,614 is great monetary value, and causing great monetary loss to the Marsh Harbor Golf Club. . . .

The State's contention on the one hand that, by referring to $4,614 *worth* of golf apparel, the trial judge considered the quantity of merchandise stolen while, on the other hand, he looked to the value of that merchandise, is basically an attempt to derive two separate items of evidence from what is essentially one fact. We find that the trial court did indeed use a single item of evidence, that golf wear valued at $4,614 was taken from the pro shop, to prove more than one aggravating factor in violation of G.S. 15A-1340.4.

In the recent case of *State v. Ahearn*, the Supreme Court of North Carolina held that "in every case in which it is found that the trial judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983). In light of the Court's decision, we are compelled to order that this case be remanded for a new sentencing hearing. Moreover, the trial court will want to take notice of the fact that G.S. 15A-1340.4(a)(1)(c) has been amended so that a finding of "pecuniary gain" is no longer to be considered an aggravating factor. The statute now reads as follows:

> "c. The defendant was hired or paid to commit the offense." (Amended 15 March 1983.)

There is no evidence that this defendant was hired or paid to take the golf apparel from the Marsh Harbor Golf Club.

[2] According to defendant the trial court further improperly found as an aggravating factor that the defendant had a prior conviction of driving under the influence of some intoxicating beverage, which is punishable by more than 60 days confinement. The defendant relies on the language of G.S. 15A-1340.4(e) which

states in part: "No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter."

There was no evidence offered at trial, however, as to whether the defendant was indigent or represented by counsel when convicted of this prior driving under the influence charge. There was also no evidence that the defendant moved to suppress use of that prior conviction.

Before prior convictions may properly be considered, the trial court must determine whether the defendant was indigent at the prior proceeding, and if so, whether he was represented by counsel or properly waived assistance. *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983). This Court has previously considered the question of whether the burden of proving this prior indigency rests with the defendant or with the State. In the recent case of *State v. Thompson*, it was decided that it was up to the State to show that the defendant was not indigent or that he had waived counsel at the time of his prior conviction. 40 N.C. App. 679, 300 S.E. 2d 29 (1983).

While it may be true that the statute precludes prior convictions from being used as aggravating factors unless defendant was afforded his right to counsel, it is just like any other evidence. In his dissent in *State of North Carolina v. Michael R. Massey*, 62 N.C. App. 66, 302 S.E. 2d 262 (1983), Chief Judge Vaughn made this point. If the defendant in this case was indigent and not represented by counsel at his prior conviction, it was his duty to raise the issue in the trial court and not, for the first time, on appeal. The express language of the statute makes that clear:

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

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

This Court is somewhat divided on this question and awaits clarification from our Supreme Court. However, the General Assembly seems to have removed any doubt when it recently enacted legislation putting the burden in fact with the defendant. While this legislation is not effective until 1 October 1983, attention should be called to the statute which reads as follows:

> § 15A-980. *Right to suppress use of certain prior convictions obtained in violation of right to counsel.*—(a) A defendant, has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:
>
> (1) increase the degree of crime of which the defendant would be guilty; or
>
> (2) result in a sentence of imprisonment that otherwise would not be imposed; or
>
> (3) result in a lengthened sentence of imprisonment.
>
> (b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. *A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.*
>
> (c) *When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel.* To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a). (Effective 1 October 1983.) (Emphasis added.)

Since the defendant in this case must be resentenced, the case is hereby remanded.

Remanded.

Judges WELLS and EAGLES concur in result.

STATE OF NORTH CAROLINA v. LARRY E. WISE

No. 823SC1191

(Filed 20 September 1983)

1. **Constitutional Law § 48— effective assistance of counsel—dismissal of assignment of error**

The record failed to show that defendant was denied the effective assistance of counsel in an assault case because defendant's attorney had previously represented the victim and other prosecution witnesses, and defendant's assignment of error concerning ineffective representation was dismissed so as to permit defendant to seek relief through a post-conviction motion for appropriate relief in the trial court pursuant to G.S. 15A-1415(a).

2. **Criminal Law §§ 113.1, 163— failure to summarize evidence—no "plain error"**

The trial court's failure to summarize evidence favorable to defendant was not "plain error" requiring a new trial even though defendant failed to object to the charge where such evidence did not tend to exculpate defendant and could not have had any prejudicial impact on the jury's finding of guilt. App. Rule 10(b)(2).

APPEAL by defendant from *Peel, Judge*. Judgment entered 26 April 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 31 August 1983.

Attorney General Edmisten by Assistant Attorney General Sarah C. Young for the State.

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

BRASWELL, Judge.

The defendant was convicted by a jury of assault with a deadly weapon with intent to kill and sentenced to the presumptive term of three years. The major issue on appeal is whether the defendant's constitutional right to the effective assistance of counsel was denied because of a conflict of interest created by his

attorney's previous representation of prosecution witnesses. The defendant also contends that the trial court committed error by failing to incorporate facts arising from his evidence into the jury instructions even though no objection to this effect was made at the appropriate time. After careful examination of each assignment of error, we conclude that the defendant's trial was free from prejudicial error.

The State offered evidence showing that the defendant is the father of two children by Shirley McClees. On 25 December 1981, Vanie Smith, Jr., and his friend, Eddie Haskins, were in Ms. McClees' apartment when the defendant and Aaron Miller arrived in the defendant's car. The defendant remained in the car while Miller went to the apartment door and told Haskins that the defendant wanted to talk to him at the car. Haskins complied. Shortly thereafter, Smith, watching from the apartment window, saw the defendant get out of the car and put a handgun into his jacket. Smith then walked out of the apartment holding out his hands to show the defendant that he was not armed. The defendant walked to the door of the apartment, and after accusing Smith of abusing his children, began firing the pistol at Smith. Wounded by the second of three shots fired by the defendant, Smith ran to a neighbor's house where the police and an ambulance were called.

The defendant offered no evidence of his own, but cross-examined each prosecution witness. Eddie Haskins, one eyewitness to the assault, originally stated that the victim had a knife with him, but immediately changed that statement and testified consistently with the other witnesses that the victim had no knife nor had he threatened the defendant in any way. In the course of the proceedings, Reginald L. Frazier, defense counsel, attempted to impeach Haskins through a previous conviction in which Frazier had represented Haskins. Later, Frazier also stated that he had represented the victim, Vanie Smith, Jr., as well as Shirley McClees for many years.

The defendant was found guilty of assault with a deadly weapon with intent to kill. The defendant, with new counsel, appeals.

[1] In his first assignment of error, the defendant claims he was denied effective assistance of counsel due to a conflict of interest

arising from his attorney's previous professional relationship with key prosecution witnesses. This right emanates from the Sixth Amendment right to counsel clause, made applicable to the states through the Fourteenth Amendment, and is also guaranteed by Article I, Sections 19 and 23 of the North Carolina Constitution. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974).

In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), the Supreme Court formally adopted the federal McMann test to gauge the effectiveness of counsel. The test requires that the assistance given by counsel be "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson, supra*, at 771, 90 S.Ct. at 1449, 25 L.Ed. 2d at 773. Obviously, this standard forces the reviewing court to approach this question *ad hoc* and to review the circumstances of each case. *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978). Before the necessary facts can appear in the record, there must be at some point an evidentiary hearing. Therefore, an ineffective representation claim is normally and more appropriately raised in post-conviction proceedings where the defendant may be granted a hearing on the matter with the opportunity to introduce evidence. *State v. Vickers*, 306 N.C. 90, 95, 291 S.E. 2d 599, 603 (1982); *State v. Milano*, 297 N.C. 485, 496, 256 S.E. 2d 154, 160 (1979); *State v. Sneed, supra*, at 612, 201 S.E. 2d at 871 (1974); and *State v. James*, 60 N.C. App. 529, 533, 299 S.E. 2d 451, 453 (1983).

The defendant has not made a motion for appropriate relief in the trial court pursuant to G.S. 15A-1415 which would entitle him to a hearing on any questions of law or fact arising from his motion. *See* G.S. 15A-1420(c)(1). By statute, the defendant may seek relief at any time after the verdict from a conviction obtained in violation of his constitutional rights. G.S. 15A-1415(b)(3). He may also seek relief in the appellate division on direct appeal. G.S. 15A-1418(a). *See State v. James, supra.* In the present case, the defendant has not formally made such a motion, but by raising the question in his brief, has in effect asked this Court to make the same determination and to award similar relief. According to G.S. 15A-1418(b),

> "When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the

> motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case."

The denial of the right to effective assistance of counsel in this case is based on a conflict of interest between the defense counsel's loyalty to the defendant and to prosection witnesses. By the very nature of the claim, this alleged conflict of interest, unlike the use of certain trial tactics or the actual performance of an attorney at trial, is not a matter which will appear on the face of the record. *See State v. Milano, supra; State v. Vickers, supra; State v. Weaver, supra.* At present, the materials of record before this Court are not sufficient to support the defendant's theory of relief. Evidence such as testimony by the attorney concerning the status of his relationship with the prosecution witnesses and testimony from these witnesses on the matter, must be received in order to enable this Court to determine whether the defense counsel's representation did meet all constitutional requirements.

G.S. 15A-1418(b) provides that if the matter cannot be decided on the basis of the materials before the court, then it should be remanded for an evidentiary hearing. In *State v. Hurst*, 304 N.C. 709, 285 S.E. 2d 808 (1982), the defendant was similarly claiming that he had been denied effective assistance of counsel. Using Article IV, Section 13(2) of the North Carolina Constitution which gives the Supreme Court exclusive authority to make the rules of appellate procedure and practice, the Supreme Court refused to remand the case. It reasoned that "[w]hile the quoted statute suggests that the motion be remanded to the trial court for hearing and determination, we think that the better procedure in this case is to dismiss the motion and permit defendant, if he so desires, to file a new motion for appropriate relief in superior court." *Id.* at 712, 285 S.E. 2d at 810.

The defendant has made no motion for appropriate relief, but instead would have us reverse the conviction and remand this case for an evidentiary hearing. No reversal is possible because

the record before us does not establish that counsel's assistance was anything less than the standard required. The transcript of the trial showed defense counsel vigorously cross-examined each prosecution witness and with the defendant's approval offered no evidence. In fact, any inside information which might have been gathered by defense counsel through the conflicting representations was used to impeach the prosecution witnesses, a definite benefit to the defendant's case, not a detriment.

Also, it was not error for the trial judge to refrain from initiating an inquiry into the possible conflict of interest. Unless the circumstances indicate otherwise, the state trial courts "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717, 64 L.Ed. 2d 333, 345-46 (1980). North Carolina case law suggests that circumstances requiring an inquiry may be when two codefendants are represented by members of the same law firm or by single counsel and the possible conflict is apparent prior to trial. *State v. Arsenault*, 46 N.C. App. 7, 264 S.E. 2d 592 (1980). Unlike those times when counsel represents two codefendants, the nature of the conflict of interest in the present case would not be apparent to the trial judge prior to trial so that he could inquire into any possible conflict of interest. Also, the *Arsenault* case was remanded for evidentiary hearing, but only after the defendant had made a substantial showing that a constitutional violation had occurred. From the record before us, the defendant can make no such showing.

Therefore, rather than overrule the defendant's first assignment of error and decide the issue on the merits based on an inadequate record, we dismiss the assignment of error in accordance with *State v. Hurst, supra*, allowing the defendant to seek relief through a post-conviction motion pursuant to G.S. 15A-1415(a),

[2] The second assignment of error raised by the defendant concerns whether the trial judge erred in his instructions to the jury by failing to include facts from the defendant's evidence. The record clearly reveals that the defendant offered no evidence, choosing only to cross-examine each state witness, and that after the judge completed his charge to the jury the defendant did not

object to the instructions when given the opportunity to do so. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." Until recently, the defendant's failure to object to the charge alone would preclude him from asserting this assignment of error.

However, the Supreme Court, acknowledging the harshness of Rule 10(b)(2), adopted the "plain error" rule. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Although the defendant does not call the rule by name in his brief, he has in effect asked this Court to apply it to this case. As explained in *State v. Odom*, "[t]he 'plain error' rule is used by the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure which states that '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *Id.* at 660, 300 S.E. 2d at 378. Naturally every error is not "plain error" justifying a reversal. Only when the alleged error is a *"fundamental* error, something so basic, so prejudicial, so lacking in its element that justice cannot have been done" will the court overlook the mandate of Rule 10(b)(2) and review the defect in the jury instructions. *Id.*, citing *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, --- U.S. ---, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original).

In order to classify the error as "plain error," "the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.*, at 661, 300 S.E. 2d at 379, citing *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 98 S.Ct. 3096, 57 L.Ed. 2d 1137 (1978). The defendant claims error was committed when the trial judge failed to summarize any of the evidence favorable to the defendant, specifically (1) that the defendant believed the victim was mistreating his children, (2) that an altercation between the victim and defendant had occurred several weeks earlier, and (3) that the victim may have been armed with a knife. The defendant is simply mistaken with regard to the first two allegedly missing facts. The challenged charge clearly states "[t]hat the defendant, Mr. Wise, said he was going to kill Vanie Smith, Jr. That approximately two weeks

before Thanksgiving the defendant, Mr. Wise, had told Vanie Smith, Jr., that he was going to kill him and having [*sic*] accused him of mistreating his children." In *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), *cert. denied*, 454 U.S. 973, 102 S.Ct. 523, 70 L.Ed. 2d 392 (1981), the court held that ordinarily the trial judge is not required to recapitulate all of the evidence, but if in his charge he states fully the contentions of the State, yet fails to give any contentions of the defendant, then he has committed prejudicial error. In the present case, as evidenced by his charge, the trial judge did include important facts favorable to the defendant.

As for the last excluded fact, on cross-examination only one witness briefly suggested that the victim might have been armed with a knife, but immediately corrected his statement: "[H]e had a knife but—I mean he had no knife or threatened that man in any kind of way." In any event, even if a reference to the knife had been included, it in no way tends to exculpate the defendant. The defendant does not raise self-defense or defense of others as a motive for his actions, but relies on the theory that the defendant had adequate provocation for his actions because it was Christmas Day and Vanie Smith, Jr., had allegedly threatened to dispose of his children's Christmas gifts. This theory constitutes a mitigating factor possibly for sentencing, but is not a defense to assault. *See State v. Frankum*, 272 N.C. 253, 158 S.E. 2d 62 (1967). *See also* 6A C.J.S. *Assault and Battery* § 86 (1975). Therefore, the absence of this evidence in the jury instructions could not have had any prejudicial impact on the jury's finding of guilt and, in turn, was not "plain error."

In conclusion, we hold that the defendant's claim that he was denied effective assistance of counsel should be dismissed so he may pursue appropriate relief in the trial court. Secondly, we have found no plain error in the trial court's charge to the jury that would mandate a new trial.

No error.

Judges BECTON and JOHNSON concur.

In re Will of Cromartie

IN THE MATTER OF THE WILL OF JULIUS CROMARTIE, DECEASED

No. 824SC362

(Filed 20 September 1983)

1. **Wills § 22.1— opinion testimony as to mental capacity**

The trial court in a caveat proceeding erred in permitting a witness who had not observed testator during the month in question to state his opinion that testator had sufficient mental capacity on the date he executed a will to make a disposition of his property since (1) it is improper for a witness to state an opinion as to testator's capacity to make a valid will and (2) the opinion of a nonexpert as to mental capacity must be based on his own observations and is limited to the times he observed the subject.

2. **Wills § 22.1— opinion testimony as to mental capacity**

The trial court in a caveat proceeding erred in refusing to permit lay witnesses for the caveators to state opinions as to testator's mental state because the date in each question was the date that each witness observed and talked with testator rather than the date the will was executed.

3. **Evidence § 29.3— hospital records—necessity for authentication**

G.S. 8-44.1 merely eliminated the necessity of taking original hospital records to court and did not modify the requirements for authentication of such records. Therefore, in order for hospital records to be admissible in evidence, it must be shown that the records or entries were made in the regular course of business at or near the times of the transactions involved and are genuinely what they purport to be.

4. **Evidence § 29.3— authentication of hospital records**

The key to authenticating hospital records is not personal knowledge by anyone of particular entries or occurrences but is evidence of system and practice.

APPEAL by caveators from *Winberry, Judge.* Judgment entered 12 February 1981 in Superior Court, SAMPSON County. Heard in the Court of Appeals 15 February 1983.

In his 83rd year, Julius Cromartie died on March 16, 1975 in the Veterans Administration Hospital in Fayetteville. He was first admitted to this hospital five months earlier on 18 October 1974. Twenty-four days later, he purportedly executed the will in question by putting his mark thereon in the presence of witnesses after it was read to him. Thirty-three days later, on 14 December 1974, he was released from the hospital, but was readmitted five days later and stayed there the remaining eighty-five days of his life.

The alleged will devised all the testator's property to his niece, the propounder, and upon it being presented for probate, various of his heirs and next of kin filed a caveat alleging the testator's lack of mental capacity and the propounder's undue influence.

During the trial, much non-expert testimony as to the testator's mental status was admitted into evidence, other such testimony was rejected, and excerpts from the hospital records of the testator's two admissions to the Veterans Administration Hospital offered into evidence by the caveators were rejected, though both contained recitals of his confusion and senility. The jury found the *devisavit vel non* issues in favor of the propounder.

Jeff D. Johnson, III for caveator appellants.

John R. Parker for propounder appellee.

PHILLIPS, Judge.

Though caveators present fourteen questions for our consideration, they can be distilled into the following: Did the court err (1) in receiving into evidence improper, non-expert opinion testimony as to the testator's mental capacity; (2) in refusing to admit proper testimony of that type favorable to the caveators; and (3) in refusing to admit into evidence portions of the testator's hospital records? We answer the first two questions in the affirmative and the third in the negative.

[1] Propounder's witness, Roland Autry, who did not see the testator during November, 1974, but did see him in October, was permitted, over objection, to answer the following question: "do you have an opinion satisfactory to yourself as to whether or not on November 11, 1974, he had sufficient mental capacity to make a disposition of his property?" The question was improper for two reasons. First, it was tantamount to asking him whether he had an opinion as to testator's capacity to make a valid will. "In will cases it is improper to ask a witness's opinion of the testator's capacity to *make a will*, since this assumes the witness's knowledge of the legal standard of testamentary capacity, though questions incorporating the component parts of that standard are permissible." 1 Brandis N.C. Evidence § 127, pp. 489-90 (2d ed.

1982). (Emphasis in original.) Second, while jurors often have to draw inferences that mental capacity did or did not exist at a certain time from evidence as to one's condition at other relevant times, and it is appropriate for expert medical witnesses to do so under certain conditions, non-expert witnesses are not permitted to do so. Non-experts cannot express opinions about situations, hypothetical or otherwise, of which they have no personal knowledge; their opinions as to mental capacity must be based on their own observations and are limited to the time or times that they observed the subject; they cannot properly testify to one's mental capacity or condition at some other time. *In re Will of Rose*, 28 N.C. App. 38, 220 S.E. 2d 425 (1975), *disc. rev. denied*, 289 N.C. 614, 223 S.E. 2d 396 (1976). Propounder's witness, Fairley Newton, who did see the testator on the day stated, was also permitted to answer the same question, so his testimony was improperly received for only one reason.

[2] Several lay witnesses for the caveators were not permitted to answer a number of opinion questions as to the testator's mental state because the date used in each question was the date that each witness observed and talked with testator, rather than the date the will was executed, when none of the witnesses saw him. Apparently, both the court and counsel for the propounder were under the impression that the date of the will had to be used in the questions, since the ultimate issue for determination was the testator's mental capacity on that day. But issues have no effect upon the knowledge of witnesses.

Glenn Edward Boykin saw the testator in the hospital; Henry Lee Treadwell and Lula Cleo Crenshaw saw him shortly before the testator went to the hospital the first time and immediately after his release from the hospital; and Clarence Herring saw him in December, 1974, between the two hospital admissions. From the observations testified to, all of the witnesses were clearly qualified to form and express an opinion as to the testator's mental capacity as of the times when they saw him. Nevertheless, these witnesses were not permitted to answer questions as to their opinion of the testator's mental capacity at the times they saw him "to understand what he was doing," "to understand the nature and effect of making a will," "to understand the extent of his property," "to understand the nature and effect of his act in making a will," and "to understand who the people were that he

naturally should consider in determining who to leave his property to." Though some of these questions do not state in precise law book form one of the three elements of testamentary capacity, as questions in will cases often do, all of them sought to elicit information that was relevant and material to the issue involved and the witnesses' answers to them should have been received into evidence.

While opinion questions used in will cases have tended to become stereotyped in the precise language of the technical elements that comprise testamentary capacity, the law does not require that such questions be always so worded. Different expressions that serve the same purpose are permitted and in our view should be encouraged when they are simpler and more readily understandable than more technically-worded questions, which often confuse the witness and fail to enlighten the jury.

[3] In trying to get portions of the testator's hospital records admitted into evidence, caveators proceeded upon the theory that the foundation required by *Sims v. Charlotte Liberty Mutual Insurance Company*, 257 N.C. 32, 125 S.E. 2d 326 (1962) was dispensed with by the enactment of G.S. 8-44.1 in 1973. In refusing to admit the records, the trial judge ruled that the requirements stated in *Sims* still abide. We agree.

The *Sims* rule, though well grained into our law now, is but a court-devised modification of the much earlier court-adopted business records exception to the rule against hearsay. Under this exception, business records, subject to being duly authenticated and otherwise admissible, have been received into evidence by the courts of this state since 1905, and perhaps earlier. To qualify, there must be evidence that the records or entries were made in the regular course of business at or near the times of the transactions involved and are genuinely what they purport to be. The rule applies to records of all kinds, including medical, hospital, and government records. *See* 1 Brandis N.C. Evidence § 155 (2d ed. 1982). G.S. 8-44.1, enacted eleven years after *Sims*, the first decision of the North Carolina Supreme Court to explicitly hold that the business exception embraces hospital records, too, reads as follows:

> Copies of hospital records in connection with the treatment of any patient or the charges therefor shall be received

> as evidence, if otherwise admissible, in any court or quasi-judicial proceeding if testified to be authentic by a person in the hospital whose duty it is to have charge or custody of such records.

This statute, quite clearly, we think, merely eliminated the necessity of taking original hospital records to court, where they were often kept for long periods to the dismay of record keepers and the inconvenience of those who needed to use the records for any purpose, including the later treatment of the patient. It did not modify the then-existing process of authenticating hospital records, which included the steps referred to in *Sims;* but, to the contrary, it ratified and reinforced the process by continuing to require authenticating testimony. For authentication in the law of records is more than identification—it is the process by which records are rendered legally admissible into evidence. *See* Black's Law Dictionary 168 (4th ed. 1968); 7A C.J.S. 911 (1980); 32 C.J.S. *Evidence* § 728, pp. 1042-43 (1964).

[4] Thus, it is still the law that before a hospital record, even if otherwise admissible, can be received into evidence, there must be proof not only that it is what it purports to be, but also that it was made and kept in the manner that makes records reliable evidence in the first place. But neither *Sims* nor any other decision requires that the authenticating proof be only by personal knowledge. Such a requirement would, of course, for all intents and purposes, abrogate the use of business records in court; because under the conditions that most businesses and hospitals are conducted today, it is a rare person, indeed, that has personal knowledge of any work or undertaking done by others. Of necessity, therefore, the key to authenticating hospital records is not personal knowledge by anyone of particular entries or occurrences, but evidence of *system* and *practice*; evidence that a business-like system of compiling records exists, which requires that entries be made at or near the time involved by those who examine, observe, test and treat patients; and that in practice the system is generally followed. When that is testified to by someone familiar with the system, and the purported record involved, or a copy of it, is testified to be genuine, the authenticating process is as complete as the circumstances reasonably permit and the law requires. And, of course, when a record as a whole is so authenticated, that an entry here or there was not made prompt-

ly after the event recorded is no ground for rejecting the entry altogether; that would only affect its weight. It is a matter of common knowledge among those familiar with hospital records that entries requiring dictation and transcription are done late by many doctors because they give priority to their other medical duties. Nevertheless, such entries, when regularly made, are still parts of the patients' record and should be so considered, except when there is evidence of duplicity or bad faith.

The case is returned for a retrial in accord with this opinion.

New trial.

Judges ARNOLD and BECTON concur.

EWELL G. PEARCE v. THE NORTH CAROLINA STATE HIGHWAY PATROL VOLUNTARY PLEDGE COMMITTEE, CAPT. O. R. McKINNEY, AND CAPT. E. D. YOUNG

No. 824SC1028

(Filed 20 September 1983)

1. **Associations § 2— action to recover association benefits—statute of limitations**

A claim for breach of contract by the Highway Patrol Voluntary Pledge Fund Committee to pay disability benefits accrued on 18 December 1978 when the Fund Committee denied benefits to plaintiff, not when a Patrol Lieutenant earlier told plaintiff he was not eligible for benefits, and not at the end of the 30 days within which the benefits were payable after plaintiff's retirement. Therefore, the three-year statute of limitations of G.S. 1-52(1) was met by plaintiff's filing of an action on 18 December 1981.

2. **Associations § 2— Highway Patrol Voluntary Pledge Fund—entitlement to disability benefits**

Under a Highway Patrol Voluntary Pledge Fund contract providing that benefits would be paid to any member who retires on disability provided he "is receiving disability benefits under the Federal Social Security Law," the reference to Social Security was not intended to mean only permanent benefits, and the relevant date for receipt of Social Security benefits was plaintiff's retirement date, not the date when the Fund Committee made its final decision on plaintiff's benefits.

Judge BRASWELL dissenting.

Pearce v. Highway Patrol Vol. Pledge Committee

APPEAL by defendants from *Stevens, Judge.* Judgment entered 13 August 1982 in Superior Court, SAMPSON County. Heard in the Court of Appeals 25 August 1983.

The plaintiff seeks benefits from the Highway Patrol Voluntary Pledge Fund Committee in this action.

On 23 February 1973, the plaintiff became a member of the Fund. Under the contract that he signed, he agreed to pay $10 to each uniformed member of the Patrol who becomes eligible for benefits. In consideration of signing the contract, the plaintiff became eligible for the same benefits.

Paragraph six of the Fund contract signed by the plaintiff provided that benefits were "[t]o be paid to any member that retires on disability provided; he has qualified and is receiving disability payments under the Federal Social Security Law."

While on duty as a member of the Patrol, the plaintiff was injured on 2 July 1973. As a result, his left leg was amputated on 20 February 1975. He retired on disability on 30 June 1975.

Based on an agreement reached with the Patrol prior to his retirement, the plaintiff began work as a Patrol telecommunicator on 1 July 1975. Prior to his retirement, the plaintiff was informed by Patrol Lieutenant J. S. Powell that he was not eligible to receive benefits from the Fund.

On 25 July 1978, the plaintiff requested a hearing before the Fund Committee. The hearing occurred on 15 December 1978 and benefits were denied in an 18 December 1978 letter from Patrol Captain O. R. McKinney, the Fund Committee Chairman. This action was filed in Superior Court on 18 December 1981.

After denial of summary judgment motions by both parties, this case was decided on affidavits by stipulation of the parties. The trial judge held that the plaintiff's claim was not barred by the statute of limitations and that he was entitled to receive $10 from each person who was a member of the Fund on 1 July 1975. From that judgment, the defendants appealed.

Warrick, Johnson & Parsons, by Dale P. Johnson, for plaintiff-appellee.

Attorney General Edmisten, by Special Deputy Isaac T. Avery, III, for defendant-appellants.

ARNOLD, Judge.

[1] Under G.S. 1-52(1), the statute of limitations for breach of contract is three years. It does not begin to run until the contract is breached and the alleged cause of action accrues. *City of Reidsville v. Burton*, 269 N.C. 206, 211, 152 S.E. 2d 147, 152 (1967).

This action is timely because it was filed three years after the Fund notified the plaintiff's attorney that benefits would be denied. That action was the administrative determination that gave the defendants right of appeal to this Court. A mere opinion in 1975 by Lieutenant Powell that the plaintiff would not be eligible for benefits is not enough to make this cause of action accrue.

We also reject the defendants' argument that this action accrued 30 days after the plaintiff retired. That contention is based on paragraph seven, which says that benefits are payable thirty days after retirement. It ignores the fact, however, that benefits were not finally denied until the Fund's decision on 18 December 1978.

The defendants argue that the plaintiff is estopped from obtaining benefits because he made no formal request to grant benefits to two Fund members who were disabled and declared ineligible in 1974 for the same reason as the plaintiff. We find this argument unpersuasive.

The plaintiff was not a member of the Fund Committee and had no influence on the denial of benefits to the two other members. Mere inaction when there was nothing the plaintiff could do for the two members does not bar his recovery. In fact, a 12 February 1982 affidavit of the plaintiff shows that he thought in 1976 that troopers in situations similar to his were being paid Fund benefits.

[2] Finally, the defendants contend that paragraph six's reference to Social Security was intended to mean permanent benefits. They also argue that the relevant time for receiving benefits was when the Fund made a final decision in 1978 and point to the 1977 revision to the Fund contract that explicitly excludes retroactive payments. We reject these contentions.

Principles stated in *Bray v. N.C. Police Voluntary Benefit Ass'n*, 258 N.C. 419, 128 S.E. 2d 766 (1963), help us to resolve the

defendants' arguments. In affirming a finding that the plaintiff was entitled to retirement benefits under the Association's rules and regulations, the Court in *Bray* said:

> The constitution, by-laws, rules and regulations of a beneficial association operate as a contract and should be reasonably and liberally construed to effectuate the benevolent purpose of the association and the manifest intention of the parties. That construction must be put on the by-laws and rules of the association, taken as a whole, which is most favorable to the members.

258 N.C. at 423, 128 S.E. 2d at 769.

Under this rule of construction, paragraph six is naturally interpreted to mean that the relevant date for receipt of Social Security is 30 June 1975, the plaintiff's retirement date. He was receiving Social Security payments on that date.

As for the argument that paragraph six means only permanent Social Security benefits, the plain and unambiguous language of the Fund contract provides no such reading.

Affirmed.

Judge WEBB concurs.

Judge BRASWELL dissents.

Judge BRASWELL dissenting.

I respectfully dissent because it appears unequivocally as a matter of law from the complaint, contract, pretrial order, and all the other documents of record, that the three-year statute of limitations, G.S. 1-52(1), had run before the plaintiff filed his lawsuit in the Superior Court upon a claim of breach of contract.

The undisputed facts show a contract entered into on 23 February 1973. By the terms of paragraph six, money benefits were:

> To be paid to any member that retires on disability provided; he has qualified and is receiving disability payments under the Federal Social Security Law.

By the terms of paragraph seven:

> The payments herein pledged are to be made within thirty (30) days of the . . . retirement of the member . . . .

The plaintiff received personal injuries in the line of duty in an automobile accident which resulted in his left leg being amputated on 20 February 1975. The plaintiff retired on disability on 30 June 1975. The Federal Social Security Administration found the plaintiff eligible and qualified for its benefits from 2 July 1973 through 31 December 1976. This lawsuit was filed on 18 December 1981. Applying these uncontroverted facts to the terms of the contract, I would hold that the payment to plaintiff should have been made within 30 days of his retirement. No payment was made. By 1 August 1975 the plaintiff knew the contract would not be performed. Nonperformance is a breach of contract which tolls the running of the statute of limitations. The plaintiff waited approximately 5 years and 6 months to file his action, and, therefore, it is barred by law.

Other facts show that on 25 July 1978 plaintiff requested a hearing before the Voluntary Pledge Committee seeking benefits. On 18 December 1978, after a meeting on 15 December 1981 in which the plaintiff testified, the Pledge Committee denied any benefit or relief to plaintiff. As I read the majority opinion it is this date of denial by the Committee which began the running of the statute of limitations. The action was filed in Superior Court on 18 December 1981, which is the last day of the 3 years from 18 December 1978. This position in my view overlooks the 5½ years of known nonperformance.

There was no contractual duty to have a hearing, such as the one in December 1978, before filing the suit in Superior Court. Also, no administrative hearing to determine benefit eligibility was required because neither the contract nor the defendants come under the provisions of the Administrative Procedure Act, G.S. 150A-1 *et seq.* All the law required of this plaintiff in order to enforce the performance of this contract was to file his claim in court within three years. It is beyond our powers to inquire into how deserving the plaintiff may be or into whether the right or wrong conclusion was reached in the December 1978 Pledge Committee meeting. Likewise, it becomes immaterial and unnecessary for us to consider the defendants' other exceptions and assignments of error, such as, whether the North Carolina State

Highway Patrol Voluntary Pledge Committee is a legal entity, and whether estoppel, waiver, or failure to join necessary parties may apply in this case.

Briefly, the case law which supports this dissent may be found in *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966); *Sechrest v. Furniture Co.*, 264 N.C. 216, 141 S.E. 2d 292 (1964); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320 (1952); *Hall v. Hood*, 208 N.C. 59, 179 S.E. 27 (1935); *Gordon v. Fredle*, 206 N.C. 734, 175 S.E. 126 (1934); *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350 (1906); and *see also* 3 Strong, N.C. Index 3d, *Contracts*, § 21.1, p. 416. In substance, these cases hold that the cause of action begins to run when the breach occurs, that nonperformance of a contract constitutes a breach, and that a party is immediately at liberty to sue for breach for nonperformance. As was said in *Lewis v. Shaver, supra*, at 513, 73 S.E. 2d at 322, "the mere lack of knowledge of the facts constituting a cause of action does not postpone the running of the statute."

I would vote to reverse.

KATHY ANN NEWMAN v. JAMES MICHAEL NEWMAN

No. 8223DC959

(Filed 20 September 1983)

1. Divorce and Alimony § 24.9— modification of child support order—findings of fact insufficient and not supporting order

The trial court erred in decreasing the amount of child support due plaintiff where the court failed to consider evidence and make findings of fact on the child's actual expenditures or present reasonable needs, findings of fact on the parties' estates, findings of fact on the parties' expenses, and where the findings on the parties' incomes were disparate.

2. Divorce and Alimony § 24.6— child support—evidence of changed circumstances erroneously considered

The trial court erred in a proceeding to modify child support by considering changes in circumstances which predated the most recent order of child support, the presence or absence of support for defendant's stepchildren, and in considering plaintiff's present husband's income in determining the parties' relative ability to pay without considering the relationship of the stepparent to the stepchild.

APPEAL by plaintiff from *Osborne, Judge.* Order entered 27 May 1982 in District Court, YADKIN County. Heard in the Court of Appeals 22 August 1983.

Plaintiff appeals from a decision of the trial court granting defendant's motion to decrease the amount of child support payments.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff appellant.

Franklin Smith for defendant appellee.

BECTON, Judge.

I

Plaintiff wife and defendant husband were married in November 1969. They lived together until 16 July 1978. On 22 November 1978 they entered into a separation agreement. Under the terms of the agreement, the wife received custody of the parties' one minor child and child support in the amount of $50 per week. On 16 October 1979 the parties obtained an absolute divorce. Shortly thereafter, the wife sought an increase in child support alleging a change in the child's needs and an increase in the husband's ability to pay. In an order entered 6 August 1980, Judge Ralph Davis, Yadkin County District Court, granted an increase in child support to $80 per week.

On 16 February 1982, the husband filed a motion to reduce the child support payments based on a change in circumstances—his wife's remarriage and increased earning capacity. In an order entered 27 May 1982, Samuel L. Osborne, Yadkin County's Chief District Court Judge, made the following findings of fact regarding the financial standing of the parties:

> At the time of the hearing before Judge Davis, the plaintiff was unemployed, but she resumed working in January of 1981, and is presently employed and has a gross income of about $750.00 per month. The plaintiff has remarried and has no other children. Her present husband is regularly employed and earns about $4.85 per hour.
>
> Plaintiff and her husband live in a fairly new mobile home which is paid for and was purchased with part of the

> $20,000.00 received from the defendant pursuant to the Separation Agreement, which mobile home is parked on land owned by the plaintiff's parents. During the past year, the defendant had gross income for tax purposes of about $58,000.00; however, the defendant has actual income of only about $325.00 per week take-home pay.
>
> The defendant owns about a one-fourth interest in a well-drilling business, and at the present time, the business is in a slump due to economic conditions. The defendant has remarried and presently has three step-children residing in the home. His present wife receives only the sum of $300.00 per month in child support.

Based upon these findings of fact, Judge Osborne concluded as a matter of law that there had been a "substantial change of circumstances" since the 6 August 1980 order. Defendant was granted a reduction in child support from the previous $80 per week payment to $50 per week. Plaintiff appeals.

II

[1] The wife first argues that the trial court's findings of fact do not support an order decreasing child support. We agree.

An order for child support may be modified upon motion and a showing of changed circumstances by either party. N.C. Gen. Stat. § 50-13.7(a) (1981). N.C. Gen. Stat. § 50-13.4(c) (1981) sets out the factors to be considered in determining the amount of child support. Our Supreme Court has recently reiterated the need for findings of specific fact in child support orders.

> Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. . . . It is not enough that there may be evidence in the record sufficient to support findings which could have been made.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). Not only must the trial court hear evidence on each of the factors listed above, but the trial court must also substantiate its conclusions of law by making findings of specific facts on each of the listed factors. *See Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). The trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses to determine "the reasonable needs of the child." *Steele* at 604, 244 S.E. 2d at 469; *Daniels v. Hatcher*, 46 N.C. App. 481, 484, 265 S.E. 2d 429, 432, *disc. rev. denied*, 301 N.C. 87, --- S.E. 2d --- (1980). Further, the trial court must hear evidence and make findings of fact on the parents' income, estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses to determine the parties' relative ability to pay. *Steele* at 604, 244 S.E. 2d at 469; *Daniels* at 484, 265 S.E. 2d at 432.

In the case before us, the trial court failed to consider evidence and make findings of fact on the child's actual past expenditures or present reasonable needs. In addition, the trial court's findings on the parties' income were disparate: the wife's approximate *gross monthly* income; her present husband's approximate *gross hourly* wage; the husband's *net weekly* wage; *no finding* on his present wife's income. The court failed to make findings of fact on the parties' estates beyond stating that the wife owned a mobile home and the husband owned a one-fourth interest in a well-drilling business. The evidence showed that the husband also owned a house and that the value of his interest in the business had increased through stock dividends. The trial court made no findings of fact on the parties' expenses.

For the foregoing reasons the trial court's order decreasing child support is not based on sufficient findings of fact.

III

[2] The wife excepts and assigns error to the trial court's consideration of circumstances which predated the most recent order (6 August 1980) in determining a change in circumstances.

In modifying a child support order the trial court should consider only changes in circumstances since entry of the most recent order. *Shipman v. Shipman*, 25 N.C. App. 213, 216, 212 S.E.

2d 415, 417 (1975). The trial court examined the husband and made findings of fact on the amount of child support his present wife received for her three children by a prior marriage. The husband had remarried on 15 November 1979, prior to the entry of the 6 August 1980 order. Since the husband had already remarried at the time of the 6 August 1980 order, the amount of child support received by his present wife was a factor to be considered in the 6 August 1980 order. Under *Shipman*, a trial court seeking to modify an order may consider only changes in circumstances since that entry date. In this case, the trial court based its conclusions on inappropriate findings. The child support for the husband's stepchildren did not represent a change in circumstances.

Further, on the facts of this case, the presence or absence of support for defendant's stepchildren should not be a factor in modifying the 6 August 1980 order. "Payment of support for a child of a former marriage may not be avoided merely because the husband has remarried and thereby voluntarily assumed additional obligations." *Shipman* at 215, 212 S.E. 2d at 417. The lack of adequate support for the husband's stepchildren does not justify a reduction in child support payments for the husband's own child.

IV

The wife excepts and assigns error to the trial court's finding of fact on her present husband's income in determining the parties' relative ability to pay. The trial court found that the wife's present husband was "regularly employed" and earned "about $4.85 per hour." A stepparent is not under a blanket obligation to support children of his spouse's former marriage. 3 R. Lee, *North Carolina Family Law* § 238 (4th ed. 1981). Lee points out that a stepparent's liability rests on whether he has voluntarily taken the stepchild into his home "in such a way that he places himself *in loco parentis* to him." The trial court must draw this conclusion based on the particular facts of the case. *Id.* The trial court failed to hear evidence on this issue. Findings of fact must be supported by competent evidence. *Coble* at 714, 268 S.E. 2d at 189. The trial court based its conclusions on faulty findings of fact.

For the above reasons, the order is vacated as to the decreased child support payments, and the matter is remanded for further findings.

Vacated and remanded.

Chief Judge VAUGHN and Judge HILL concur.

T. WOOD PAXTON v. O.P.F., INC.

No. 8229SC732

(Filed 20 September 1983)

1. **Quasi Contracts and Restitution § 2— pleading express contract—recovery on quantum meruit basis**

Although plaintiff alleged only an express contract in his complaint, the trial court did not err in permitting plaintiff to recover on the basis of *quantum meruit* where the services for which plaintiff was granted recovery in *quantum meruit* were the same as those alleged in connection with the express contract.

2. **Quasi Contracts and Restitution § 2.1— recovery on quantum meruit basis—sufficiency of evidence**

The evidence was sufficient to support the trial court's findings that plaintiff rendered certain services to defendant corporation in the development of property owned by defendant, that those services were knowingly and voluntarily accepted by defendant, and that they were not gratuitously rendered, and the findings supported the trial court's conclusion that plaintiff was entitled to recover the reasonable value of those services on a *quantum meruit* basis. However, the evidence was insufficient to support the trial court's determination that the reasonable value of plaintiff's services to defendant was $22,500.00 where the only evidence supporting such amount was plaintiff's own estimate, and there was no effort to cast this figure in terms of the type of work done or the number of hours worked or to correlate it to any community or industry standard.

APPEAL by defendant from *Freeman, Judge.* Judgment entered in open court and signed on 17 February 1982 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 13 May 1983.

This is a civil action wherein plaintiff seeks payment for services allegedly rendered under an express contract with defendant.

Plaintiff initiated this action on 26 August 1977 by filing a Complaint which alleged the following: (1) that plaintiff had entered into an agreement with O.P.F. whereby plaintiff was to

supervise certain aspects of the residential subdivision and development of O.P.F.'s property, (2) that plaintiff was to receive as compensation ten percent of the sale price of each parcel in the subdivision, (3) that plaintiff performed his obligations under the agreement, (4) that, upon completion of the work, O.P.F. terminated the agreement and refused to pay plaintiff. Plaintiff prayed the court for a monetary recovery in the amount of $32,150 or, alternatively, ten percent of all sales of property in the subdivision. O.P.F. answered on 27 October 1977, denying all of the material allegations of the Complaint and denying plaintiff's right to any recovery.

After a trial and the presentation of evidence and testimony by both parties, the court entered judgment for plaintiff based on the following pertinent findings of fact (summarized):

(1) From 1972 to 1975, plaintiff supervised various aspects of the development and subdivision of lots within a sixty acre tract of land owned by O.P.F.

(2) That plaintiff's brother was president of O.P.F. during this time and visited the work site approximately once a month.

(3) Plaintiff's brother died in March of 1975 whereupon a Mr. Fernandez became president of O.P.F. and instructed plaintiff to continue his work for the corporation.

(4) Approximately three weeks later, plaintiff's relationship with O.P.F. was terminated by a Mr. Olivares, another principal officer and stockholder in the corporation.

(5) There was no "concrete agreement" between plaintiff and O.P.F. as to compensation. Plaintiff had received certain amounts, totaling approximately $3,387.50, as compensation and commissions from O.P.F.

(6) The reasonable value of plaintiff's services for which he was not compensated was $22,500.

Based on these facts, the court concluded that plaintiff was entitled on a *quantum meruit* basis, to a recovery of $22,500 from defendant as the reasonable value of the services rendered by plaintiff to O.P.F. Judgment was entered accordingly and O.P.F. appealed.

Potts and Welch, by Paul B. Welch, III, and Jack H. Potts, for plaintiff appellee.

Hudson and Peterson, by John R. Hudson, Jr., for defendant appellant.

JOHNSON, Judge.

[1] Defendant excepts to and assigns as error the trial court's conclusion that plaintiff was entitled to recovery on a *quantum meruit* basis. Defendant contends that this conclusion is improper in that the theory of *quantum meruit* was neither pleaded by plaintiff nor tried by consent. For the court to base its judgment and award on that theory, defendant contends, was therefore both unfair and contrary to the established law in North Carolina.

Plaintiff alleged an express contract in his Complaint but the award by the court was based on *quantum meruit*, which was not pleaded. *Quantum meruit* is an equitable principle that allows recovery for services based upon an implied contract. *Harrell v. Lloyd Construction Co.*, 41 N.C. App. 593, 255 S.E. 2d 280 (1979). Defendant argues that the correct rule of law is that where a party proves a cause of action that he failed to plead, but fails to prove a cause of action that was pleaded, that it nevertheless amounts to a complete failure of proof, provided the other party makes proper objections and the cause is not tried by consent. That rule is expressed in the two cases cited by defendant, *Martin Flying Service v. Martin*, 233 N.C. 17, 62 S.E. 2d 528 (1950) and *Talley v. Harriss Granite Quarries Co.*, 174 N.C. 445, 93 S.E. 995 (1917). However, in *Martin Flying Service*, the court relied on the qualified exception to that rule, also applicable here: "One may sue on an express contract and recover on an implied contract [citation] unless the allegation is such as to mislead the defendant." 233 N.C. at 20, 62 S.E. 2d at 530. That exception has been relied on by our courts. *See e.g., Yates v. W. F. Mickey Body Co.*, 258 N.C. 16, 128 S.E. 2d 11 (1962); *see generally*, 11 N.C. Index 3d, Quasi Contracts and Restitution, §§ 2, 2.1 (1978 and Supp. 1983). Although the better practice is to plead both the express and implied contracts, recovery in *quantum meruit* will not be denied where a contract may be implied from the proven facts but the express contract alleged is not proved. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Allen v. Seay*, 248 N.C. 321, 103 S.E. 2d 332 (1958).

Inasmuch as the services for which plaintiff was granted recovery under the implied contract were the same as those alleged in connection with the express contract, we cannot see how defendant was prejudiced by plaintiff's failure to plead the implied contract or by the trial court's award in reliance thereon.

[2] Defendant next contends that there is not sufficient evidence to support findings of fact from which the court could imply the contract necessary to grant recovery under the theory of *quantum meruit.* In order for the law to imply a promise to pay and therefore, a contract, it must appear from the facts that services are rendered by one party to another, that the services were knowingly and voluntarily accepted and that they were not gratuitously rendered. *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582 (1963); *Harrell v. Lloyd Construction Co., supra.* Our careful review of the record shows that defendant's contention, insofar as it relates to the sufficiency of the evidence to support the finding of a contract, is meritless. There is ample evidence in the record to show that plaintiff Paxton rendered certain services to defendant O.P.F. and that those services were knowingly and voluntarily accepted by O.P.F. There is no showing that the services were rendered gratuitously. The findings of fact made by the trial court are conclusive on appeal even though there may be competent record evidence to support a contrary finding. *Williams v. Pilot Life Insurance Co.,* 288 N.C. 338, 218 S.E. 2d 368 (1975); *see generally* 1 N.C. Index 3d, Appeal and Error, § 57.2 (1976 and Supp. 1983). The record evidence here supports the facts necessary for the trial court to imply the existence of the contract. The conclusion that plaintiff was entitled to recovery thereon was therefore properly drawn.

Finally, defendant argues that the evidence is not sufficient to prove the reasonable value of plaintiff's services and that the trial court's finding that the value thereof was $22,500 was improper. While the trial court properly concluded that plaintiff was entitled to recovery, defendant's exception as to the amount of that recovery is well taken. In order to recover in *quantum meruit,* a party must prove, in addition to the contract, the reasonable value of his services rendered thereunder. *Hood v. Faulkner,* 47 N.C. App. 611, 267 S.E. 2d 704 (1980); *Harrell v. Lloyd Construction Co., supra.*

> The general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than on the use to be made of the result or the benefit to the person for whom the services are rendered. [Citations.]

Turner v. Marsh Furniture Co., 217 N.C. 695, 697, 9 S.E. 2d 379, 380 (1940); *Hood v. Faulkner, supra; Harrell v. Lloyd Construction Co., supra.*

The only evidence supporting the awarded amount of $22,500 is plaintiff's own estimate, upon inquiry by the court, of the reasonable value of the services rendered and not paid for. As defendant points out, there was no effort by either plaintiff or the court to cast this figure in terms of the type of work done or the number of hours worked or to correlate it to any community or industry standard. Even though the $22,500 figure may be, in plaintiff's words, "extremely reasonable," especially in view of $32,150 prayed for in the Complaint, the evidence supporting that figure is clearly inadequate. *Turner v. Marsh, supra; Hood v. Faulkner, supra; Harrell v. Lloyd Construction Co., supra; see also Austin v. Raines Enterprises*, 45 N.C. App. 709, 264 S.E. 2d 121 (1980). The trial court's award of that amount was therefore improper.

Plaintiff has established an implied contract and the breach thereof and is therefore entitled to a recovery. *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Johnson v. Sanders, supra; Harrell v. Lloyd Construction Co., supra.* In order to recover more than nominal damages, however, plaintiff must do more than simply allege an amount and its reasonableness.

In summary, we affirm the trial court's holding that plaintiff is entitled to recover on *quantum meruit*, but reverse the trial court's holding as to the reasonable value of plaintiff's services and remand this cause for further proceedings in accordance with this opinion regarding the reasonable value of plaintiff's services.

Affirmed in part, reversed in part and remanded.

Judges HILL and PHILLIPS concur.

IN RE: WRIGHT, A MINOR

No. 8211DC326

(Filed 20 September 1983)

1. **Parent and Child § 1— termination of parental rights—sufficiency of evidence**

In a proceeding to terminate parental rights, the findings of fact were amply supported by the evidence and in turn supported the conclusions of law terminating the parental rights where the evidence tended to show that respondents permitted the child to live in filth, failed and refused to obtain necessary medical care for her, both when she had a broken femur and later when she had sores all over her body, and where respondents failed to pay anything toward the cost of the child's foster care during the six months preceding the filing of the petition.

2. **Parent and Child § 1; Trial § 6— proceeding to terminate parental rights—recordation of hearing—stipulation—failure of recording device**

In a proceeding to terminate parental rights, a contention that a new trial should be ordered because of the failure of a recording device used at the hearing was without merit where the use of the recording device was stipulated to and where no evidence favorable to respondents that a transcript would have contained was suggested.

3. **Parent and Child § 1— termination of parental rights—statutes constitutional**

G.S. 7A-289.32(2), authorizing the court to terminate parental rights upon a finding that a parent has "neglected" the child, is not unconstitutionally vague. Neither is G.S. 7A-289.32(4), authorizing parental rights to be terminated upon a parent's failure for six months preceding filing of the petition to pay a reasonable portion of the costs of caring for the child, unconstitutional as applied to the minor child's father, in that the statute does not require notice that payment is due, no notice was received by the father, and because the father received public assistance all of his life, he was unaware that anything was expected or required of him, since knowledge of the law is not the test of its application.

APPEAL by respondents from *Greene, K. Edward, Judge.* Order entered 5 January 1982 in District Court, JOHNSTON County. Heard in the Court of Appeals 11 February 1983.

Respondents Linda Gail Wright and Richard Robinson appeal from order terminating their parental rights with respect to their minor child Jennifer Marie Wright.

When the child was born on December 30, 1979, the respondents were fourteen years old and unmarried. The child lived with her mother and paternal grandmother until custody was assumed by the Department of Social Services. In May, 1980, she sustained a fractured right femur, her mother refused to get medical help for her, and she was taken to the hospital by her grandmother, where a body cast was applied. Ten days later, the baby was readmitted because the leg was not healing properly; she was hospitalized again June 27, 1980, because her feet had swollen and blisters had formed. Soon thereafter she was treated for open sores. On July 11, 1980, the child still needing medical attention, which respondent Linda Gail Wright refused to arrange for, the Department of Social Services, under order of court, took the child to a doctor, who diagnosed her many sores as being the result of poor hygiene.

Social workers who visited the home noticed that the house was dirty and overcrowded, trash and decaying food were lying around, no running water or sewer facilities were available, an open well was just outside the house, and on one occasion Linda Gail Wright was observed feeding the baby from a dirty bottle, which had mold on the nipple and was filled with curdled milk.

At a hearing held on July 23, 1980, the child was adjudged to be neglected and custody was continued in the Department of Social Services. Six months later, a guardian ad litem for the respondent parents was appointed.

On February 24, 1981, a petition for termination of parental rights was filed, alleging neglect in and failure to pay any amount toward the costs of caring for the child. The petition was amended to allege that the parents were incapable as a result of mental retardation of providing for the proper care and supervision of the child, who is a dependent child within the meaning of G.S. 7A-517(13). The response of the guardian ad litem for the respondents denied the material allegations and raised various constitutional and jurisdictional defenses.

When the matter was heard on April 29, 1981, the parties stipulated for the proceeding to be recorded on magnetic tape, but because of some defect, the tape was unintelligible, and the evidence was reconstructed by the parties. No evidence was offered by the respondents. At the end of the hearing, an oral order

terminating the respondents' parental rights was entered, which by stipulation was not reduced to writing and filed until January 20, 1982, when the reconstructed record was completed.

In the order, Linda Gail Wright was found to have neglected her child in several ways, but Richard Robinson's parental rights were terminated solely on his failure to pay a reasonable portion of the costs of the child's care after she was placed in the custody of the Department of Social Services, pursuant to G.S. 7A-289.32 (4). The issue as to the mental retardation of the respondents was not considered.

Ashley, Holland, Wellons & Whitley, by W. A. Holland, Jr., for petitioner appellee Johnston County Department of Social Services.

Spence & Spence, by Robert A. Spence, Jr., guardian ad litem for petitioner appellee Jennifer Marie Wright.

Mast, Tew & Armstrong, by Allen R. Tew, guardian ad litem for respondent appellants Linda Gail Wright and Richard Robinson.

PHILLIPS, Judge.

[1] None of the material findings of fact, showing that the respondent Linda Gail Wright permitted the child to live in filth, failed and refused to obtain necessary medical care for her, both when she had a broken femur and later when she had sores all over her body, and that both respondents failed to pay anything toward the cost of the child's foster care during the six months preceding the filing of the petition, were excepted to. All are supported by evidence and are therefore conclusive. *Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980). They also amply support the conclusions of law and resultant decision that the child's best interests require that the parental relationship be terminated. The respondents' several assignments of error, all based upon technical and constitutional grounds, though ably and earnestly presented, are without merit, and the order terminating the parental rights of respondents to the child Jennifer Marie Wright is herewith affirmed.

[2] The contention that a new trial should be ordered because of the failure of the recording device used at the hearing is accom-

panied by no showing that respondents' rights on appeal have been prejudiced by the absence of an accurate and complete transcript of the proceeding. Use of the recording device was stipulated to and no evidence favorable to respondents that a transcript would have contained has been suggested. *In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981). Furthermore, the respondents' record on appeal shows that they offered no evidence at the hearing, and it is apparent from the pleadings and assignments of error that their reliance from the outset has been on the unconstitutionality of the statutes proceeded under, rather than on any evidence of theirs or any weakness in the petitioner's evidence.

[3] G.S. 7A-289.32(2), authorizing the court to terminate parental rights upon a finding that a parent has "neglected" the child, is not unconstitutionally vague. In our jurisprudence, the word "neglected" in regard to children is well understood, as numerous decisions of our Supreme Court and this Court attest. *Matter of Allen*, 58 N.C. App. 322, 293 S.E. 2d 607 (1982); *Matter of Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed*, --- U.S. ---, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983); *In re Huber*, 57 N.C. App. 453, 291 S.E. 2d 916, *appeal dismissed*, 306 N.C. 557, 294 S.E. 2d 223 (1982); *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981); *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). That the word applies to the child in this case would be readily recognized by ordinary people everywhere, we feel sure. People of all societies and cultures, even the most backward and primitive, know that parents have the duty to safeguard and protect the health and safety of their children—a duty, according to the record, that was flagrantly disregarded in this instance. Nor is the statute applicable only to the poor, as respondents contend, and thus violative of their rights to equal protection of the law; the statute applies to all persons similarly situated and is reasonably related to the welfare and safety of the public. *In re Huber, supra*, 57 N.C. App. at 458, 291 S.E. 2d at 919. Respondents' parental rights have not been terminated because of their poverty, but because of their aggravated and prolonged indifference to the health, safety and well-being of their offspring.

It was ingeniously argued upon behalf of respondent Robinson, the child's father, that G.S. 7A-289.32(4), authorizing parental rights to be terminated upon a parent's failure for six months

preceding the filing of the petition to pay a reasonable portion of the cost of caring for the child, is unconstitutional as applied to him, in that the statute does not require notice that payment is due, no notice was received by him, and because he had received public assistance all of his life, he was unaware that anything was expected or required of him. Though this argument is novel, it is unavailing. Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.

Affirmed.

Judges WEBB and BECTON concur.

JAMES B. CURL, JR., BY AND THROUGH HIS GUARDIAN AD LITEM, FRED CURL, JUDY C. CARPENTER CUMMINGS, PATTY C. THURSTON, AND VICKI C. JOHNSON v. WALTER JACK KEY AND WIFE, MARGARET KEY, WILLIAM C. RAY, TRUSTEE, AND W. MARCUS SHORT

No. 8218SC1026

(Filed 20 September 1983)

1. **Trial § 58.3— nonjury trial—conclusiveness of findings**

Findings of fact made by the court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary.

2. **Cancellation and Rescission of Instruments § 3.1— elements of undue influence**

In order to set aside an instrument because of undue influence, it must be shown that (1) the victim was a person susceptible to influence and (2) a result indicating undue influence was exercised.

3. **Cancellation and Rescission of Instruments § 3.1— undue influence—relevant factors**

Factors relevant in determining if a victim was subjected to undue influence and if his will was actually overcome include the age, physical and mental condition of the victim; whether the victim had independent advice; whether the transaction was fair; whether there was independent consideration for the transaction; the relationship of the victim and alleged perpetrator; the value of the item transferred compared with the total wealth of the victim;

whether the perpetrator actively sought the transfer; and whether the victim was in distress or an emergency situation.

4. Cancellation and Rescission of Instruments § 3.1— undue influence—burden of proof

Where there is a confidential relationship between the parties in an undue influence case, a presumption of fraud arises if the fiduciary benefits in any way from the relationship, and the burden is then upon the fiduciary to remove the suspicion by presenting proof that the transaction was a voluntary act of the alleged victim. Where there is no confidential or fiduciary relationship, the burden of proof remains upon the party alleging undue influence.

5. Cancellation and Rescission of Instruments § 10.2— execution of deed—absence of confidential relationship and undue influence

In an action to set aside a deed on the ground of undue influence, there was ample evidence to support the trial court's finding that no confidential relationship existed between plaintiffs and defendant where evidence for the defendant tended to show that defendant was not a blood relative, that while he lived with the plaintiffs he paid rent and was treated as an ordinary tenant, and that he occupied no position of special trust or responsibility as to the plaintiffs. Furthermore, there was ample evidence to support the trial court's finding that no undue influence had been exerted by defendant where there was evidence that plaintiffs were both adults when they signed the deed and both were better educated than defendant; plaintiffs were not physically or mentally disabled in any way; defendant was almost illiterate and was partially disabled as a result of an accident suffered in the plaintiffs' home; although defendant was represented by an attorney and plaintiffs were not, defendant's attorney explained to plaintiffs the purpose and effect of the deed; and the deed was executed in settlement of defendant's threatened personal injury suit against plaintiffs.

APPEAL by plaintiffs from *John, Judge*. Judgment entered 27 August 1982 in GUILFORD County District Court. Heard in the Court of Appeals 25 August 1983.

Plaintiffs brought this action to set aside a deed conveying their family home to defendant Walter Jack Key. The case was tried before Judge John without a jury.

At trial, plaintiffs alleged among other grounds, that plaintiffs James B. Curl, Jr. and Vicki Curl Johnson were minors at the time the deed was executed and had not since ratified the deed. Plaintiffs also alleged that defendant Key stood in confidential relationship to them and that he exerted undue influence upon them in obtaining the deed to the family home. The trial court granted summary judgment before trial in favor of James

B. Curl, Jr. and Vicki Curl Johnson, on the grounds they were infants when the deed was signed. They therefore do not join this appeal.

At trial, plaintiffs' evidence tended to show the following circumstances, events and transactions. Defendant Key was a longtime, close family friend to whom plaintiffs turned for advice after their father died, leaving them the family home as their sole inheritance. Key lived with them as a member of the family for some months. Plaintiffs were unaware that they were signing a deed to their home and neither defendant nor defendant's attorney discussed the nature or effect of the document.

Defendant's evidence tended to show that although defendant was a friend of plaintiffs' deceased father and was called "Uncle Jack" by plaintiffs, defendant Key was not a blood relative, nor did he occupy a special, advisory relationship to plaintiffs. Defendant lived with plaintiffs for a time, but he paid rent and occupied only the position of tenant to landlord as to the plaintiffs. Defendant was injured in an accident in the plaintiffs' home, was considering suing the plaintiffs for personal injuries he suffered in the mishap, and plaintiffs deeded their home in settlement of the claim. Although plaintiffs were not represented by an attorney when they executed the deed, defendant's attorney explained the significance and effect of the transaction to plaintiffs before they signed the deed.

From judgment entered for defendant, plaintiffs Judy C. Cummings and Patty C. Thurston appealed.

Adams, Kleemeier, Hagan, Hannah & Fouts, by John P. Daniel, for plaintiffs.

Short & Simpson, by H. Marshall Simpson, for defendants.

WELLS, Judge.

Plaintiffs assign as error that the trial court found as facts that no confidential relationship existed between defendant and plaintiffs, and that defendant exerted no undue influence upon the plaintiffs. Plaintiffs argue there was insufficient evidence in the record to support the findings of fact.

[1] Findings of fact made by the court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal

if there is evidence to support them, although the evidence might have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Complex, Inc. v. Furst*, 57 N.C. App. 282, 291 S.E. 2d 296, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982).

[2] Undue influence is defined as force or persuasion exerted "over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *In re Estate of Loftin*, 285 N.C. 717, 208 S.E. 2d 670 (1974), *Brown v. Brown*, 171 N.C. 649, 88 S.E. 870 (1916). Undue influence is distinguished from fraud in that "[f]raud . . . is characterized by false representations, concealment, or deception, whereas there may be undue influence although all facts are truly represented and full disclosure of them made." 25 Am. Jur. 2d *Duress and Undue Influence* § 35 (1966), *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Thus the two key elements of undue influence which must be proven are: (1) the victim was a person susceptible to influence and (2) a result indicating undue influence was exercised.

[3] Factors relevant in determining if the victim was subject to undue influence and whether his will was actually overcome include the age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship of the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation. 25 Am. Jur. 2d *supra*, § 36.

[4] Assignment of the burden of proof in an undue influence case hinges upon whether a confidential or fiduciary relationship existed between the perpetrator and the victim. Where there is a confidential relationship between the parties, a presumption of fraud arises if the fiduciary benefits in any way from the relationship. *Cross v. Beckwith*, 16 N.C. App. 361, 192 S.E. 2d 64 (1972). The burden is then upon the fiduciary to remove the suspicion by presenting proof that the transaction was a voluntary act of the alleged victim. *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615

(1943). *See also* cases cited in Strong's N.C. Index *Cancellation & Rescission* § 9 (1976, 1983 Supp.). Where there is no confidential or fiduciary relationship, the burden of proof remains upon the party alleging undue influence. *Wessell v. Rathjohn*, 89 N.C. 377 (1883), 25 Am. Jur. 2d *supra* § 36.

Courts have been reluctant to define precisely what constitutes a confidential or fiduciary relationship.

> The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' (Cites omitted.)

Abbitt v. Gregory, 201 N.C. 577, 160 S.E. 896 (1931), *see also Link v. Link*, *supra*.

[5] In the case at bar, there was ample evidence to support the trial court's finding that no confidential relationship existed between defendant and plaintiffs. Evidence for the defendant showed that defendant was not a blood relative, that while he lived with the plaintiffs he paid rent and was treated as an ordinary tenant, and that he occupied no position of special trust or responsibility as to the plaintiffs.

There was also sufficient evidence presented that defendant exerted no undue influence over the plaintiffs. First, evidence for the defendant tended to show that plaintiffs Judy Cummings and Patty Thurston were not susceptible to undue influence. Plaintiffs were both adults when they signed the deed and both were better educated than defendant Key. There was no showing that either plaintiff was physically or mentally disabled in any way. Defendant, on the other hand, was almost illiterate, and was partially disabled as a result of the accident suffered in the plaintiffs'

home. Although defendant was represented by an attorney, and plaintiffs were not, there was evidence that defendant's attorney explained the purpose and effect of the deed to plaintiffs.

Further, there is evidence that plaintiffs' free will was not actually overcome by defendant, because there was evidence the deed was transferred in settlement of defendant Key's threatened personal injury suit against plaintiffs. Because there was ample evidence to support the trial court's findings that no confidential relationship existed and no undue influence had been exerted by defendant, this assignment of error is overruled.

Plaintiffs do not present arguments in support of their other assignments of error in their brief. Therefore, those issues are not preserved for consideration by this court. Rule 28(b)(5) of the Rules of Appellate Procedure.

Affirmed.

Judges HEDRICK and PHILLIPS concur.

FRANK C. HICKS, ADMINISTRATOR OF THE ESTATE OF CYNTHIA KAY PHILLIPS JOYNER AND PARENTS, CHESTER AND DOROTHY PHILLIPS v. BROWN SHOE COMPANY

No. 8210IC368

(Filed 20 September 1983)

1. Master and Servant § 48— four or more regular employees within State—sufficiency of evidence

In a workers' compensation proceeding, the evidence was sufficient to support the Commission's conclusion that defendant shoe company had four or more regular employees in North Carolina during the time involved in an accident and thus was subject to the Act where the president of defendant testified he had five or more employees in North Carolina on the day of the accident and where the fact that decedent was the only employee for one line of shoes in the state did not make the line of shoes a separate and distinct business from the rest of defendant company's business.

2. Master and Servant § 55.6— workers' compensation—in course of employment—sufficiency of evidence

The evidence was sufficient to find decedent's fatal automobile accident occurred within the scope and course of her employment where decedent was

a traveling sales representative, and where the accident occurred in the middle of her territory, during business hours, on a highway between two towns which had stores she regularly called upon.

3. Master and Servant § 78— interest on award constitutional

The Industrial Commission did not err in requiring interest to be paid on an award of the Hearing Commissioner from the date of its rendition since G.S. 97-86.2, allowing interest on an award from the date of its rendition, was enacted before the award of the Hearing Commissioner, and before defendant's appeal therefrom, and since it affected no vested legal right of the defendant.

APPEAL by defendant from opinion and award of the Industrial Commission entered 10 November 1981. Heard in the Court of Appeals 15 February 1983.

In this action for death benefits under the Workers' Compensation Act, the Hearing Commissioner's award for the plaintiffs was affirmed by the Full Commission and the defendant appealed. The evidence tended to show the following:

The defendant Brown Shoe Company is a large marketer of shoes, whose home office is in St. Louis. It sells a number of different brands of shoes, including Air Step, Buster Brown, Foot Works, Levi's for Feet, Life Stride, Mound City, Pedwin, Forest Park, Naturalizer, and Rob Lee; each brand of shoes is marketed through a separate sales division of the company which sells only that particular shoe. At the time involved, eight such divisions, including Levi's for Feet, sold shoes in North Carolina through regularly-employed, fulltime sales representatives, five of whom lived in this state. All of the sales divisions are headquartered in St. Louis at the same address defendant is headquartered, and all sales representatives of the various sales divisions are paid their salary and commissions directly through the payroll department of defendant located there.

In April, 1978, the decedent, Cynthia K. Phillips Joyner, was employed by defendant to sell Levi's for Feet shoes in North Carolina. She lived in Greenville, North Carolina and traveled extensively throughout the state. In her work for defendant, she regularly called on customers or prospective customers in Boone and West Jefferson. Incident to her plan to call on customers in Boone and West Jefferson on October 4, 1978, she spent the night before with her parents in Johnson City, Tennessee, about 45

miles from Boone, and departed therefrom at about 8:10 the morning of October 4th in her automobile. About two and a half hours later, she was involved in a fatal vehicular accident one and a half miles east of Boone on U.S. 221 North, the main and direct route between Boone and West Jefferson. Earlier that morning, she had called on a shoe store in Boone and had an appointment later in the day with a store in West Jefferson.

Franklin Smith for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for defendant appellant.

PHILLIPS, Judge.

The defendant brings forward three assignments of error. None have merit.

[1] Under the provisions of G.S. 97-13, the Workers' Compensation Act does not apply "to any person, firm or private corporation that has regularly in service less than four employees *in the same business* within this State." (Emphasis supplied.) Defendant first contends that the Commission's conclusion that the defendant had four or more regular employees in North Carolina during the time involved and thus was subject to the Act was not supported by evidence. In doing so, defendant overlooks much evidence that was introduced, including the testimony of its president. When asked if Brown Shoe Company didn't have five or more employees in North Carolina on October 4, 1978, he testified, "On October 4, 1978, I guess we had 5 employees in North Carolina" and gave the names and addresses of the five employees. In contradiction thereof, defendant argues that because its several sales divisions operated independently of each other, each selling its particular brand of shoes, each division was a separate *business* within contemplation of G.S. 97-13, and since decedent was Levi's for Feet's only employee in this state, the Act does not apply. The evidence makes plain, however, that Levi's for Feet was not a separate and distinct *business* from Brown Shoe Company's business, but was an integral part of it, as were the several other divisions, and that five employees of defendant who lived in this state were regularly engaged in defendant's shoe-selling business.

[2] The defendant next contends that the Commission's conclusion that decedent was acting within the scope and course of her employment when the fatal accident occurred was also without evidentiary foundation. The record is replete with evidence on this point as well. She was a traveling sales representative, and the personal deviation to see her parents had ended and is not a factor in the case. The accident occurred in the middle of her territory, during business hours, on a highway between two towns which had stores she regularly called on. Even if the Workers' Compensation Act limited the coverage of traveling sales representatives to occasions when they are actually calling on customers or are on the way to do so, this evidence would support a finding to the latter effect, in our judgment. But, of course, coverage is not so limited; it applies to many activities incidental to the travel required. *See* 99 C.J.S. Workmen's Compensation § 231(f), pp. 799-804; *Clark v. Burton Lines, Inc.*, 272 N.C. 433, 158 S.E. 2d 569 (1968). In all events, this evidence abundantly supports the conclusion made that she was on the job and about her master's business when the accident occurred. Furthermore, it is in evidence, through the testimony of defendant's official, that it *verified* that she had called on a store in Boone a few minutes before the accident and had an appointment later in the day with a store in West Jefferson. That defendant's verification was arrived at by telephoning stores in Boone and West Jefferson a few hours after the accident did not make this evidence inadmissible hearsay, as defendant argues. The testimony did not show what the store representatives said in those telephone conversations and was not offered to show that what they said was true—it was offered to prove what the defendant did, which was verify that decedent was on the job and about its business when the accident occurred. That the verification was accomplished by means that its counsel now questions is no reason for rejecting this testimony.

[3] Finally, the defendant contends that requiring interest to be paid on the award of the Hearing Commissioner from the date of its rendition is unconstitutional because at the time the accident occurred and plaintiffs' rights became fixed, no authority to require interest existed. On April 23, 1981, the General Assembly enacted G.S. 97-86.2, and provided that it should be effective upon ratification. The enactment reads as follows:

> When, in a worker's compensation case, a hearing or hearings have been held and an award made pursuant thereto, if there is an appeal from that award by the employer or carrier which results in the affirmance of that award or any part thereof which remains unpaid pending appeal, the insurance carrier or employer shall pay interest on the final award from the date the initial award was filed at the Industrial Commission until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

In attaching interest to the award from the date of its rendition, the Commission only followed the statute and in doing so impinged on no constitutional right of defendant. *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843 (1941). This remedial and procedural statute, enacted *before* the award of the Hearing Commissioner was made on June 5, 1981, and before defendant's appeal therefrom, affected no vested legal right of the defendant. The statute did not alter in any way plaintiffs' cause of action or defendant's obligation to pay compensation for decedent's death; it only strengthened plaintiffs' remedy in collecting the award which was obtained later. The Constitution does not freeze procedural rules and remedial practices as of the date causes of action accrue. 16A C.J.S. Constitutional Law § 383, p. 61.

The opinion and award appealed from is

Affirmed.

Judges ARNOLD and BECTON concur.

CHRISTINE O'NEAL, FORMERLY CHRISTINE O'NEAL WYNN v. JON B. WYNN

No. 822DC1063

(Filed 20 September 1983)

1. **Divorce and Alimony § 24.5— child support—consent judgment—modification for changed circumstances**

Where the trial court adopted a consent judgment for child support as its own determination of the rights of the parties, the judgment is subject to modification under G.S. 50-13.7(a) upon a showing of changed circumstances.

2. **Divorce and Alimony § 24.7— modification of child support order—changed circumstances**

The trial court did not err in reducing the amount of child support which a court order required defendant father to pay from $275.00 per month to $150.00 per month where the court found that, although the needs of the child remained unchanged, defendant is unable to contribute more than $150.00 per month for child support due to his present financial condition, and such amount is a reasonable sum considering the estates, earnings, conditions and customary standard of living of the child and the parties, and where this finding was supported by evidence that defendant's income has decreased because of the loss of his job as an air traffic controller when he refused to cross a picket line, defendant has borrowed substantial sums in operating a motel and a bar, the motel and bar have both lost money, and plaintiff mother's income has increased substantially.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Ward, Judge.* Judgment entered 13 May 1982 in District Court, HYDE County. Heard in the Court of Appeals 30 August 1983.

The parties heretofore entered into a consent order resolving their differences as to child custody and support. The defendant father violated the terms of the consent order by failing to make timely support payments and to provide medical insurance coverage. At the instance of the wife, the Clerk of Superior Court issued a show cause order to defendant father, who then moved the court to modify the provision of the 1976 order relating to support, custody, and medical insurance. The plaintiff appeals an order entered by the trial judge modifying the 1976 order and refusing to find defendant in contempt.

George Thomas Davis, Jr., for the appellant.

Carter, Archie & Hassell, by Sidney J. Hassell, for appellee.

HILL, Judge.

On 17 November 1976 plaintiff and defendant attempted to settle their differences with respect to their marital separation by consenting to a judgment of the court. Findings of fact included in the judgment determined that at the time the parties entered into the consent judgment the defendant was earning approximately $20,000.00 as an air traffic controller, and the plaintiff was earning approximately $3,600.00 per year. The consent order provided that defendant pay $275.00 per month for the use and benefit of the minor child. The order further directed the defendant to continue to maintain his major medical insurance on the child. In addition, the court entered the order "as its own judgment" and provided that the order be enforceable as for contempt of court.

Both the plaintiff and defendant have married other parties subsequent to the entry of the 1976 order. One child has been born to the defendant and his second wife, and another was expected near the end of June, 1982.

On 1 February 1981 the defendant and other members of his family formed a partnership to acquire and operate a motel known as "The Boyette House." The partnership borrowed $210,000.00 to acquire the property. The operator has lost money since its inception.

During the summer of 1981 the Air Traffic Controllers Union went on strike. Although the defendant was not a member of the Union, he refused to cross the picket line and was fired for failing to report to work. Defendant thereupon reduced his child support payments. Defendant and his second wife moved to Ocracoke, North Carolina, borrowed $60,000.00, and purchased a tract of land on which they opened a tavern and dance hall in March 1982. From August 1981 to May 13, 1982, defendant was paid $300.00 by the Boyette House and approximately $250.00 from the tavern.

Plaintiff earned approximately $10,523.12 in 1981, working at the North Carolina Ferry Terminal and as a waitress. She purchased a Blue Cross and Blue Shield hospital policy on the child when defendant let his policy lapse.

Plaintiff instituted a show cause order directing the defendant to show cause why he should not be held in contempt for reducing his payments and allowing the insurance coverage on the child to lapse. Defendant moved to modify the 1976 order. The trial judge found as a fact that the defendant had no significant assets which were not heavily encumbered; that the needs of the child exceed $275.00 per month, but due to the financial condition of the defendant he was unable to contribute more than $150.00 monthly for the support of the child. The trial judge further found that the defendant had suffered a substantial change of circumstances through the loss of his job and his financial involvement with the Boyette House and the ¾ Time Tavern, entitling defendant to have his payments for child support reduced from $275.00 per month to $150.00 and to permit the medical insurance policy he had carried on the child to lapse.

[1] Plaintiff-appellant argues the trial court may not decrease child support obligations established by a consent order, citing *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964) which holds that the ordinary rules governing the interpretation of contracts apply to separation agreements, and the courts are without power to modify them. Appellant's argument is misplaced. The trial judge entered the judgment as its own judgment, albeit with the consent of the parties, and specifically provided for the enforcement of the order by its contempt power. *See Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E. 2d 657 (1982), *aff'd*, 307 N.C. 401, 298 S.E. 2d 345 (1983). Since the court adopted the judgment as its own determination of the rights of the parties, the judgment is subject to modification under G.S. 50-13.7(a) upon a showing of changed circumstances. *Dishmon v. Dishmon*, 57 N.C. App. 657, 292 S.E. 2d 293 (1982).

[2] Appellant next argues the District Court may not reduce the amount of child support without having before it any evidence of, or making any findings concerning the present needs of the child. We are aware the court generally modifies the child support provisions of an order only when it has before it evidence that there has been a substantial change in circumstances affecting the welfare of the child. *Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E.

2d 235 (1979). The court made findings to the effect that the reasonable needs of the child for her health, education, and maintenance exceed $275.00 per month, the exact finding heretofore made by the trial judge in the 1976 order. However, the judge further found:

> 32. That due to his present financial condition, the Defendant is unable to contribute more than $150.00 per month for the support of said child, and this is a reasonable sum considering the estates, earnings, conditions and customary standards of living of the *child* and the parties.

This finding is substantiated by evidence of appellee's decrease in income by loss of his job, the debts he assumed voluntarily in operating a motel and bar, and the increased income of the appellant. Nothing in the record tends to show the appellee has willfully suppressed his income. Rather appellee has exerted efforts to engage in two lawful businesses and appears to have given the enterprises his best. In determining a station in life for the child, the court not only considers the needs of the child but also the abilities of the parents to provide those needs. *Steele v. Steele,* 36 N.C. App. 601, 244 S.E. 2d 466 (1978). Here the court acknowledged the needs of the child as unchanged, but found the ability of the appellee to pay had decreased substantially. The findings of the court are supported by the evidence and binding on appeal. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). This assignment is overruled.

Appellant next argues the appellee may not use the facts that he lost his job, by participating in a strike, or that he incurred three substantial debts as a basis of changed circumstances justifying a reduction in his child support obligations. We disagree. Appellee testified he did not go on strike, but refused to run a picket line. Appellee was not a Union member. As a result of appellee's failure to present himself for work, he was notified that his employment was terminated. He has not been charged with any crime related to his dismissal.

Appellee's only job training was as an air traffic controller. He could find no other work as such, and went into business for himself, incurring substantial indebtedness. His incurrence of

debt is a normal incidence to the entry of business. Absent a finding that appellee is deliberately depressing his income or otherwise acting in a deliberate disregard of his obligation to provide reasonable support for his child, his ability to pay child support is determined by his actual income at the time the award is modified. *See Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E. 2d 751 (1982).

Lastly, the appellant points to the valuable assets owned by the appellee, and contends some of appellee's equity could be used to support the child. Appellant's contention is not supported under the facts of the case. Appellee is part owner in the Boyette House and full owner with his second wife in the ¾ Time Bar, and has incurred debts in acquiring them. Both are new businesses; both have operated at a loss since opening. This is hardly a source of quick income and is questionable as collateral for a loan to meet a child support obligation.

Affirmed.

Judge HEDRICK dissents.

Judge WEBB concurs.

Judge HEDRICK dissenting.

In my opinion, the record does not support the judge's order reducing the defendant's payment for the support of his child.

GEORGE M. CLELAND, ADMINISTRATOR C.T.A. OF THE ESTATE OF W. BRYAN WHITE AND DOROTHY S. WHITE v. THE CHILDREN'S HOME, INC.

No. 8221SC1064

(Filed 20 September 1983)

Contracts § 12.2- ambiguous contract—summary judgment inappropriate

Where a charitable institution conveyed several lots of land to plaintiff, where several of the lots were exempt from taxation while owned by defendant, and where the deeds delivered at closing contained a provision indicating

the conveyance was subject to ad valorem taxes on any portions of the property conveyed which were "currently taxable," summary judgment for either party was inappropriate since, under the circumstances of the case, more than one interpretation of the words "currently taxable" could be reasonable as a matter of law and the ambiguity should be resolved by a jury.

Judge WEBB dissenting.

APPEAL by defendant from *Wood (William Z.), Judge.* Judgment entered 28 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 August 1983.

The following facts are undisputed. On 31 March 1978 defendant Children's Home entered into a sale-purchase agreement with W. Bryan White Realty Co., Inc. for the sale of approximately 405 acres of land. The agreement contained the following provision:

> 5. The sale and purchase of the aforesaid property under this Agreement shall be closed . . . at 10:00 A.M., Monday, July 3, 1978, or such earlier date as shall be mutually agreeable to the parties. At the closing . . . the Seller shall deliver to the Purchaser a good and sufficient deed conveying the aforesaid property . . . free and clear of all liens and encumbrances, except . . . 1978 ad valorem taxes on any portions of said property which are subject to taxation, such taxes to be prorated, on a calendar year basis, as of the date of closing.

The parties later agreed to change the closing date from 3 July 1978 to 2 June 1978. On that date W. Bryan White and his wife Dorothy S. White, as assignee and designee of the realty company, purchased the property from the defendant pursuant to the agreement. The deed delivered at closing contained the following provision:

> (c) This conveyance is also subject to 1978 ad valorem taxes on any portions of the property hereby conveyed which are currently taxable.

The record reveals that two of the lots conveyed in this transaction were subject to ad valorem taxes while owned by the defendant. The remaining lots were tax exempt while owned by the defendant because the lots were used for charitable purposes

under N.C. Gen. Stat. Chap. 105, Art. 12. Upon transfer to a non-charitable purchaser, however, these lots lost their exempt status and became subject to 1978 ad valorem taxes under N.C. Gen. Stat. Sec. 105-285(d), which provides:

> (d) Real Property.—The value of real property shall be determined as of January 1 of the years prescribed by G.S. 105-286 and 105-287. The ownership of real property shall be determined annually as of January 1, except in the following situation: When any real property is acquired after January 1, but prior to July 1, and the property was not subject to taxation on January 1 on account of its exempt status, it shall be listed for taxation by the transferee as of the date of acquisition and shall be appraised in accordance with its true value as of January 1 preceding the date of acquisition; and the property shall be taxed for the fiscal year of the taxing unit beginning on July 1 of the year in which it is acquired. The person in whose name such property is listed shall have the right to appeal the listing, appraisal, and assessment of the property in the same manner as that provided for listings made as of January 1.

On 15 November 1978 city and county ad valorem taxes of $24,070.50 were assessed against the property. Plaintiffs paid this amount and then demanded partial reimbursement from defendant in the amount of $10,089.83. Defendant denied any obligation for taxes assessed on property that was exempt prior to the conveyance and refused to reimburse plaintiffs.

Both parties moved for summary judgment. From grant of summary judgment for plaintiffs, defendant appealed.

Block, Meyland & Lloyd, by A. L. Meyland for the plaintiffs, appellees.

Womble, Carlyle, Sandridge & Rice, by W. F. Womble, Sr. and Allan R. Gitter for the defendant, appellant.

HEDRICK, Judge.

The defendant assigns error to the trial court's denial of its motion for summary judgment and to the granting of plaintiffs' motion for summary judgment. The defendant contends that the

deed provision governing apportionment of ad valorem taxes is clear and unambiguous. It further contends that the provision establishes as a matter of law that defendant is not obligated to pay any portion of taxes assessed on property that was exempt from taxation immediately prior to the conveyance.

Summary judgment is proper only if "there is no genuine issue as to any material fact. . . ." G.S. 1A-1, Rule 56(c). The law in North Carolina is well settled that "[w]henever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E. 2d 622, 624 (1973). A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. *Id.* at 410, 200 S.E. 2d at 624; *Nash v. Yount*, 35 N.C. App. 661, 242 S.E. 2d 398, *disc. rev. denied*, 295 N.C. 91, 244 S.E. 2d 259 (1978). If an agreement is ambiguous, on the other hand, and the intention of the parties unclear, interpretation of the contract is for the jury. *Silver v. Board of Transportation*, 47 N.C. App. 261, 270, 267 S.E. 2d 49, 55 (1980). "[I]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent . . . to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court." *Root v. Insurance Co.*, 272 N.C. 580, 590, 158 S.E. 2d 829, 837 (1968) (citations omitted).

In the present case, the defendant, a charitable institution, conveyed several lots of land to plaintiff. Two of these lots were subject to ad valorem taxes while owned by the defendant. The remaining lots were exempt from taxation while owned by defendant because of the charitable use to which they were put. Transfer of these lots to a non-charitable purchaser prior to 1 July 1978 caused the property to be treated as if it had been non-exempt for the entire year under the provisions of N.C. Gen. Stat. Sec. 105-285(d). It is in light of these circumstances that the words "currently taxable" must be considered. While the words appear clear and unambiguous, their meaning is less certain when they are considered in the context of all the circumstances surrounding the transaction. The defendant contends that the words reflect the parties' intention to limit defendant's liability to its pro-rata share of taxes assessed on the two non-exempt lots—that only

this land was "currently taxable." Plaintiffs contend that the agreement fixed defendant's obligation to pay its share of taxes on any land eventually determined to be subject to the 1978 ad valorem taxes. Because neither interpretation of the words "currently taxable" can be said to be unreasonable as a matter of law, the provision must be treated as ambiguous. Ambiguities in contracts are to be resolved by the jury upon consideration of "the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Silver v. Board of Transportation*, 47 N.C. App. 261, 268, 267 S.E. 2d 49, 55 (1980) (citation omitted). Because a genuine issue of material fact exists in regard to the intention of the parties, summary judgment was not appropriate. Summary judgment for plaintiff is thus vacated and the cause is remanded to Superior Court for further proceedings.

Vacated and remanded.

Judge WEBB dissents.

Judge HILL concurs.

Judge WEBB dissenting.

I dissent. I believe the words of the contract can be interpreted without resort to a jury trial. The contract provides that the property shall be conveyed "free and clear of all liens and encumbrances, except . . . 1978 ad valorem taxes on any portions of said property which are subject to taxation, such taxes to be prorated, on a calendar year basis, as of the date of closing." As I understand this language it provides that there are no encumbrances on the land except possibly 1978 ad valorem taxes. If there were any 1978 taxes on the property the taxes were to be apportioned. There were 1978 ad valorem taxes on the property and the taxes should have been apportioned. I believe the parties did not anticipate what happened. If they had done so we do not believe they would have closed the transaction before 1 July 1978. Nevertheless, the parties did close before 1 July 1978 making the property subject to 1978 ad valorem taxes. The contract provides that in such event the taxes were to be prorated. I vote to affirm the judgment of the Superior Court.

BURKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION v. JUNO CONSTRUCTION CORPORATION AND STATESVILLE ROOFING & HEATING COMPANY

No. 8225SC983

(Filed 20 September 1983)

1. **Appeal and Error § 68.3— denial of motion to amend pleadings—former decision—law of the case**

In an action for breach of contract to maintain a school roof, the appellate court's decision in a prior appeal affirming the trial court's ruling denying defendant's motion to amend its pleadings to allege unenforceability of the maintenance contract became the "law of the case" on that issue.

2. **Evidence § 47— expert testimony based partly on testimony of another expert**

In an action for breach of contract to maintain a school roof, plaintiff's expert witness could properly base part of his estimate of the amount of damages caused as a result of defendant's failure to maintain the roof between 1973 and 1978 on the previous testimony of another roofing expert who viewed the roof in 1977 and 1981.

3. **Contracts § 29.2— breach of contract to maintain roof—measure of damages**

The proper measure of damages for breach of a contract to maintain a school roof was the cost of repair, and plaintiff's expert witness could properly base his estimate of the cost of repair by taking the actual cost of repair in 1981 and reducing that figure to reflect price levels during the years for which defendant was liable.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 28 April 1982 in BURKE County Superior Court. Heard in the Court of Appeals 23 August 1983.

The current appeal marks the second time this case has been considered by this court. Plaintiff, Burke County Board of Education, contracted with the Shaver Partnership to design a roof for plaintiff's Freedom High School. Defendant Juno Construction Corporation was the general contractor and defendant Statesville Roofing & Heating Company was the subcontractor for the roofing job. In 1979, after leaks developed in the high school roof, plaintiff sued both defendants for faulty installation of the roof and for breach of their contracts. Plaintiff also sued defendant Statesville Roofing & Heating Company for an alleged violation of Statesville Roofing's contract to maintain the high school roof. At the initial trial, the trial court denied defendant Statesville Roofing's motion to amend its pleading to allege the unenforceability

of the roof maintenance contract. The jury found that both Juno and Statesville Roofing breached their contracts with plaintiff. The jury found further, however, that defects in the roof were the result of defective roof design furnished to defendants by plaintiff, and no damages were awarded plaintiff.

Plaintiff appealed to this court, which affirmed the judgment below as to Juno Construction, but found defendant Statesville Roofing liable on the roof maintenance contract. The Court of Appeals upheld the trial court's ruling denying Statesville Roofing's motion to amend the pleadings to allege unenforceability of the maintenance contract. We then remanded for determination of damages owing plaintiff by defendant Statesville Roofing. *See Burke County Public Schools Board of Education v. Juno Construction Corporation and Statesville Roofing & Heating Company*, 50 N.C. App. 238, 273 S.E. 2d 504 (1981). Our Supreme Court granted discretionary review, 302 N.C. 396, 279 S.E. 2d 350 (1981), but later dismissed the petition for review as improvidently granted, 304 N.C. 187, 282 S.E. 2d 778 (1981).

On remand in 1982, the trial court denied defendant's renewed motion to amend its pleadings to allege the unenforceability of the roof maintenance contract, and denied defendant's motions for summary judgment and directed verdict. The trial court also overruled defendant's objections to admission of expert testimony concerning the amount of damage to the Freedom High School roof. The jury determined damages at $100,000.00, and defendant appealed.

Simpson, Aycock, Beyer & Simpson, P.A., by Samuel E. Aycock, for plaintiff.

Raymer, Lewis, Eisele, Patterson & Ashburn, by Douglas G. Eisele, for defendant Statesville Roofing & Heating Company.

WELLS, Judge.

[1] In its first assignment of error, defendant argues that the trial court erred in denying its motion to amend the pleadings to allege unenforceability of the roof maintenance contract. This identical motion was made by defendant, and denied by the court in the initial trial of this case in 1979. The trial court's denial of the motion to amend was affirmed by this court in *Board of Education v. Construction Corp., supra.*

Where a question before an appellate court has previously been answered on an earlier appeal in the same case, the answer to the question given in the former appeal becomes "the law of the case" for purposes of later appeals. *La Grenade v. Gordon*, 60 N.C. App. 650, 299 S.E. 2d 809 (1983); *see also Complex, Inc. v. Furst and Furst v. Camilco, Inc. and Camilco, Inc. v. Furst*, 57 N.C. App. 282, 291 S.E. 2d 296, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982). This assignment is, therefore, overruled. In its present appeal, defendant advances another theory in support of its motion to amend, i.e., that its agreement with plaintiff was unenforceable as against public policy. Such additional arguments may not serve to change the law of this case on this point.

[2] Defendant also assigns as error the trial court's allowing plaintiff's expert witness Luther Pinkerton to estimate the amount of damages caused to plaintiff's roof as a result of defendant's failure to maintain the roof between August 1973 and August 1978, as required by the contract. Defendant raises four objections to Pinkerton's testimony. First, defendant argues Pinkerton had no firsthand knowledge of the condition of the roof before 1981, and was improperly permitted to base part of his estimates on testimony of Thomas Anderson, a roofing expert, who viewed the roof in 1977 and 1981.

It is well established that an expert witness need not have firsthand knowledge of all matters upon which he bases an opinion. He may, for instance, base an opinion upon previous testimony given in the same trial. McCormick, *The Law of Evidence*, § 14 (1972), 1 Brandis, *North Carolina Evidence*, § 136 (2d Rev. Ed. 1982), *see also State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

Second, defendant argues that Anderson did not view all areas of the roof in 1977, and therefore could not accurately distinguish between damage existing in 1977, for which defendant was responsible, and damage occurring after August 1978, for which defendant was not liable. Although there was some evidence at trial that Anderson did not personally inspect every square foot of the roof in 1977, this is not sufficient to bar his testimony, nor to prevent Pinkerton from basing his cost estimates upon Anderson's testimony. Rather, defendant's objection goes to the weight and credibility of the evidence, a matter for the jury.

Third, defendant contends Pinkerton failed to base his damage estimate on the cost required to make the roof conform to the original specifications. There is ample evidence in the record showing that Pinkerton did use the original specifications in his calculations; therefore, the trial judge did not err in permitting Pinkerton's testimony on this point.

Finally, defendant objects that Pinkerton determined the amount of damage in 1977 dollars, by taking the actual cost of repairs made in 1981 and reducing that figure by 25 percent. Defendant argues the 25 percent figure is arbitrary and that the formula includes damages occurring between 1977 and 1981, for which defendant is not contractually liable.

[3] The correct measure of damage in construction contract cases is the cost of repairing the structure to make it conform to contract specifications. Where substantial destruction of the structure is required to remedy the defects, however, the correct measure of damage is the value of the building as contracted for, minus the value of the building as actually constructed. *LaGasse v. Gardner*, 60 N.C. App. 165, 298 S.E. 2d 393 (1983); *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960). There was no evidence at trial that repairing the roof would require substantial destruction of plaintiff's school. Therefore, cost of repair was the proper measure of damages, and plaintiff's evidence concerning the 1981 costs was relevant and admissible. This court is not aware, nor has defendant cited any cases which forbid determining costs of repairs in a past year, by discounting current costs to reflect earlier price levels and the effect of inflation on those levels. The accuracy of the method, as well as the question whether Pinkerton properly calculated the damages to omit defects arising after 1978, when defendant's liability ceased, again go to the weight and credibility of the testimony, rather than its admissibility. Defendant was free to cross-examine Pinkerton, to call expert witnesses of its own, and to argue credibility to the jury. Defendant's assignment of error is overruled.

Because there was admissible evidence on the issue of damages, and because the trial judge correctly denied defendant's motion to amend the pleadings, there was no error in the court's decision to deny summary judgment, deny defendant's motion to dismiss and to enter judgment on the verdict.

No error.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JERRY ALLEN EARNEST

No. 8225SC1172

(Filed 20 September 1983)

Embezzlement § 6— sufficiency of evidence

The evidence was sufficient to convict defendant of embezzlement under G.S. 14-90 where the evidence tended to show that defendant's duties, as president of the corporation, were to hire and fire employees and to direct payment of bills, and where his duties did not encompass the authority to open a separate bank account for the purpose of depositing corporate funds which he did.

APPEAL by defendant from *Owens, Judge.* Judgment entered 21 September 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 30 August 1983.

On 28 September 1979, Stephen Daniels, Kenneth Huggins, James Jacumin, and the defendant agreed to set up a corporation to be named Hepco Publishing, Inc. At the first organizational meeting, held 1 October 1979, defendant was elected president, Huggins was elected vice-president, Daniels was elected secretary, and Jacumin was elected treasurer.

The defendant's responsibilities as president were to direct payment of bills and to hire and fire employees. As treasurer, Jacumin was authorized to open a bank account for the corporation, and such an account was opened under the name of Hepco, Inc. at the First National Bank of Catawba County. All funds of the corporation were to be deposited in the corporate bank account.

Over the next two months, the defendant received some 20 checks totaling $3,108.50 and made payable to Hepco Publishing, Inc. These checks were received either personally by the defendant or through James Lemley, a salesman for the corporation. Instead of giving these checks to the treasurer or depositing them

in the Hepco bank account, the defendant deposited the checks in an account entitled Earnest Publishing Company, which was an account personally opened by the defendant in August of 1979.

On or about 29 October 1979, the defendant went to the corporate office and cleared out his desk. He did not return until a called meeting of the directors of the corporation on 3 December 1979, at which time he was removed as president.

Defendant testified at trial that he received the checks in question and that he deposited them in his Earnest Publishing Company account, but stated further that he paid Hepco bills totaling $3,048.23 from that account. At the close of all the evidence, defendant's motion to dismiss and motion for appropriate relief were denied.

The jury found the defendant guilty of embezzlement of property received by virtue of office or employment in violation of G.S. 14-90. The defendant was subsequently ordered to serve not less than nor more than six months in the Department of Corrections, with the remainder of the sentence suspended. He was further ordered to pay the sum of $3,050.00 as restitution.

The defendant served notice of appeal in open court on 21 September 1981.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Reginald L. Yates for defendant-appellant.

ARNOLD, Judge.

The defendant first contends that the trial court erred in denying his motion to dismiss made at the close of all the evidence. The defendant argues that there was no showing that he misapplied or converted the funds to his own use.

In order to convict a defendant of embezzlement under G.S. 14-90, the State must prove three distinct elements: (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use

the money or valuable property of his principal which he had received in his fiduciary capacity. *State v. Pate*, 40 N.C. App. 580, 253 S.E. 2d 266 (1979). Only the third element is in dispute in the present case. In order to meet the requirements of that element it is not necessary to show that the defendant converted his principal's property to his own use, provided it is shown that he fraudulently or knowingly and willfully misapplied it. *Id.*

The fraudulent intent required under G.S. 14-90 is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it in the course of his employment. *Id.* It is not necessary, however, that the State offer direct proof of fraudulent intent if facts and circumstances are shown from which it may be reasonably inferred. *Id.*

Upon a motion to dismiss in a criminal action, all of the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference from that evidence. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to determine whether there is substantial evidence of each essential element of the offense charged, substantial evidence being such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

When viewed in the light most favorable to the State, the evidence in this case was sufficient to allow a reasonable inference to be drawn that the defendant either fraudulently or knowingly and willfully misapplied funds of Hepco Publishing, Inc. As president of the corporation the defendant's duties were to hire and fire employees and to direct payment of bills. His duties did not encompass the authority to open a separate bank account for the purpose of depositing corporate funds. It would not have been difficult for the defendant to give any checks he had received to the treasurer, or to simply deposit them in Hepco's own bank account.

The defendant next maintains that the trial court erred in denying his motion for appropriate relief, wherein he sought to have the verdict set aside and an order entered dismissing the

charge of embezzlement or in the alternative, granting the defendant a new trial. This motion was without merit and was properly denied by the trial judge, as there was no error committed at trial.

No error.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL LINDSAY TAYLOR

No. 825SC1053

(Filed 20 September 1983)

1. **Receiving Stolen Goods § 7— possession of stolen pistol—misdemeanor conviction—excessive sentence**

Defendant's conviction of possession of a stolen firearm was a conviction for a misdemeanor where there was no evidence that the firearm had a value of more than $400.00 or that it was stolen from the person or by a breaking or entering in violation of G.S. 14-51, 14-53, 14-54 or 14-57, and a sentence of five years imposed on defendant was excessive. G.S. 14-72(a), (b)(1) and (2) and (c).

2. **Receiving Stolen Goods § 5.1— possession of stolen goods—knowledge that goods stolen—sufficiency of evidence**

The State's evidence was sufficient to permit an inference that defendant knew or had reasonable grounds to believe that a pistol was stolen so as to support his conviction of possession of stolen goods where it tended to show that when defendant was accosted by a man who simply yelled at him, defendant removed the pistol from his coat, stooped near a car, and surreptitiously attempted to hide or dispose of the pistol by throwing it into the bushes.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 8 June 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 March 1983.

Upon an indictment proper in form, defendant was tried by jury on the charges of breaking and entering a motor vehicle with intent to commit larceny, larceny of a firearm, and felonious possession of a stolen firearm.

Evidence for the State tended to show the following facts: at about 5:00 p.m., on 27 February 1982, Roy K. Trimer parked his

1981 Ford pickup truck in an alley at 217 Dock Street, Wilmington, North Carolina. Upon returning to his truck at about 12:00 midnight, Trimer discovered that someone had broken into the truck and taken his .32 caliber German semi-automatic pistol. He immediately reported the breaking and entering and theft to the police. That evening, between 7:00 and 8:00 p.m., James Blake had observed defendant in the vicinity of the ABC store located on Second Street, in the city of Wilmington. Defendant had a bicycle and rode back and forth past the liquor store about ten times. Thinking that defendant might be preparing to rob the store, Blake had someone call the police. Before the police arrived, defendant walked into a nearby alley. Blake went to the entrance of the alley to keep defendant under surveillance. While watching defendant, Blake yelled at him. Defendant stopped walking and stooped near a car parked in the alley. While in a stooping position, defendant removed a pistol from his coat and threw it into some nearby bushes. Officer T. R. Richardson arrived, and after Blake informed him of what he had observed, Officer Richardson searched and found the pistol defendant had discarded. Later, it was determined that the discarded pistol, valued at $50 to $75, was the one taken from Trimer's truck.

Defendant presented no evidence at trial. The jury found defendant guilty of possession of a stolen firearm and not guilty of the charges of breaking and entering and larceny. From a judgment imposing an active sentence of five (5) years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

William Norton Mason, for defendant appellant.

JOHNSON, Judge.

[1] Before discussing defendant's assignment of error, we, pursuant to Rule 2 of the Rules of Appellate Procedure, will consider the propriety of the defendant's sentence to "prevent manifest injustice" to the defendant. Defendant did not assign error to the sentence he received, nor did he present the question in his appellate brief.

Possession of stolen goods is a statutory crime created by the Legislature and is of recent vintage. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). The possession statutes were passed to provide protection for society in those incidences where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving stolen property. *Id.*

G.S. 14-72(a) divides the offense of receiving or possessing stolen goods into the categories of felony or misdemeanor on the basis of the value of the goods stolen. The receiving or possessing of stolen goods of the value of more than $400, knowing or having reasonable grounds to believe that the goods are stolen is a felony; and except as provided in G.S. 14-72(b) and (c), the receiving or possessing of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than $400, is a misdemeanor punishable under G.S. 14-3(a).

G.S. 14-72(c) provides:

> The crime of possessing [or receiving] stolen goods knowing or having reasonable grounds to believe them to be stolen *in the circumstances described in subsection (b)* is a felony, without regard to the value of the property in question. (Emphasis added.)

The "circumstances" described in subsection (b) which raise the possession or receiving of stolen goods [a stolen firearm] to the level of a felony are confined to those circumstances described in subsections (b)(1) and (2), to wit: the possession or receiving of goods stolen from the person, or stolen pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. Subsections (b)(3) and (4) do not describe "circumstances" making the *possession* or *receiving* of stolen goods a felony. Subsections (b)(3) and (4) provide, in pertinent part, that the crime of *larceny* is a felony, without regard to the value of the property in question, if the larceny is of any explosive or incendiary device or substance or of any firearm.

The record in this case reveals that the firearm did not value more than $400 and there is no evidence the firearm was stolen from the person or pursuant to G.S. 14-51, 14-53, 14-54 or 14-57. The trial judge instructed the jury on the elements of misdemeanor possession of stolen goods and defendant was sentenced

to a term of five (5) years. We hold that defendant was convicted of misdemeanor possession of stolen goods and that the sentence imposed exceeds the statutory maximum. G.S. 14-72(a) provides that for a misdemeanor conviction of possession of stolen goods, the penalty shall be as provided under G.S. 14-3(a). That statute provides that punishment by imprisonment shall not exceed a term of two (2) years.

[2] By his sole assignment of error, defendant contends the trial court erred in its denial of his motion to dismiss made at the close of the State's evidence. Defendant argues that the evidence was insufficient to establish that defendant "knew or had reasonable grounds to believe that the pistol was stolen."

A motion to dismiss in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the indictment, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom, *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

The essential elements of misdemeanor possession of stolen goods are (1) possession of personal property, (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (4) the possessor acting with a dishonest purpose. *See State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981); *State v. Scott*, 11 N.C. App. 642, 182 S.E. 2d 256 (1971); G.S. 14-71.1, 14-72; *see also* N.C.P.I. —Crim. § 216.46.

G.S. 14-71, the receiving statute, states the element of knowledge as follows: "knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken." G.S. 14-71.1, the possessing statute, contains the identical language: "knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken." In the case of *State v. Davis, supra*, the Supreme Court held that possession of stolen goods is not a lesser included offense of receiving stolen goods because the elements of *receiving* and *possessing* involved separate and distinct acts, the one not present in the other. As to the question of whether the element that defendant knew or had reasonable grounds to believe that the goods were feloniously stolen or taken would be the same for the two offenses, the Supreme Court expressed no opinion. However, in light of the

Legislature's use of the identical language in delineating the knowledge requirement for the two offenses, we conclude that with regard to the question of proof that defendant knew or had reasonable grounds to believe that the firearm in question had been stolen, the standard of proof established in cases of receiving stolen goods is equally applicable to cases involving possessing stolen goods. *See State v. Bizzell*, 53 N.C. App. 450, 457, 281 S.E. 2d 57, 61 (1981) (Whichard, J., dissenting.)

Our courts have stated the standard for the offense of receiving stolen property as follows:

> [G]uilty knowlege need not be shown by direct proof of actual knowledge, as proof that defendant witnessed the theft, or that such theft was acknowledged to him by the person from whom he received the goods; rather, such knowledge may be implied by evidence of circumstances surrounding the receipt of the goods.

State v. Scott, *supra* at 645, 182 S.E. 2d at 258. Knowledge that property was stolen may be inferred from incriminating circumstances. *State v. Hart*, 14 N.C. App. 120, 187 S.E. 2d 351, *cert. denied*, 281 N.C. 625, 190 S.E. 2d 469 (1972).

The key evidence relied upon by the State to show the required knowledge of the defendant was that once defendant was accosted by James Blake who simply yelled at him, defendant removed the firearm from his coat, stooped near a car and attempted to surreptitiously hide or dispose of it by throwing it into nearby bushes. These circumstances, viewed in the light most favorable to the State, are sufficiently incriminating to permit a reasonable inference that defendant knew or must have known that the firearm was stolen, and thus sufficient to support a finding to that effect by the jury. It is the function of the jury to determine the facts in the case from the evidence and to determine what the evidence proves or fails to prove. *State v. Martin*, 6 N.C. App. 616, 170 S.E. 2d 539 (1969), *cert. denied*, 276 N.C. 184 (1970). Therefore, defendant's assignment of error is without merit.

In the trial of defendant's case we find no error. However, it is clear that the trial court erred in sentencing defendant to a term of five years, and the sentence must be vacated and the case remanded for resentencing only.

No error and remanded.

Judges WELLS and HILL concur.

B&J SALES AND SERVICE CORPORATION v. J. EDWARD MOSS, D/B/A ELECTRO SPEC

No. 8227SC969

(Filed 20 September 1983)

Negligence § 6— doctrine of res ipsa loquitur properly not submitted to jury

A trial court properly failed to submit to the jury the theory of *res ipsa loquitur* in a negligence action where the evidence presented two precise but conflicting versions of the cause of a fire. Where circumstantial evidence points to a specific cause of a fire and negates other causes, the question of actionable negligence should be submitted to the jury, but not the theory of *res ipsa loquitur.*

APPEAL by plaintiff from *Owens, Judge.* Judgment entered 27 May 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 23 August 1983.

Plaintiff sued defendant for negligence in connection with a fire which destroyed plaintiff's machine shop.

The fire broke out on a Sunday morning while two of plaintiff's employees were working outside the machine shop. The employees had turned on the power to one of the buildings, sending electricity to the automatic screw machine and other equipment and lights, but the building was unoccupied when the fire broke out.

The jury answered the issue of defendant's negligence in defendant's favor. From judgment entered on the verdict, plaintiff has appealed.

Harris, Bumgardner and Carpenter, by Seth H. Langson, and Hollowell, Stott, Hollowell, Palmer and Windham, by Grady B. Scott, for plaintiff.

Golding, Crews, Meekins, Gordon and Gray, by James P. Crews and Rodney Dean, for defendant.

WELLS, Judge.

The sole question for review in this appeal is whether the trial judge erred in refusing to instruct the jury on the doctrine of *res ipsa loquitur* as requested by the plaintiff. *Res ipsa loquitur* permits an inference of negligence, based on common experience, from the occurrence of something that ordinarily does not happen in the absence of negligence. *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979).

Plaintiff presented evidence through five witnesses: plaintiff, its two employees, Mr. Parker and Mr. Goins, and two expert witnesses, Dr. McKnight and Mr. Smith. Through the testimony of these witnesses and exhibits used by them, the origin of the fire in plaintiff's machine shop was carefully and expertly traced to a specific cause: the electrical ignition of oil present in the cable housing containing the electric wires of the screw machine, the oil having been allowed into the cable housing because of the type of housing (non-seal tight) used by defendant when defendant rewired the screw machine.

Plaintiff's evidence tended to show the following: plaintiff hired defendant to repair and rewire the electrical system of an automatic screw machine. Defendant worked on the machine from time to time from July to September of 1980. On 9 November 1980 two of plaintiff's employees, Mr. Parker and Mr. Goins, arrived at the machine shop to strip copper from old motors in order to earn Christmas money. The weather was nice so they worked outside. After about fifteen minutes, Mr. Parker noticed smoke coming from the building containing the screw machine. He rushed into the building and saw fire and smoke around the electrical control panel mounted on the screw machine. He did not see fire anywhere else in the building. Mr. Parker tried to extinguish the blaze while Mr. Goins called the fire department, but the building was quickly consumed by fire.

Dr. McKnight testified that defendant's use of flexible metal conduit in rewiring the screw machine created a hazard because it exposed electrical wires to flammable oil sprayed around the area of the screw machine while it was in use. McKnight stated that it was his opinion that the presence of oil in the control circuits was the probable cause of the fire, and that oil seeped into

the circuits because the flexible metal conduit used was not liquid-tight.

Mr. Smith identified the same specific negligence as causing the fire. He stated that defendant's use of flexible metal conduit violated sound electrical principles, that the fire started in the conduit, and that "failure to use the sealtight conduit . . . did result in a fire."

The testimony of Dr. McKnight and Mr. Smith also tended to eliminate the possibility of the fire starting anywhere but in the metal conduit of the screw machine.

Defendant's evidence tended to rebut plaintiff's evidence that defendant's choice of conduit was negligent. He showed that the screw machine manufacturer used flexible metal conduit. In his opinion, the conduit he chose was in compliance with the National Electric Code because its higher abrasion resistance was necessary to protect the wires from metal filings around the screw machine. Defendant's expert witness, Mr. Bolen, testified that flexible metal conduit was proper under the National Electric Code, that oil was not likely to penetrate it, and that the amperage in the one energized wire in the conduit was too low to ignite any oil.

Thus, plaintiff and defendant presented two precise but conflicting versions of the cause of the fire. In such a case,

> The question of *res ipsa loquitur*, which plaintiff desires to have considered, is hardly available on the record, for all the conditions attendant on the occurrence were fully observed and testified to by the witnesses, and the case was properly made to depend upon whether the account of the occurrence given by plaintiff or by defendant's witnesses should prevail.

Baldwin v. Smitherman, 171 N.C. 772, 88 S.E. 854 (1916). Where circumstantial evidence points to a specific cause of a fire and negates other causes, the question of actionable negligence should be submitted to the jury, but not the theory *res ipsa loquitur*. *Gaston v. Smith*, 22 N.C. App. 242, 206 S.E. 2d 311, *cert. denied*, 285 N.C. 658, 207 S.E. 2d 753 (1974). *See also* 2 Brandis, *North Carolina Evidence* § 227 at 205 (2d rev. ed., 1982).

The trial court instructed the jurors in part that they should find the defendant negligent if (1) defendant "failed to use sealtight conduit when he knew or should have known that the failure to do so would allow the intrusion of oil into the conduit and cause a fire in the event of a short circuit, . . ." or (2) defendant failed to seal the power panel box, when he knew or should have known that failure to do so could allow oil into the box, creating a fire hazard, or (3) defendant contracted to rewire the screw machine to new machine standards and failed to do so. These instructions cover the reasonable inferences of negligence that can be drawn from the evidence.

No error.

Judges HEDRICK and PHILLIPS concur.

BRIAR METAL PRODUCTS, INC. v. ALBERT SMITH

No. 8228SC1089

(Filed 20 September 1983)

1. **Judgments § 21.2— consent judgment—necessity for consent at time of entry**

A consent judgment is valid only if all parties give their unqualified consent at the time the court sanctions the agreement and promulgates it as a judgment. Therefore, where the evidence in a hearing on a motion to set aside a consent judgment for lack of consent by plaintiff was conflicting as to whether the authority previously given by plaintiff to his attorney to consent to the judgment had been withdrawn prior to the time the judgment was entered, it was incumbent upon the trial court to make a finding as to whether plaintiff's consent subsisted at the time of entry of the judgment.

2. **Judgments § 21.1; Rules of Civil Procedure § 60.1— consent judgment—alleged lack of consent—motion in the cause**

A motion in the cause made within "a reasonable time" pursuant to G.S. 1A-1, Rule 60(b)(4) was the correct procedure for presenting the question of whether a consent judgment was void for lack of consent by plaintiff, and whether an appeal was taken from the consent judgment was not pertinent to the issue of whether such motion should have been granted.

APPEAL by plaintiff from *Allen, Judge.* Order entered 26 February 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 1 September 1983.

Plaintiff sued defendant in October, 1979, on claims including conversion and wrongful interference with contract. Defendant counterclaimed. Attorneys for the parties entered into settlement negotiations and by July, 1980, agreed to enter into a consent judgment. A judgment was entered by Judge Ferrell on 30 March 1981, wherein plaintiff agreed to pay and defendant agreed to accept the sum of $89,600.00 in settlement of all matters in controversy between plaintiff and defendant. Plaintiff did not give notice of appeal from the entry of judgment. On 29 October 1981, plaintiff filed a motion in the cause pursuant to G.S. 1A-1, Rule 60(b)(4), of the Rules of Civil Procedure, to set aside the judgment. Following a hearing on plaintiff's motion, Judge Allen entered the following order.

> THIS CAUSE coming on to be heard before the Honorable Walter C. Allen, upon Motion in the Cause to Set Aside the Judgment entered on the 30th day of March, 1981, by the Honorable Forrest Ferrell, and based upon the evidence presented, arguments of counsel, and legal briefs submitted by the parties, the Court hereby makes the following:
>
> FINDINGS OF FACT
>
> 1. That on or about October 26, 1979, a Complaint was filed in the above captioned matter.
>
> 2. That on or about October 30, 1979, an Answer and Counterclaim was filed by the Defendant against the Plaintiff.
>
> 3. That since October 30, 1979, all matters and things in controversy have been at issue between the Plaintiff and the Defendant. That the Plaintiff and the Defendant entered into extensive settlement negotiations by and through their Attorneys of Record.
>
> 4. That a Consent Judgment was signed by the Plaintiff's Attorney, Robert F. Orr, by and with the authority of the Plaintiff in October 1980. That the Defendant and his Attorney, Marvin P. Pope, Jr., signed the aforesaid Consent Judgment in August, 1980.
>
> 5. That on or about March 30, 1981, a Hearing in chambers was held before the Honorable Forrest Ferrell.

That at the time of the Hearing, the Plaintiff had not signed the Consent Judgment. That the Attorney for the Plaintiff and the Attorney for the Defendant were personally present at the time that Judge Ferrell signed and entered the Consent Order.

6. That the Plaintiff's Attorney, Robert F. Orr, objected to the signing and the entry of the aforesaid Consent Judgment on March 30, 1981.

7. That the Plaintiff failed to appeal the aforesaid Consent Judgment within apt time pursuant to the Rules of Civil Procedure and the Court of Appeals for the State of North Carolina.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT HEREBY MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. That the Judgment of March 30, 1981, in the above captioned matter is a valid, binding, and enforceable Order of this Court.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion in the Cause to Set Aside the Judgment of March 30, 1981, be and is hereby denied.

Plaintiff has appealed from Judge Allen's order.

Forbis & Grossman, by Steven A. Grossman, for plaintiff.

Marvin P. Pope, Jr., for defendant.

WELLS, Judge.

In one argument, plaintiff brings forward exceptions to findings of fact numbered 4. and 7. and to the single conclusion of law contained in Judge Allen's order. We deal with these exceptions *seriatim.*

[1] There was evidence before Judge Allen which would support his finding of fact number 4. Such a finding, however, is not determinative of the basic issue before us in this case. The evidence before Judge Allen was conflicting as to whether plaintiff's con-

sent to the judgment entered by Judge Ferrell subsisted *at the time of entry* of that judgment. Plaintiff's evidence tended to show that the authority previously given by plaintiff to his attorney to consent had been withdrawn prior to 30 March 1981 and that plaintiff's attorney stated this to Judge Ferrell. Defendant's evidence tended to show plaintiff's prior authority to plaintiff's attorney was never withdrawn. A consent judgment is valid only if all parties give their unqualified consent at the time the court sanctions the agreement and promulgates it as a judgment. *Overton v. Overton*, 259 N.C. 31, 129 S.E. 2d 593 (1963), *citing Ledford v. Ledford*, 229 N.C. 373, 49 S.E. 2d 794 (1948) *and King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945). Where such consent did not subsist at the time of entry the judgment is void. *Id.* Under the evidence before him, it was incumbent upon the Judge to make a finding as to whether plaintiff's consent subsisted at the time of entry of Judge Ferrell's judgment.

[2] While Judge Allen's finding of fact number 7. is also supported by the evidence, neither is it determinative of the issue in this case. If Judge Ferrell's judgment may be found to be void for lack of consent, *see Overton, supra*, then a motion in the cause is the correct procedure for presenting that question to the trial court, *Overton, supra*. Such a motion must be made within "a reasonable time." Rule 60(b)(4). Whether an appeal was taken from the consent judgment under attack is not pertinent to the issue of whether the Rule 60(b) motion should be granted, particularly as to whether the Rule 60(b) motion was filed within a reasonable time.

Judge Allen's findings of fact are not sufficient to support his conclusion of law. This case must be remanded for proper findings of fact as to (1) whether plaintiff's Rule 60(b) motion was made within a reasonable time, and if so, (2) whether plaintiff's consent subsisted at the time of entry of Judge Ferrell's judgment.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. HARRY MITCHELL SIDBURY

No. 8216SC1192

(Filed 20 September 1983)

Criminal Law § 99.1— expression of opinion on evidence by trial judge—prejudicial error

The trial court expressed an impermissible opinion on the evidence in a prosecution for armed robbery where defendant's wife testified that her husband was a professional poker player and that her husband always wore a glove on his crippled right hand at which point the court queried: "Something I need to know: When he plays cards, does he deal with his glove on?"; and where a medical expert testified that it would have been very difficult for defendant to hold the pistol with his right hand and that he could not grip the gun by curling his finger, and where the court dismissed the jurors for the day, giving them the usual admonitions and further advised: "Do not try to play cards with gloves on." Whether the defendant had the strength and dexterity in his right hand to handle a gun in the manner described by a motel clerk was a highly contested issue in the case, and by its impromptu question to defendant's wife and by the court's remark to the jurors, the trial court's comments and conduct in the case constituted prejudicial error.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 24 March 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 31 August 1983.

Defendant was tried a second time and convicted of armed robbery on 22 March 1982 after a first trial ended in a hung jury. He was sentenced to 30 years in prison.

Attorney General Edmisten, by Associate Attorney General William N. Farrell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

BECTON, Judge.

I

The issues on appeal concern whether certain of the trial court's statements and conduct constituted an impermissible expression of an opinion, and whether evidence that defendant refused to participate in a lineup was erroneously admitted. For the following reasons, we hold that defendant is entitled to a new trial.

II

The State's evidence tended to show that on the night of 16 September 1981, the Family Inns of America motel was robbed of $259.00 by a black male armed with a handgun. The motel clerk on duty identified the defendant as the robber. About the time of the robbery, a witness saw a black male driving a brown 1973 Catalina with a tan top and the headlights off, leaving a Gulf station near the motel. The next day, the North Carolina Highway Patrol stopped the defendant in a vehicle fitting that description. With defendant's consent, the officers searched the vehicle and found a .357 caliber revolver tucked underneath an armrest and $680.00 in cash.

The defendant's evidence tended to show that he was at home playing cards during the time the robbery was committed, and that it would have been difficult for him to handle a gun with his right hand due to a crippling injury to that hand. Defendant further testified that he is left-handed.

III

Defendant first contends that certain of the trial court's statements and actions denied defendant a fair trial. We agree.

Defendant's wife testified that her husband was at home playing cards with her on the night of the robbery; that her husband was a professional poker player; and that her husband always wore a glove on his crippled right hand. The court then queried: "Something I need to know: When he plays cards, does he deal with his glove on?" She answered yes. A medical expert subsequently testified that it would have been very difficult for defendant to hold a pistol with his right hand and that he could not have gripped the gun by curling his finger. At the conclusion of the expert's testimony, the court dismissed the jurors for the day, giving them the usual admonitions and further advised: "Do not try to play cards with gloves on."

Trial judges are prohibited from expressing an opinion by N.C. Gen. Stat. § 15A-1222 (1978). They must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is

entitled to a trial before an impartial judge and an unbiased jury. *State v. Whitted*, 38 N.C. App. 603, 248 S.E. 2d 442 (1978). While not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case. *Id.*

Whether defendant had the strength and dexterity in his right hand to handle a gun in the manner described by the motel clerk was a hotly contested issue in the case. By its impromptu question to the witness, the court brought it to the jury's attention that defendant was able to deal cards with gloves on. The seed was thus implanted in the jurors' minds to question defendant's inability to handle a gun as opposed to his ability to deal cards with his glove on. The court indirectly reminded them of this seeming inconsistency by its statement at the end of the day.

The court's remark may have been intended as humor, but it missed the mark when viewed from the standpoint of justice and fair play. *See State v. Guffey*, 39 N.C. App. 359, 250 S.E. 2d 96 (1979). Perhaps the court's statement could be defended as a legitimate admonishment to the jurors not to conduct an experiment. However, if one juror interpreted the court's remarks as questioning the credibility of defendant's evidence, that was one juror too many.

In addition, the court hindered the defendant's cross-examination of the motel clerk, the State's key witness. At a preliminary hearing and at the first trial, the clerk testified that the robber was holding a gun with his right hand. At the present trial, the clerk testified, for the first time, that she could not say which hand the robber had used. Defendant's counsel was attempting to get the clerk to admit that this was the first time she had testified to any doubt about which hand the robber used when the court interrupted: "This isn't the first time." Although the court went on to say that counsel had asked the question three times, the statement also impermissibly suggests to the jury that this was not the first time the witness had expressed doubt about the hand used.

Improper remarks or conduct by trial judges are sometimes harmless. In this case, however, the eyewitness testimony was not overwhelming. Indeed, the first trial ended in a hung jury. These factors alone suggest that a trial court should be particularly cautious in its comments and conduct of trial, including

the admission of evidence. The trial court's comments and conduct in this case constitute prejudicial error.

IV

Whether defendant was told by Detective Phillips that he had a right not to be in a line-up is insufficiently developed in the record for us to address that issue. Further, because we are ordering a new trial, defendant's assignments of error relating to his sentencing have been rendered moot.

New trial.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. JERRY MARTIN

No. 8229SC1168

(Filed 20 September 1983)

1. **Constitutional Law § 48— denial of continuance—no denial of effective assistance of counsel**

A defendant tried for felonious escape was not denied the effective assistance of counsel because counsel was appointed only six working days prior to trial where defendant twice met with his attorney, and where the factual issues involved in the case were relatively simple.

2. **Constitutional Law § 68— denial of continuance—no violation of right to confront witnesses**

The denial of defendant's motion for a continuance did not deprive him of his right to prepare for and confront witnesses where defendant failed to demonstrate that a continuance would enable him to secure any evidence or testimony to refute the charges against him, and defendant offered no names of witnesses and indicated no evidence material to his defense which any witness could provide.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 5 August 1982 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 30 August 1983.

Defendant was charged in a proper bill of indictment with felonious escape from the Rutherford County Prison. Defendant

was found guilty as charged, and from a judgment imposing a prison sentence of not more than two years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr. for the State.

Arledge, Callahan & Franklin, by Hugh J. Franklin for the defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the court's denial of his motion to continue. Defendant contends that denial of his motion deprived him of his constitutional rights to confront witnesses and to effective assistance of counsel. He claims that appointment of counsel only six days prior to trial provided insufficient opportunity "to confer with counsel, call witnesses in his defense and prepare cross-examination."

The general rule is that a motion for continuance is addressed to the discretion of the trial judge, and that denial of such a motion will be upheld on appeal absent a showing of abuse of discretion. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981) *cert. denied*, 456 U.S. 932 (1982). When a motion for continuance is based on constitutional rights, however, the decision of the trial court is reviewable as a question of law. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). Defendant's motion in the present case was based on his constitutional rights to effective assistance of counsel and to confront witnesses against him. The court's denial of his motion is therefore fully reviewable as a question of law.

[1] Defendant's assertion that he was denied effective assistance of counsel is based on the appointment of counsel "six working days" prior to trial. Defendant does not contend that his attorney was incompetent, but rather that his attorney had insufficient time to prepare his defense.

> It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed

and whether defendant is denied due process must be determined under the circumstances of each case.

State v. McFadden, 292 N.C. 609, 616, 234 S.E. 2d 742, 747 (1977). In *State v. Maher*, 305 N.C. 544, 290 S.E. 2d 694 (1982), our Supreme Court discussed some of the circumstances to be considered in reviewing such a claim. The court in *Maher*, in finding that the defendant in that case had been deprived of effective assistance of counsel, observed, "[t]he attorney who represented the defendant at trial . . . had not prepared the case, had not met with the defendant prior to the morning of trial, and was given little time in which to prepare a defense. . . . [C]ounsel here was given fifteen minutes." *Id.* at 548-49, 290 S.E. 2d at 697. In the present case, the same counsel who represented the defendant at trial also prepared the case; there was no substitution or change of counsel. According to the record, the defendant had twice met with his attorney, once at the jail and again the morning of the hearing. Furthermore, the attorney in the present case was appointed six working days before trial. In light of the relatively simple legal and factual issues involved in a case of this nature, we do not believe six days was insufficient time in which to prepare a defense. Because there was adequate time for defendant to confer with his attorney and to prepare his defense, we hold that defendant's right to effective assistance of counsel was not abridged by the trial court's refusal to grant a continuance.

[2] Defendant also contends that denial of his motion for a continuance deprived him of his right to prepare for and confront witnesses. In considering a similar argument our Supreme Court stated, "a postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term." *State v. Tolley*, 290 N.C. 349, 357, 226 S.E. 2d 353, 362 (1976) (citation omitted). In the present case, the defendant failed to demonstrate that a continuance would enable him to secure any evidence or testimony to refute the charges against him. He offered no names of witnesses and he indicated no evidence material to his defense that any witness could provide. His oral motion for a continuance was not accompanied by any affidavit or other offer of proof. "This state of the record suggests only a natural reluctance to go to trial and

affords no basis to conclude that absent witnesses, if such existed, would ever be present for the trial." *State v. Stepney*, 280 N.C. 306, 312, 185 S.E. 2d 844, 848 (1972).

We find no error in the court's denial of defendant's motion to continue.

No error.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION: CAROLINA POWER AND LIGHT COMPANY (APPLICANT); THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION v. KUDZU ALLIANCE

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY (APPLICANT); NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION; AND PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION v. KUDZU ALLIANCE

Nos. 8210UC824 and 8210UC843

(Filed 20 September 1983)

1. **Utilities Commission § 38— fuel clause proceeding—cost of purchased power**

It was error for the Utilities Commission to consider factors other than the cost of fossil fuel in a proceeding pursuant to former G.S. 62-134(e).

2. **Utilities Commission § 38— reasonableness of purchased power—consideration of in rate case**

The cost of fuel is an operating expense of the utility and, as such, the Utilities Commission must examine these costs for the reasonableness of their having been incurred before incorporating them into the base rate.

APPEALS by intervenor Kudzu Alliance from Orders of the North Carolina Utilities Commission in case No. 8210UC843 (Duke Power Company) and case No. 8210UC824 (Carolina Power and Light Company). Orders in both cases were entered 26 February 1982. Both cases were heard in the Court of Appeals on 20 May 1983.

Pursuant to G.S. 62-134(e), applications were made to the North Carolina Utilities Commission by Duke Power Company (application filed 25 January 1982) and Carolina Power and Light Company (application filed 28 January 1982) for orders authorizing adjustments to the base retail rates of both applicants for billings from April 1982 through July 1982. The requested adjustments were based on increased fuel costs during the four month test period ending 31 December 1981.

Kudzu Alliance, the North Carolina Textile Manufacturers Association, and the Public Staff of the Utilities Commission intervened. The applications were heard by the Commission on 17, 18, and 19 February 1982. From orders entered 26 February 1982 granting both of the requested adjustments, Kudzu Alliance appealed.

Edelstein and Payne, by M. Travis Payne, for intervenor appellant (Nos. 8210UC843 and 8210UC824).

Steve C. Griffith, Jr., George W. Ferguson, Jr., and William L. Porter for applicant appellee Duke Power Company (No. 8210UC843).

Bode, Bode and Call, by John T. Bode, and Richard E. Jones and Robert W. Kaylor for applicant appellee Carolina Power and Light Company (No. 8210UC824).

Before Judges WHICHARD, JOHNSON and EAGLES.

Because of the similarity of the facts and the issues presented by the appeals in these two cases, we have combined our consideration of them. We note at the outset that G.S. 62-134(e), the statute governing the instant proceedings before the Utilities Commission, has been repealed. 1981 Session Laws (Reg. Sess., 1982) c. 1197, s. 2. The repealing statute provides that "all rates and changes under G.S. § 62-134(e) shall terminate not later than December 1, 1982." 1981 Session Laws (Reg. Sess., 1982) c. 1197, s. 3. Since the rate increases in the present cases involve a period before 1 December 1982, G.S. 62-134(e) controls the proceedings and our consideration of the orders emanating therefrom. *State ex rel. Utilities Commission v. Public Staff*, 58 N.C. App. 480, 293 S.E. 2d 880 (1982), *rev'd on other grounds* (see below), 309 N.C. 195, 306 S.E. 2d 435 (1983).

[1] Appellant contends that the Commission erroneously considered factors other than the cost of fossil fuels in determining the increase in rates due to increased fuel costs. In *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983), our Supreme Court held that the Utilities Commission in fuel cost adjustment proceedings can consider only the fluctuations in the cost of fossil fuels—oil, coal and natural gas—used by the utility in the production of electric power in its generating units. We therefore agree with appellant and hold that it was error for the Utilities Commission to consider factors other than the cost of fossil fuel in the instant proceedings.

[2] Appellant's remaining contentions are whether it is proper, in the context of a G.S. 62-134(e) fuel cost adjustment proceeding, to use a base rate, established in a general rate proceeding, the fuel cost component of which was itself derived from a G.S. 62-134(e) proceeding. In *State ex rel. Utilities Commission v. North Carolina Textile Manufacturers Association*, 309 N.C. 238, 306 S.E. 2d 113 (1983), our Supreme Court held, in a *per curiam* opinion, that it was improper to adopt the fuel costs established in the next preceding fuel cost adjustment proceeding as the fuel cost component used in establishing the general rate. Rather, that case holds that the cost of fuel is an operating expense of the utility and that, as such, the Utilities Commission must examine these costs for the reasonableness of their having been incurred before incorporating them into the base rate. The decisions of the Supreme Court in that case, and in *State ex rel. Utilities Commission v. Public Staff, supra*, are controlling with respect to this question.

Appellee admits that the fuel cost component of the base rate used in the instant fuel clause proceedings was established by the very method found improper by the Supreme Court in *State ex rel. Utilities Commission v. North Carolina Textile Manufacturers Association, supra.* Appellant contends that to allow the fuel cost adjustment established in the proceedings below would allow the utilities to set rates in order to recover past expenses. Inasmuch as the fuel cost component of the base rate in the present cases has not been properly examined for reasonableness, we agree with appellant's contention. It is improper to allow a utility to recover its past expenses through a rate that is supposed to be

prospectively applied. *Utilities Commission v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

Accordingly, we must reverse the orders of the Utilities Commission and remand these causes for such further proceedings as may be necessary in light of the recent opinions of our Supreme Court, cited above.

Reversed and remanded.

STATE OF NORTH CAROLINA v. VINCENT QUINTIN DAVIS

No. 8226SC1179

(Filed 20 September 1983)

Burglary and Unlawful Breakings § 5— first degree burglary—intent to commit larceny—sufficiency of evidence

The State's evidence in a first degree burglary case was sufficient to raise an inference of an intent to commit larceny as alleged in the indictment where it tended to show that defendant was seen standing at the bedroom door of the female owner of the dwelling in question with his pants unzipped and his belt jingling, that the owner knew defendant, and that defendant and the owner had seen each other at a bar earlier in the evening and defendant knew the owner would not be at home when he entered the dwelling.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 3 June 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 August 1983.

The defendant was tried on a bill of indictment charging him with the first degree burglary of a dwelling house occupied by 12-year-old Bavonne Little on or about 10 October 1981, at nighttime, and with the intent to commit the felony of larceny. At home during the night in question, other than Bavonne Little, were her cousin Tammy Carruthers, and her cousin's boyfriend Jerome Calvin, both of whom were sleeping in Little's mother's bedroom. Laverne Adams, the mother of Bavonne Little, was not at home.

Bavonne Little testified that she awakened at about 1:45 a.m. and saw the defendant coming out of her mother's bedroom. She saw nothing in his hands, but noticed that his pants were un-

zipped and that his belt was jingling. After she turned on a hallway light, she saw the defendant slipping and sliding, and then falling down the stairs. After the defendant had left the apartment, Bavonne Little went downstairs to the kitchen and found the previously near-closed kitchen window wide open, and the defendant was gone.

Laverne Adams, the mother of Bavonne Little, testified that she had long been friends with the defendant. She stated that she had seen the defendant on the night of the burglary at the L and P Lounge, a local bar. Although she said she was still at the bar when the defendant left, she did not know exactly what time he had left. She further stated that the defendant did not have her permission to enter the dwelling that night.

At the close of the State's evidence, the defendant moved to dismiss and renewed the motion at the close of all the evidence. The trial court denied the motion.

At the close of all the evidence, the defendant tendered two written requests for jury instructions. The first instruction explained that specific felonious intent is an essential element of first degree burglary. The second requested instruction defined larceny, the felony allegedly intended by the defendant. Both instructions were refused by the trial court.

After being instructed that they could return a verdict of first degree burglary, non-felonious breaking and entering, or not guilty, the jury returned a verdict of guilty of first degree burglary.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Anne Duvoisin for the defendant-appellant.

ARNOLD, Judge.

The defendant contends that the trial court erred when it denied his motion to dismiss as there was no evidence that he had the intent to commit larceny, the underlying felony to the charge of first degree burglary. The defendant further contends that the State's evidence goes only to show that his intent was to commit some sexual offense, thereby negating any inference that the intent was larcenous.

Felonious intent is an essential element of burglary which must be alleged and proved. In addition, the State is held to proof of the intent alleged in the indictment. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). However, "in the absence of proof to the contrary, a reasonable inference of felonious intent may be drawn from the fact that an individual broke into and entered the dwelling of another at night." *State v. Simpson*, 303 N.C. 439, 449, 279 S.E. 2d 542, 548 (1981).

The defendant bases his contention that any intent demonstrated on the night of the burglary was not larcenous, but purely carnal in nature, and thus a different intent than that alleged in the indictment, on evidence that Laverne Adams knew the defendant, that the defendant had no burglary tools in his possession, and that the defendant was seen standing at Laverne Adams' bedroom door with his belt jingling and his pants unzipped.

The evidence in question does not require an inference of intent to commit a sexual offense as defendant argues. Laverne Adams knew the defendant, and had seen him earlier at the Lounge, permitting an inference that the defendant knew she would not be at home when he entered the dwelling. Moreover, burglary tools are not required to show the existence of larcenous intent. Sufficient circumstantial evidence was presented to raise the inference of intent to commit larceny. There is no error in the denial of defendant's motion to dismiss.

The defendant also contends that the trial court erred in charging the jury on first degree burglary, and in failing to instruct on the definition of larceny and on their duty not to convict upon some abstract theory of law, but only upon the specific felonious intent alleged. We find no error in the court's instruction on first degree burglary. The second part of defendant's argument is not before us. Notwithstanding his contentions about the court's refusal to give his requested instructions on the elements of larceny, the record contains no exception to the court's refusal to give the requested charge. Rule 10, Rules of Appellate Procedure.

No error.

Judges WELLS and EAGLES concur.

WARREN HELMS AND JONNIE T. HELMS v. C. FRANK GRIFFIN, SUBSTITUTE TRUSTEE, AND THE FEDERAL LAND BANK

No. 8220SC1068

(Filed 20 September 1983)

Appeal and Error § 6.2— denial of preliminary injunction—interlocutory appeal

An order denying plaintiffs' motion for preliminary injunction to enjoin defendant from proceeding with the foreclosure of a deed of trust was interlocutory since it did not finally dispose of the case and requires further action by the trial court.

APPEAL by plaintiffs from *Mills, Judge*. Judgment entered 14 May 1982, amended by order 2 August 1982 denying plaintiffs' motion for preliminary injunction, in Superior Court, UNION County. Heard in the Court of Appeals 30 August 1983.

The plaintiffs appeal from the trial court's order denying their application for a preliminary injunction to enjoin the defendant from proceeding with the foreclosure of a deed of trust executed by plaintiffs to the defendant C. Frank Griffin as trustee for the defendant Federal Land Bank of Columbia. This Court has earlier affirmed the trial court's decision allowing the defendants to proceed in the foreclosure action. *See In Re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 284 S.E. 2d 553 (1981).

On 24 June 1969, the plaintiffs executed a promissory note in the amount of $67,500 payable to the defendant Federal Land Bank and a deed of trust to the defendant C. Frank Griffin, as trustee for the defendant Federal Land Bank, to secure payment of the note. The plaintiffs made the payments required by the note, but failed to pay county property taxes for 1978 and 1979 totalling $2,203.03. The defendant Federal Land Bank paid the taxes and then sought reimbursement from the plaintiff.

After no such reimbursement was forthcoming the defendant Federal Land Bank sent the plaintiff a series of letters demanding payment, culminating in a letter dated 21 August 1980, the contents of which include the following:

> This is to advise you that because of default in performing the terms of the note and the deed of trust relating to the above loan, the Federal Land Bank of Columbia hereby

exercises its option provided in the note to declare the total outstanding indebtedness on your note now due and payable.

As a courtesy to you, and to avoid foreclosure action, I suggest you contact Mr. Larry W. Shoffner, president of the Federal Land Bank Association of Monroe, to discuss whether some acceptable arrangement can be made to meet the obligation.

Unless a satisfactory arrangement is made within the fifteen (15) days from the date of this letter, I shall proceed with foreclosure.

On 26 August 1980, the plaintiffs visited Larry Shoffner and were told that they would have to "catch the note up." The plaintiffs understood this to mean that they would have to reimburse the defendant Federal Land Bank for payment of the property taxes, so the plaintiff Warren Helms made arrangements to sell another tract of real estate he owned in order to make the reimbursement. During the week of 1 September 1980, however, the plaintiff Jonnie Helms called Shoffner to find out exactly how much was due for a complete reimbursement and was told that reimbursement would not be acceptable as foreclosure proceedings had begun. On 4 November 1980 formal foreclosure proceedings were instituted by the defendant C. Frank Griffin.

The plaintiffs applied for and received a temporary restraining order enjoining further foreclosure proceedings. An application for a preliminary injunction was subsequently denied, but the foreclosure sale was stayed pending appeal.

Harry B. Crow, Jr. for plaintiff-appellants.

Donald C. Perry and H. Ligon Bundy for defendant-appellees.

ARNOLD, Judge.

The plaintiffs contend that the trial court erred when it denied their motion for a preliminary injunction. We are not so persuaded.

However, the more important question before us is whether the order by the trial court is in fact appealable. An interlocutory order is immediately appealable only when it affects a substantial right of the appellant. *Ball v. Ball*, 55 N.C. App. 98, 284 S.E. 2d

555 (1981). *See* G.S. 1-277 and G.S. 7A-27(d). Since the sale was stayed pending appeal, we find that the order does not affect a substantial right of the plaintiff.

Moreover, in a case recently considered by the North Carolina Supreme Court in which a preliminary injunction had been denied at trial, the Court stated "in a case such as the one now under consideration, although involving a substantive right of the appealing party, where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E. 2d 754, 759 (1983). We agree. The order denying the plaintiffs' motion for a preliminary injunction is interlocutory since it does not finally dispose of the case and requires further action by the trial court. This appeal is

Dismissed.

Judges WELLS and EAGLES concur.

LUCILLE RHOTON KIRSTEIN v. DEWEY SAMSON KIRSTEIN, JR.

No. 8228DC1081

(Filed 20 September 1983)

1. **Judgments § 39— foreign judgment vesting title to realty in N.C.—voidness**

A judgment of a Kentucky divorce court which purported to vest wholly in defendant title to real property in North Carolina which had been held by the parties as tenants by the entirety was void and not entitled to full faith and credit, since the courts of one state cannot determine title to real property located in another state.

2. **Husband and Wife § 14— creation of estate by the entireties—effect of divorce**

A conveyance of realty to a husband and wife creates an estate by the entireties. Upon divorce, the estate is converted into a tenancy in common, and each former spouse is entitled to an undivided one-half interest in the property.

3. **Declaratory Judgment Act § 4.4— quieting title to realty**

A declaratory judgment is the appropriate action to perform the duty of quieting title to real property.

Kirstein v. Kirstein

APPEAL by defendant from *Styles, Judge.* Judgment entered 29 July 1982 in District Court, BUNCOMBE County. Heard in the Court of Appeals 31 August 1983.

Plaintiff brought an action for a Declaratory Judgment to declare a Judgment issued by a Kentucky divorce court null and void since it attempted to determine title to real property located in North Carolina.

The court granted plaintiff Summary Judgment and held, in essence:

(1) that the Kentucky Judgment purporting to vest title in defendant was void and not entitled to Full Faith and Credit; and

(2) that the plaintiff was entitled to retain the same interest in the property that she held prior to such Judgment.

The pertinent facts are as follows:

Plaintiff and defendant were married in 1948. In 1966, while the parties were still married, defendant's parents conveyed a parcel of real property in Buncombe County, North Carolina to plaintiff and defendant. A deed was recorded in 1966 in the Office of the Register of Deeds for Buncombe County, vesting title in plaintiff and defendant.

In 1980, defendant was granted a divorce from plaintiff in a Kentucky court. The Kentucky Judgment purported to convey and vest title to the property in Buncombe County wholly in defendant. A deed was recorded in 1980 in the Office of the Register of Deeds for Buncome County purportedly vesting title to the property wholly in defendant.

Gudger, Reynolds, Ganly, Stewart and Christy, by Jack W. Stewart, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, by Marla Tugwell, for defendant-appellant.

VAUGHN, Chief Judge.

[1] It is an accepted law in North Carolina that courts of one state cannot determine title to real property located in another state. *Lea v. Dudley*, 20 N.C. App. 702, 202 S.E. 2d 799 (1974); *No-*

ble v. Pittman, 241 N.C. 601, 86 S.E. 2d 89 (1955); *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948). The Kentucky court had no power to determine title to the realty in dispute, which was located in North Carolina.

Plaintiff does not attack the validity of the Kentucky divorce decree. Even if the Kentucky court had jurisdiction over the parties, it does not follow as a corollary that it had jurisdiction over the res. *See In Re Biggers*, 228 N.C. 743, 47 S.E. 2d 32 (1948).

The Full Faith and Credit Clause of the United States Constitution, Article IV, § 1 has no application when the court rendering judgment did not have jurisdiction over the subject matter. *McRary, supra.* To the extent that the Kentucky decree attempted to affect title to property in North Carolina, it is void. *Lea, supra; Noble, supra; McRary, supra.* We are not bound by such part of the Kentucky decree.

We note that a court having jurisdiction over the parties may, by a decree *in personam*, require the execution of a conveyance of real property in another state. *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). We are not, however, presented with such a situation. The Kentucky court did not merely order plaintiff to convey her interest in the North Carolina realty; rather it purported to award title to defendant, consonant with the nature of an *in rem* proceeding—a proceeding to which the Kentucky court had no jurisdiction.

[2] A conveyance of realty to a husband and wife creates an estate by the entireties. *Freeze v. Congleton*, 276 N.C. 178, 171 S.E. 2d 424 (1970). Upon divorce, the estate is converted into a tenancy in common, each former spouse entitled to an undivided one-half interst in the property. *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E. 2d 87 (1978). Pursuant to such generally accepted principles of law, plaintiff is a co-tenant with defendant, her former husband, and is entitled to a one-half undivided interest in the disputed property.

[3] There are no genuine issues of material fact in controversy between the parties. The legal principles are settled and clear. Finally, a Declaratory Judgment is the appropriate action to perform the duty of quieting title to real property. *York v. Newman*, 2 N.C. App. 484, 163 S.E. 2d 282, *cert. denied*, 274 N.C. 518 (1968).

We, therefore, affirm the trial court order.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

BENNY G. VASSEY v. WILLIAM H. BURCH, M.D.

No. 8229SC750

(Filed 20 September 1983)

1. **Evidence § 50— medical expert—suppression of testimony erroneous**

In a medical negligence action which was based on the alleged failure of the defendant physician to properly diagnose and treat plaintiff's appendicitis, the trial court erred in failing to allow a medical expert to express an opinion before the jury that the infection would not have developed if the appendix had been removed the day before even though the opinion was haltingly and apologetically expressed since the opinion was of great value to plaintiff and could have tipped the scales of the jury in his favor.

2. **Evidence § 40— nonexpert opinion testimony—blood count**

The trial court in a medical negligence action erred in striking plaintiff's testimony that "[n]o blood count had been done up to that point." It is not necessary for a lay witness to demonstrate any special knowledge of medicine before he can be permitted to testify that a blood count was done on him.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 27 January 1982 in Superior Court, POLK County. Heard in the Court of Appeals 13 May 1983.

This medical negligence action is based on the alleged failure of the defendant physician to properly diagnose and treat plaintiff's appendicitis. According to plaintiff, because of severe abdominal pain and stomach disorders for several hours, he consulted defendant, who listened to his heart and lungs, discussed his signs and symptoms, and gave him a shot of penicillin, but did no other test or examination. Plaintiff's symptoms persisted and about ten hours later, he went to the hospital emergency room, where he was given certain medicines and sent home. About sixteen hours after that plaintiff went to see Dr. Morgan, who sent him to the hospital, where during surgery his appendix, which

was gangrenous, was removed. Because of widespread infection, various complications developed, requiring several other operations, and plaintiff incurred hospital and medical expenses in excess of $60,000. After many developments irrelevant to this appeal, the case came on for trial and the jury rendered a verdict for the defendant.

Hamrick & Hamrick, by J. Nat Hamrick, for plaintiff appellant.

Harrell and Leake, by Larry Leake, for defendant appellee.

PHILLIPS, Judge.

[1] Crucial to plaintiff's case was expert medical testimony that the defendant's failure to diagnose and treat the appendicitis caused the troublesome and expensive complications that followed. If the abdominal infection was already underway when the plaintiff consulted defendant—or if it resulted from a laceration of the bowel that occurred during surgery, a possibility raised by the hospital records—defendant would not be liable. Dr. Morgan, who assisted the surgeon that performed the appendectomy, observed some cloudy-looking fluid within the plaintiff's abdomen when it was opened up; and he testified that the fluid may have leaked from the infected and necrotic appendix. But he was not permitted to express the opinion before the jury that the infection would not have developed if the appendix had been removed the day before. Dr. Morgan's proffered answer to the hypothetical question was as follows:

> No, the problems would not have arisen if it had been removed at the time. Again, this comes in this rumor I'm hearing and books.

The question was partially based on the plaintiff's hospital records, salient portions of which had been read into evidence, and the court apparently construed the doctor's answer, as defendant contends, as indicating that he did not deem the record entries referred to as being reliable, and therefore really had no opinion about the matter. But since there is nothing in the record to suggest that Dr. Morgan had any basis for disputing the validity of any of the records, or that he even did so, it seems more likely to us that the doctor was merely being apologetic to a fellow practi-

tioner he was testifying against, and that despite the irrelevant surplusage did have an opinion of material benefit to plaintiff's case, which it was error not to receive. Nor was the error erased, as defendant contends, because somewhat the same testimony was received from another doctor later. Though Dr. Brown did testify that the appendix had probably been leaking into the abdominal cavity for between six and twelve hours before it was removed, and that "[i]f the appendix had been removed before it started leaking, chances of having infection would be very unlikely," he was a pathologist, who had not seen plaintiff and did not treat patients; whereas, Dr. Morgan not only observed the operation on plaintiff, he was the only living witness that did so, as the operating surgeon died before trial, and Dr. Morgan practiced medicine in somewhat the same way the defendant did. Thus, it seems to us that his opinion, though haltingly and apologetically expressed, as so often happens in medical negligence cases, was nevertheless of great value to plaintiff, and that it could have tipped the scales of the jury in his favor.

[2] The trial court also erred in striking plaintiff's testimony that "[n]o blood count had been done up to that point." The basis for this ruling, apparently, was that it had not been shown that plaintiff was familiar with medical technology and knew what a blood count was. In our view, it is not necessary for a lay witness to demonstrate any special knowledge of medicine before he can be permitted to testify that a blood count was done on him. If the plaintiff claimed to know that a test of his blood was not done by the defendant, he should have been permitted to testify accordingly.

New trial.

Judges HILL and JOHNSON concur.

ROBERT L. STAINBACK v. INVESTOR'S CONSOLIDATED INSURANCE COMPANY

No. 829SC1041

(Filed 20 September 1983)

Insurance § 44.1— group hospitalization policy—violation of 75% employee coverage requirement—policy not void

Violation of the 75% employee coverage requirement of G.S. 58-254.4(b) for a group hospitalization insurance policy did not void the policy but merely gave the insurer the right to cancel the policy. G.S. 58-258(b).

APPEAL by defendant from *Smith, Judge.* Judgment entered 13 May 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 26 August 1983.

This is an action seeking payment of a claim under a hospitalization insurance certificate underwritten by defendant insurance company pursuant to the terms of a master group insurance contract. In completing the insurance application, plaintiff listed the number of full-time employees at his business as one, although both plaintiff and the defendant's agent knew that this information was inaccurate. Plaintiff, who was president of his company, had informed the agent that there was one other full-time employee of his company but that this employee would soon resign. The agent represented to plaintiff that he had discussed the question with the president of defendant insurance company and that the president had authorized the issuance of the policy covering only plaintiff.

The policy, providing medical coverage for plaintiff and his dependents, was issued by defendant on 1 December 1976 and continued in effect until the premium refund was made in 1978. On 21 May 1977, plaintiff's minor son was severely injured and hospitalized. Plaintiff filed a claim and defendant refused payment because of noncompliance with terms of the certificate and the master policy requiring that not less than seventy-five percent of the employees of a business participate in the insurance coverage under the master policy. In May of 1977, there were still two employees of plaintiff's business because the second employee had not resigned. Plaintiff was the only employee participating in the group insurance plan.

From judgment of the trial court, sitting without a jury, in favor of plaintiff, defendant appeals.

Bobby W. Rogers, for plaintiff-appellee.

Butler, High, Baer and Jarvis, by Sneed High, for defendant-appellant.

EAGLES, Judge.

Defendant asserts that the trial court erred in ruling that as a matter of law plaintiff was entitled to recover damages under the group hospitalization insurance policy. The dispositive issue is whether plaintiff's noncompliance with the 75% employee coverage requirement voids this group health insurance policy contract. We hold that it does not.

G.S. 58-254.4(b) provides that: "No policy or contract of group accident, group health, or group accident and health insurance shall be delivered or issued for delivery in this State unless the group of persons thereby insured conforms to the requirements of the following: . . . the group shall comprise not less than seventy-five percent (75%) of all persons, eligible of any class or classes of employees, or agents, determined by conditions pertaining to the employment or agency." To ascertain the effect of violation of this statutory 75% rule, we look to G.S. 58-258(b). It provides as follows:

> A policy delivered or issued for delivery to any person in this State in violation of this Subchapter shall be held valid but shall be construed as provided in this Subchapter. When any provision in a policy subject to this Subchapter is in conflict with any provision of this Subchapter, the rights, duties and obligations of the insurer, the insured and the beneficiary shall be governed by the provisions of this Subchapter.

Violation of the 75% employee coverage requirement for a group policy under G.S. 58-254.4(b) does not automatically void the policy. Pursuant to G.S. 58-258(b), a policy issued in violation of the statute "shall be held valid." Thus, a violation merely gives the insurance company the right to cancel the policy.

This conclusion is supported by language from defendant's Master Policy which provides:

> The Company reserves the right to terminate insurance with respect to all employees of any member if the total number of employees, with respect to said number recorded reported for insurance hereunder is less than seventy-five percent of such members employees eligible for insurance hereunder.

By this language, defendant spelled out its remedy, i.e., the right to terminate coverage, if the total enrollees fell below 75% of the eligible employees. clearly defendant did not make 75% participation in the group plan a condition going to coverage or scope. To cancel this policy, the defendant would have had to take timely affirmative action. It did not do so and accordingly is bound by the clear language of the statutes and its own policy. A health insurance company cannot avoid liability on its policy by passive reliance on policy language which merely reserves for the insurance company the right to cancel the policy for noncompliance with its group enrollment minimum percentage requirement.

Though not the basis for our decision here, we note that the trial court found as a fact and concluded as a matter of law that defendant company's president had been informed by its agent Stewart of the plaintiff's failure to meet the 75% minimum enrollment criteria and that defendant's president McKee "specifically authorized Percy Stewart to accept and submit the application of the plaintiff and deliver the policy to the plaintiff knowing that 75% of West End Used Cars, Inc., would not be covered" and that the policy was "specifically authorized for issuance in violation of N.C.G.S. (58-) 254.4(b) [sic] by George McKee."

Affirmed.

Judges BECTON and JOHNSON concur.

Norman v. Royal Crown Bottling Co.

LAWRENCE NORMAN AND HOWARD NORMAN, T/A NORMAN'S MARKET, PLAINTIFFS v. ROYAL CROWN BOTTLING COMPANY, INC., AND WILLIE LEE FOWLER, DEFENDANTS, AND BETTY N. WESTMORELAND, INTERVENOR v. ROYAL CROWN BOTTLING COMPANY, INC., AND WILLIE LEE FOWLER, DEFENDANTS

No. 8226DC687

(Filed 20 September 1983)

1. Appeal and Error § 26— exception to the judgment

An exception to the judgment raises only two questions of law: (1) whether the facts found support the conclusions of law and the judgment, and (2) whether error appears on the face of the record.

2. Master and Servant § 35.1— liability for damage caused by employee

The trial court's findings, including findings that defendant's truck damaged the property of each of the plaintiffs in the amount of $1,000.00, and that when it did so it was being operated by defendant's employee, acting within the course and scope of his employment, were sufficient to support the trial court's judgment for $1,000.00 in favor of each plaintiff against defendant.

APPEAL by defendant Royal Crown Bottling Company, Inc. from *Bennett, Judge*. Judgment entered 2 February 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 May 1983.

While on plaintiffs' premises for the purpose of delivering a supply of beverages to plaintiffs' market, the truck of defendant bottling company, operated by its employee, the co-defendant Willie Lee Fowler, ran into the car of plaintiff intervenor and knocked it into the market building. Plaintiffs sued defendants for the $600 in damage allegedly done to their building, later amended to $1,500, and the car owner intervened for the $900 damage allegedly done to her car, later amended to $1,000.

The case has been tried and appealed twice. In the first trial, before a jury, the trial judge directed a verdict in favor of the defendant Royal Crown at the close of the plaintiffs' evidence, but also directed a verdict in favor of each plaintiff for $1,000 against the co-defendant Fowler, who neither filed answer nor appeared at the trial. Upon plaintiffs' appealing to this Court, it was ruled that the evidence raised issues of the bottling company's liability to both plaintiffs, and a new trial was ordered. *Norman v. Royal Crown Bottling Company, Inc.*, 49 N.C. App. 661, 272 S.E. 2d 355

(1980). The second trial, to the judge this time, by stipulation, resulted in judgment for $1,000 being rendered in favor of each plaintiff against the bottling company and in attorneys' fees in the amount of $3,824 being taxed against the defendants as part of the costs.

Myers, Ray and Myers, by R. Lee Myers, for plaintiff appellees.

Golding, Crews, Meekins, Gordon & Gray, by Robert L. Burchette, for defendant appellant Royal Crown Bottling Company, Inc.

PHILLIPS, Judge.

[1] The sole exception brought forward and argued in defendant's brief is as follows:

> The defendant Royal Crown Bottling Company, Inc., assigns as error:
>
> 1. The Court entering judgment in favor of the plaintiffs against the defendant Royal Crown Bottling Company, Inc., pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, which is PLAINTIFFS' EXCEPTION NO. 1 (No. 1) (R pp 44-50).

Despite the irrelevant reference to Rule 41, this is no more than an exception to the judgment. As such it raises only two questions of law: (1) whether the facts found support the conclusions of law and the judgment, and (2) whether error appears on the face of the record. *Moore v. Associated Brokers, Inc.*, 9 N.C. App. 436, 176 S.E. 2d 355 (1970); 1 Strong's N.C. Index 3d *Appeal and Error* § 26 (1976). It does not question the sufficiency of the evidence to support the findings of fact or the verdict. *Russell v. Taylor*, 37 N.C. App. 520, 246 S.E. 2d 569 (1978); *Lea v. Bridgeman*, 228 N.C. 565, 46 S.E. 2d 555 (1948).

[2] The findings of fact show that defendant's truck damaged the property of each of the plaintiffs in the amount of $1,000, and that when it did so it was being operated by its employee, acting within the course and scope of his employment. These findings and others amply support the verdict, and no error appears on the face of the record.

In making his exception, defendant may have intended to call in question the sufficiency of the evidence to support the judgment. But it makes no difference, since that question was answered by the previous appeal, when the Court ruled that plaintiffs' evidence raised a jury question. *Norman v. Royal Crown Bottling Company, Inc.*, 49 N.C. App. 661, 664, 272 S.E. 2d 355, 357 (1980).

No error.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA, DAN MILES, IV-D AGENT, EX REL. v. LARRY DONNELL MITCHELL

No. 826DC1067

(Filed 20 September 1983)

Rules of Civil Procedure § 60.2 – denial of motion to set aside entry of default and default judgment – proper

The trial court's denial of defendant's motion to set aside entry of default and default judgment pursuant to Rule 60(b) was proper where defendant failed to show either excusable neglect or a meritorious defense. The fact that defendant believed a 1980 dismissal of criminal charges in a bastardy action meant that "the matter was over with" did not excuse his failure to respond to the subsequent summons and complaint.

APPEAL by defendant from *Williford, Judge*. Order entered 21 July 1982 in District Court, HERTFORD County. Heard in the Court of Appeals 30 August 1983.

In 1978, defendant was charged with willful nonsupport of an illegitimate child. The defendant was represented by counsel in this criminal matter, and the charges were dismissed in February of 1980 in Superior Court of Hertford County.

On 7 April 1982, the State filed a complaint, seeking to have defendant adjudged the father of the child, to establish his support obligations, and to recover AFDC funds paid by the State for support of the child. Defendant was personally served with the complaint on 14 April 1982. Defendant failed to file an answer or

otherwise respond to the summons and complaint. Default judgment was entered on 19 May 1982.

On 29 June 1982, defendant, through counsel, filed a motion pursuant to Rule 55 to have entry of default and judgment by default set aside. The motion was incorrectly designated, but the trial court, in its discretion, treated the motion as a Rule 60(b) motion. At the hearing on the motion, the defendant's evidence consisted of testimony that the criminal action for bastardy had been dismissed in 1980. The defendant's motion was not verified and defendant did not testify at the hearing. The trial court found that defendant had failed to make a showing of excusable neglect and did not have a meritorious defense so as to allow the court to set aside the default judgment. From the order denying defendant's motion to set aside entry of default and default judgment, defendant appeals.

Gillam, Gillam and Smith, by Lloyd C. Smith, Jr., and Roswald B. Daly, Jr., for plaintiff-appellee.

Carter W. Jones by Carter W. Jones, Kevin M. Leahy, and Charles A. Moore, for defendant-appellant.

EAGLES, Judge.

The defendant assigns as error the trial court's denial of his motion to set aside entry of default and default judgment. To prevail on a Rule 60(b) motion, the burden is on the movant to show that his neglect in failing to answer or otherwise appear was excusable and that he has a meritorious defense to the action of the plaintiff. *Menache v. Atlantic Coast Management Corp.*, 43 N.C. App. 733, 260 S.E. 2d 100 (1979), *cert. denied* 299 N.C. 331, 265 S.E. 2d 396 (1980). We find no error in the trial judge's determination that the defendant did not show excusable neglect or a meritorious defense.

The facts support the trial judge's conclusion that there was no excusable neglect in the instant case. It is clear from the record that the summons and complaint were personally served on defendant. The trial judge found that defendant was under no disability and, in fact, had retained counsel to represent him in other matters. The fact that defendant believed that the 1980 dismissal of criminal charges in the bastardy action meant that

"the matter was over with" does not excuse his failure to respond to the subsequent summons and complaint. This court has found that a party served with a summons must give it the "attention which a person of ordinary prudence gives to his important business, and failure to do so is not excusable neglect under G.S. 1A-1, Rule 60(b)(1)." *Boyd v. Marsh*, 47 N.C. App. 491, 492, 267 S.E. 2d 394, 395 (1980). This defendant failed to show that he gave the summons and complaint the attention that an important business matter deserves and failed to show why he could not do so. Total disregard of a summons and complaint which were personally served is not the action of a person of ordinary prudence and thus is not excusable neglect, no matter what that person's belief is concerning the propriety of the summons and complaint.

Where there is excusable neglect, there must then be a showing of prima facie meritorious defense to the complaint in order for the movant to prevail in a motion to set aside entry of default and default judgment. *Wynnewood v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E. 2d 787, 790 (1975). The trial court, while concluding that defendant failed to make a showing of excusable neglect, also made a finding that defendant did not present a meritorious defense. Defendant's motion to set aside entry of default and default judgment presents the 1980 dismissal of the criminal charges and the statute of limitations in G.S. 49-14 as defenses. Defendant's belief that dismissal of the criminal charges meant that "the matter was over with" is not a basis on which to excuse a defendant for ignoring a summons and complaint. The statute of limitations defense must also fail. This court has held G.S. 49-14 unconstitutional when applied to civil paternity actions. *Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E. 2d 816 (1980). Thus, there was no meritorious defense presented.

The trial court's order denying defendant's motion to set aside entry of default and default judgment is

Affirmed.

Judges ARNOLD and WELLS concur.

Oxendine v. Moss

GROVER C. OXENDINE v. HUBERT M. MOSS AND WIFE, LAMELLE V. MOSS, D/B/A MOSS BUILDING AND REALTY

No. 8220DC1019

(Filed 20 September 1983)

Rules of Civil Procedure § 50— directed verdict—failure to specify grounds

Where plaintiff sued to recover the value of carpentry services he performed on two separate theories of recovery, *i.e.*, work performed and an account stated, and where defendants failed to state to the trial court any specific grounds for their motion for a directed verdict, as required by G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure, defendants failed to preserve the trial court's denial of their motion for appellate review. Further, the failure to include in the record on appeal their motion for a directed verdict or the trial court's order denying their motion did not comply with the requirements of App. R. 9(b)(1)(viii) and (x).

APPEAL by defendants from *Huffman, Judge*. Judgment entered 27 May 1982 in MOORE County District Court. Heard in the Court of Appeals 25 August 1983.

Plaintiff sued to recover the value of carpentry services he performed for defendants in 1978. Plaintiff's evidence tended to show the following circumstances, events and transactions. Plaintiff performed framing work on five houses being constructed by defendants during the summer and fall of 1978. Plaintiff's work for defendants was performed pursuant to an oral agreement. Over a number of years, plaintiff had performed similar work for defendants on more than 100 houses. After plaintiff's work on the five houses was completed, he went to defendants' office, where he saw Mrs. Moss and asked her to "fix me up a list of what they owed me on the balance of all the homes that I had done," i.e., the five homes framed in the summer and fall of 1978. When plaintiff later returned to defendants' office, Mrs. Moss gave plaintiff a list of the houses he had worked on, for which he had not been paid and the balance owed plaintiff on each house. These balances totaled $7,145.00. Later Mrs. Moss paid plaintiff $1,000.00 against the balance of $7,145.00, leaving a balance of $6,145.00, the amount plaintiff sued to recover. Plaintiff kept no business records of his own, but relied on the statement furnished him by Mrs. Moss.

Defendant's evidence tended to show that plaintiff performed work for defendants, but that defendant Hubert Moss did not agree to or ratify the amount owed to plaintiff.

At the close of all the evidence, defendants' motion for a directed verdict was denied by the trial court. The case was submitted to the jury on the issue of an account stated, which was answered for plaintiff and against defendants.

Aberdeen Legal Clinic of McCrann & Craven, Attorneys, by Michael J. McCrann, for plaintiff.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendants.

WELLS, Judge.

In their sole assignment of error, defendants contend that the trial court erred in denying their motion for a directed verdict at the close of all the evidence, on the grounds that there was insufficient evidence to permit the jury to find existence of an account stated.

Although plaintiff's complaint alleged and plaintiff's evidence tended to support two separate theories of recovery for his services, i.e., work performed and an account stated, defendants, the moving party, failed to state to the trial court any specific grounds for their motion for a directed verdict, as required by G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure. Under such circumstances, defendants have failed to preserve the trial court's denial of their motion for our review. *Johnson v. Dunlop*, 53 N.C. App. 312, 280 S.E. 2d 759 (1981); *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 10 N.C. App. 364, 178 S.E. 2d 794 (1971); *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970); *Compare Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974).

Defendants also failed to include in the record on appeal their motion for a directed verdict or the trial court's order denying their motion, but merely referred in their brief to the pages of the trial transcript where these transactions might be found. This does not comply with the requirements of Rule 9(b)(1)(viii) and (x) of the Rules of Appellate Procedure.

Appeal dismissed.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JESSE ADAM CANTRELL

No. 8228SC1212

(Filed 20 September 1983)

1. **Criminal Law § 74.2— confession—deleting references to co-defendant—no prejudice**

There was no prejudice to the defendant caused by the editing of his confession by deleting all references to the co-defendant.

2. **Criminal Law § 118.4— instructions—failure to object**

Pursuant to App. R. 10, the Court dismissed defendant's objection to an instruction to the jury where defendant failed to state his objection before the jury began its deliberation and where the trial court noted that the counsel for the State and the defendant were invited to the bench at the conclusion of the charge and that they had no objections.

3. **Criminal Law § 138— sentencing—aggravating factor of pecuniary gain improperly considered**

In a prosecution for armed robbery, the trial court improperly submitted as aggravating factors that the offense was committed for hire or pecuniary gain and that the defendant was armed with a deadly weapon at the time of the crime since both factors were used as evidence to prove the crime with which defendant was charged.

APPEAL by defendant from *Howell, Judge*. Judgment entered 24 June 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 1 September 1983.

The defendant was charged in a proper bill of indictment with armed robbery. The jury found defendant guilty as charged. From a judgment imposing a prison sentence of twenty years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb for the State.

Assistant Public Defender Lawrence C. Stoker for the defendant, appellant.

HEDRICK, Judge.

The defendant first assigns error to the trial court's denial of his motion to sever his case from that of his co-defendant. Whether to allow such a motion is within the trial court's discretion and its ruling will not be overturned without a showing of abuse of that discretion. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). The defendant has not set forth any argument under this assignment of error in his brief or otherwise shown any abuse of the trial judge's discretion. This assignment of error is therefore overruled.

[1] In his second assignment of error the defendant contends the court erred in its attempt to delete all references to the co-defendant, Clarence Cantrell, from the confession of the defendant, Jesse Cantrell. He argues "the editing distorted and falsified the meaning of the statement as originally made." This contention has no merit. The trial court's deletion of all references to Jesse Cantrell's co-defendant complied with decisions of the United States Supreme Court, the Supreme Court of North Carolina and our General Statutes. *Bruton v. United States*, 391 U.S. 123 (1968); *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); and N.C. Gen. Stat. Sec. 15A-927(c)(1). There is no showing of prejudice to the defendant caused by the edited statement. This assignment of error will not be sustained.

[2] The defendant argues in his third assignment of error that the trial court erred in its instruction to the jury. He contends the court did not make it "sufficiently clear to the jury that they did not have to find both defendants guilty if they found one of them guilty." Upon review of the record, we find the defendant failed to state this objection before the jury began its deliberations. The trial court noted in the record that counsel for the State and the defendant were invited to the bench at the conclusion of the charge and "that they had no objections, additions, corrections, subtractions to the Court's charge, with the exception of the defendants renewing their original requests for an instruction on the lesser included offense of common law robbery. . . ." We dismiss this assignment of error pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure.

[3] Defendant's Assignment of Error Nos. 4-6 relate to the sentencing of the defendant. The court found as aggravating factors that the offense was committed for hire or pecuniary gain and that the defendant was armed with a deadly weapon at the time of the crime. Because the evidence that defendant used a deadly weapon was employed to prove an essential element of the crime, it was error for the court to rely on this same evidence to find as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime. Similarly, it was error to find as an aggravating factor that the offense was committed for pecuniary gain where the finding was based on the same evidence as that showing defendant took property of value from another. N.C. G.S. § 15A-1340.4(a)(1). See also *State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107 (1983) and *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983). These errors in finding factors in aggravation require a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judges WEBB and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 SEPTEMBER 1983

JOHNSTON OIL v. MADDEN No. 8215SC1084	Alamance (81CVS1095)	Dismissed
STATE v. BRAYBOY No. 8216SC1208	Robeson (81CRS18791) (81CRS18792)	No Error
STATE v. MOORE No. 8227SC1114	Cleveland (82CRS2528) (82CRS4020)	Remanded for Resentencing
STATE v. SWIMM No. 8218SC1201	Guilford (82CRS22763)	Vacated and Remanded
STEWART, CAMPBELL & HENDRIX v. FOSTER No. 8222DC1011	Davie (81CVD171)	Affirmed

In re Will of Maynard

IN THE MATTER OF THE WILL OF EDNA EARL MAYNARD, DECEASED

No. 8210SC839

(Filed 4 October 1983)

1. **Bills of Discovery § 1; Witnesses § 1.4— calling witness not listed in pretrial order—testimony not suppressed—no abuse of discretion**

Inasmuch as the trial judge offered the propounders of a will a reasonable time to consider and meet surprise testimony regarding the validity of the will, the trial judge did not abuse his discretion in denying the propounder's request for a three weeks' continuance.

2. **Bills of Discovery § 1— admission of contract into evidence—not listed as exhibit in pretrial order—no abuse of discretion**

The trial court did not abuse its discretion by admitting into evidence a contract between one of the propounders of a will and the testatrix on the ground that it was not listed as an exhibit in the pretrial order since (1) the propounders did not make a timely objection to the evidence of the contract in that they only objected after it had been fully discussed by the witness on cross-examination, and (2) the evidence indicated that both the will and the contract were prepared by the same law firm, of which the executor of the will and his counsel in this proceeding were members, and a deceased member of the firm had been the testatrix's attorney for decades.

3. **Wills § 24.1— caveat proceeding—refusal to set aside verdict—no abuse of discretion**

A trial judge's refusal to grant a motion to set aside the verdict in a caveat proceeding in which the jury found that the testatrix had sufficient mental capacity to make and execute a will did not constitute an abuse of discretion where the evidence was squarely in conflict and where the propounders presented substantial credible testimony as to the testamentary capacity of the testatrix.

4. **Wills § 22— testamentary capacity as differing from mental capacity to handle affairs—rebuttable presumption that one under guardianship lacks testamentary capacity**

Testamentary capacity differs from the mental capacity to manage one's affairs, and a person who has been declared incompetent may subsequently have the testamentary capacity to execute a will. There is only a *rebuttable* presumption that one under guardianship lacks testamentary capacity. Therefore, even though evidence was introduced that the testatrix was adjudged incompetent for want of understanding to manage her affairs by reason of mental and physical weakness on account of hardening of the arteries, congestive heart failure, emphysema, and high blood pressure and a mental condition connected therewith, the fact that approximately nine months later the testatrix executed a will and revoked a prior will did not conclusively establish that she lacked mental capacity since the caveators presented evidence that the testatrix had sufficient mental capacity to execute a valid will, that she knew the natural objects of her bounty, that she knew who her children were

and knew the nature and extent of her property and the legal consequences of making a will. Whether the testatrix's mental capacity was sufficient to rebut the presumption of incapacity was a question for the jury to determine.

5. **Appeal and Error § 31.1— failure to object to the charge—applicability of "plain error" rule to civil appeal**

The propounders of a will failed to follow App. R. 10(b)(2) by offering no objection to any portion of the jury charge or omission therefrom before the jury entered to consider its verdict, and assuming the "plain error" rule for appellate review applies to civil actions, the doctrine is available to remedy only those unusual trial errors so contrary to fundamental fairness as to amount to a denial of the litigant's due process right to a fair and impartial trial. The alleged errors in the caveat proceeding regarding the instructions on testamentary capacity and undue influence do not reach the dimensions of an unconstitutional deprivation of the propounders' right to a fair and impartial trial, nor are the alleged errors "fundamental error[s], something so basic, so prejudicial, so lacking in its element that justice cannot have been done."

APPEAL by propounders from *Lee, Judge.* Judgment entered 25 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 20 May 1983.

This is a caveat proceeding in which the caveators seek to set aside and annul probate of the will of Edna Earl Maynard dated 28 April 1977 and have admitted to probate a subsequent will dated 13 November 1979.

The testatrix, Edna Earl Maynard, died on 15 January 1981 at the age of 77. She was survived by her five adult children: Walter Troy Maynard (Troy), Edna Maynard Grubbs (Edna), Mildred Maynard Dawson (Mildred), Raymond Amos Maynard (Raymond), and Ruby Roselle Maynard (Ruby). On 28 April 1977, Edna Earl Maynard executed a will in the office of her attorney of many years, William T. Hatch (hereafter referred to as the 1977 will), which left her property equally to her five children. At the time the 1977 will was executed, Mrs. Maynard was approximately 73 years old. Nearly two years later, on 21 February 1979, Mrs. Maynard was adjudged incompetent from want of understanding to manage her affairs, and a guardian was appointed for her. No proceeding to restore Mrs. Maynard to competency was instituted prior to her death in 1981. On 13 November 1979, the testatrix was taken to the office of Attorney Carl Holleman of Apex, and there executed a will which Mr. Holleman had prepared at her request (hereafter referred to as the 1979 will). The 1979 will expressly revoked the 1977 will and left Mrs. Maynard's property to

only three of her five children, Ruby, Raymond and Mildred, leaving nothing to Edna and Troy. Shortly after her death, Mrs. Maynard's second guardian, Larkin Kirkman, delivered both the 1977 will and the 1979 will to the Clerk of Superior Court of Wake County. The Clerk admitted the 1977 will to probate in common form on 21 January 1981. On 3 February 1981, the 1979 will was presented for probate by Carl Holleman, the alternate executor named in that will.

This action was initiated by Ruby Maynard and Raymond Maynard on 13 August 1981, by the filing with the Clerk of Superior Court of Wake County of a caveat and petition for Probate of Will in Solemn Form. In their petition, the caveators alleged that the 1977 will had been revoked by the 1979 will and that the 1979 will was the last will and testament of Edna Earl Maynard. In the ensuing caveat proceeding, the propounders were Harold W. Berry, Jr., Executor of the 1977 will, Edna Grubbs, Walter Maynard, Mildred Dawson, and the caveators were Ruby Maynard and Raymond Maynard.

This action was tried before a jury. Both parties presented extensive evidence and after arguments by counsel, the following issues were submitted to and answered as follows by the jury:

1. Was the paper writing dated April 28, 1977, executed by Edna Earl Maynard according to the requirements of the law for a valid Last Will and Testament?

Answer: No.

2. Was the paper writing dated November 13, 1979, executed by Edna Earl Maynard according to the requirements of the law for a valid Last Will and Testament?

Answer: Yes.

3. At the time of the signing and executing the paper writing dated November 13, 1979, did Edna Earl Maynard have sufficient mental capacity to make and execute a valid Last Will and Testament?

Answer: Yes.

4. Was the execution of the paper writing dated November 13, 1979, procured by undue influence?

Answer: No.

5. Is the paper writing dated November 13, 1979, and every part thereof, the Last Will and Testament of Edna Earl Maynard?

Answer: Yes.

6. Is the paper writing dated April 28, 1977, and every part thereof, the Last Will and Testament of Edna Earl Maynard?

Answer: No.

The propounders' motion to set aside the verdict as contrary to law and against the greater weight of the evidence, and for a new trial, was denied. From judgment entered upon the verdict for the caveators, the propounders appeal.

Hatch, Little, Bunn, Jones, Few & Berry, by David H. Permar, for propounder appellant Harold Berry.

David R. Cockman, for propounder appellants Mildred M. Dawson, Edna M. Grubbs, and Walter Troy Maynard.

Ransdell, Ransdell & Cline, by William G. Ransdell, Jr. and James E. Cline, for caveator appellee Ruby Maynard.

Parker, Sink, Powers, Sink and Potter, by Henry H. Sink, for caveator appellee Raymond Maynard.

JOHNSON, Judge.

The issues to be decided by this appeal are (1) whether the court erred in denying the motion to set aside the verdict and for a new trial on the grounds that (a) the prior adjudication of Mrs. Maynard's incompetency raised a conclusive presumption that the testatrix lacked testamentary capacity on 13 November 1979, (b) that the evidence showed the testatrix to be laboring under an insane delusion, and (c) because the propounders were unfairly surprised at trial; (2) whether the court's instructions to the jury properly declared and explained the law arising on the evidence and correctly charged the jury on the issues of testamentary capacity and undue influence; and (3) whether the court erred in admitting into evidence certain testimony and exhibits which were not listed in the pretrial order. For the reasons set forth below, we find no error in the rulings of the trial court.

The key factual issues at trial were whether the testatrix had sufficient mental capacity on 13 November 1979 to make and execute a valid will, whether Mrs. Maynard changed her will because she suffered under the insane delusion that her son Troy was trying to harm her, or because she was of the opinion that Troy and her daughter Edna had already received their portion of her estate; and whether the making and execution of the 1979 will was procured through the undue influence Ruby Maynard exerted over her mother, Edna Earl Maynard, in the months just preceding November, 1979.

The evidence presented at trial may be summarized as follows: The testatrix, Edna Earl Maynard, was born in 1903. Her husband, Walter A. Maynard, died intestate in 1936, leaving as the bulk of his estate approximately 80 acres of land in Cary, North Carolina. Mrs. Maynard was 32 years of age at the time of her husband's death and had little formal education. Following the death of her husband in 1936, Attorney William T. Hatch of Raleigh became Mrs. Maynard's legal advisor, and remained in that capacity for approximately 40 years. Mrs. Maynard and her husband had five children, all of whom survived Mrs. Maynard.

In 1954, the testatrix's son, Troy, instituted a special proceeding to have his portion of his intestate father's estate allotted to him by setting off his mother's dower right. The other children of the testatrix borrowed money to pay Troy for his share of the property. Troy received somewhat less than $2,000, which he testified did not represent his share of his mother's estate. In 1955, the other children deeded their interest in the property to the testatrix.

Edna M. Grubbs testified that from the time she was married in 1945 she regularly visited her mother, that she looked after her mother's business affairs, and wrote all of her mother's checks up until about 1976 when William Hatch began to act under a power of attorney for Mrs. Maynard. In 1970, the testatrix gave by deed 2.7 acres of land to her grandson Thomas Grubbs, the son of Edna M. Grubbs. Thomas was supposed to live on this land near the testatrix; however, shortly thereafter he sold it to the Masons for a temple site. Mrs. Grubbs testified that this gift was made against her advice, that it was not to represent her share of her mother's estate and that Edna Maynard had never stated that the

conveyance to Thomas Grubbs was to represent Mrs. Grubbs' share of the estate.

The testatrix' physical health had been deteriorating for many years before her death. She had emphysema, a heart condition, hypertension, and arteriosclerosis. She was hospitalized for a period in 1976 and 1977.

On 28 April 1977, Mrs. Maynard executed a will in the office of William Hatch, who had drafted the instrument for her. On that same date, testatrix executed a contract with her son Troy. The contract was also drafted by Attorney Hatch, and it provided that Troy and his wife Marlene would care for the testatrix for the rest of her life, in exchange for which the testatrix "has this day formally executed her last will and testament in which she devised and bequeathed to the parties of the first part [Troy and wife] her home residence, including house and 2.2 acres of land located at 1140 East Maynard Road, Cary, North Carolina, together with household furnishings . . ." At about this time, Troy and his wife Marlene moved next door to Mrs. Maynard, and they helped look after her until they moved away.

The 1977 will offered for probate by the propounders, however, had no provision therein for Troy and his wife to have the house and lot. Rather, it provided that the five children would share their mother's estate equally. On cross-examination, Troy admitted having signed the contract to assure that he "might get a little something for going out there" (to live by his mother), but denied being surprised by the fact that the 1977 will failed to contain the provision called for by the contract executed that same day.

The 1977 will consisted of four pages, the first two setting out the dispositive provisions and the fourth page being the executed signature page. The third page of this will was a blank signature page dated 1978. The propounders presented testimony by John McLain, an attorney in the Hatch firm, and Wendy Hicks, a legal secretary, both of whom were attesting witnesses, that the 1977 will was duly and properly executed by Mrs. Maynard. Thereafter, the caveators were allowed to present the testimony of James Durham, an examiner of questioned documents, despite the fact that Durham was not listed as a witness in the pretrial order. Over the propounders' objection Durham testified that the

fourth page (executed signature page) of the 1977 will was not typed at the same time, nor on the same typewriter as were pages one, two and three.

There was considerable strife between testatrix' children Ruby and Raymond on one side and her other children, Troy, Edna and Mildred on the other. At various times, different children would help care for testatrix. At times, relations were also strained between testatrix and her children, with long intervals of noncommunication between the various family members. Edna Grubbs testified that between 1972 and 1976, Ruby did not visit her mother.

Mrs. Grubbs testified further that in late 1978 or early 1979, a dispute developed between Raymond Maynard and Mrs. Maynard's attorney-in-fact, William Hatch, over sums of money that Raymond sought from his mother and that, as a result, Mrs. Maynard revoked Hatch's power of attorney. Further, that because she was concerned that her mother was easily swayed and would dissipate her funds, Edna Grubbs filed a petition before the Clerk of Wake County on 2 February 1979, seeking to have the testatrix declared incompetent to handle her affairs and seeking the appointment of a guardian.

The guardianship petition detailed Mrs. Maynard's physical and mental weaknesses. Pursuant to this petition, a hearing was held on 21 February 1979, and those party to and present at the hearing included each of the five children who were later parties to the caveat proceedings that are the basis of this appeal. At the hearing, the jury found Mrs. Maynard to be incompetent. A judgment was entered, stating that in consequence of "hardening of the arteries, congestive heart failure, emphysema, and high blood pressure and a mental condition connected therewith," Mrs. Maynard was "incompetent for want of understanding to manage her affairs by reason of mental and physical weaknesses on account of said diseases," and S. Johnson Howard was appointed as guardian for her.

Attorney Howard testified for the propounders that during his tenure as guardian, Mrs. Maynard was too weak and feebleminded to take care of herself, that she was often confused and that she was easily swayed to agree with whomever she had last spoken with. He also noted that at times Mrs. Maynard was

pleased that her son Troy was taking care of her, but that at other times she would demand that Troy be moved out of the house. Often at these times, she would accuse Troy of attempting to harm her, which Howard testified that he knew from his own knowledge to be patently untrue.

The propounders offered further evidence tending to show that their mother's mental condition did not improve prior to her death, that she remained easily confused and easily swayed and that, in the opinion of the various witnesses, Mrs. Maynard did not have sufficient mental capacity to execute a will during the period of time following the incompetency proceeding in February of 1979 and before her death in 1981.

Attorney Howard shared office space with Attorney David Cockman, who represented Mrs. Grubbs as petitioner in the competency proceeding, and who represents Mrs. Grubbs and Troy and Mildred, propounders of the 1977 will, in the present action. Ruby and Raymond, caveators, retained Attorney Brian Howell to represent them insofar as their mother's interests were concerned. They determined that Howard should not serve as guardian for the testatrix in view of Howard's relationship with David Cockman. Subsequently, Howard did resign as guardian and Attorney Larkin Kirkman was appointed successor guardian on 9 October 1979.

Larkin Kirkman's testimony concerning Mrs. Maynard's expressions of fear of her son Troy corroborated that of Mr. Howard. Kirkman termed this fear an "irrational fixation" and testified that he was confronted by demands from Mrs. Maynard that Troy and his wife be removed from her property and that he had received letters from Mrs. Maynard to that effect. However, as to Mrs. Maynard's mental and physical condition in general, Kirkman testified that when he was appointed successor guardian in October, 1979, his initial visit found Mrs. Maynard coherent and able to express her needs and desires intelligently. In Kirkman's opinion, Mrs. Maynard also possessed sufficient mental capacity to execute a valid will on 13 December 1979. Kirkman also testified that during the spring and summer of 1980 he had observed Mrs. Maynard get out in her garden. Further, that she could can vegetables and had, at that point, lived alone for a substantial period of time.

Sometime prior thereto, in August or September of 1979, Ruby Maynard had moved in with her mother, and she remained there until 20 April 1980 when her mother began living alone again. During that period, Ruby was the only child to have any sustained contact with Mrs. Maynard or with Larkin Kirkman. The other children, especially Mrs. Grubbs, Mildred and Troy, testified that they found it difficult to visit their mother and were told not to visit her without Kirkman's permission. During this period and afterwards, Ruby prepared her mother's meals, saw that she took her medicine, bought her groceries, did her laundry and transported her wherever she went. In some cases, Ruby composed her mother's letters and notes and made suggestions as to how they should be stated. Of the children, Kirkman dealt primarily with Ruby.

In late October, 1979, Kirkman received a note from Mrs. Maynard which expressed her desire to revoke the 1977 will and make another one. Kirkman also met with Mrs. Maynard in person to discuss this request. He advised her that, as her guardian, he would arrange for her to receive advice about preparing a new will from another attorney.

On 31 October 1979, Mrs. Maynard requested that Carl Holleman draft a will for her. Mr. Holleman visited the testatrix in her home and had a lengthy discussion with her in regard to the will and other matters. The parties were apparently concerned about the effect of the prior adjudication of incompetency on Mrs. Maynard's ability to revoke the 1977 will and validly make and execute a new will. The institution of a proceeding to restore Mrs. Maynard to competency was considered, but was never begun because the Clerk of Superior Court had advised against it.

On 13 November 1979, Ruby took Mrs. Maynard to Holleman's office and left her off. Mrs. Maynard executed the will Holleman had prepared for her. Holleman and other witnesses for the caveators testified that Mrs. Maynard had indicated to them that she provided in the later will for only three of her five children (Raymond, Ruby and Mildred) because the other two (Troy and Edna) had already received their share. The caveators' witnesses each testified further that, in their opinions, Mrs. Maynard had testamentary capacity on 13 November 1979. After

execution of the 1979 will, Mrs. Maynard's health continued to deteriorate, and she died on 15 January 1981.

We now turn to the questions presented by this appeal, which we will discuss in order of convenience.

I

The propounders assign error to the trial court's admission into evidence of James Durham's testimony and the contract executed by Troy and Mrs. Maynard on the grounds that they were not listed on the pretrial order, raised issues not previously raised by the pleadings and, therefore, constituted unfair surprise to the propounders.

The record discloses that following the cross-examination of Troy Maynard regarding his lack of surprise that the 1977 will did not conform to the provisions of the 1977 contract, it apparently occurred to caveator Ruby Maynard's attorney, William Ransdell, that the various pages of the 1977 will admitted to probate may have been switched or tampered with. This would explain the puzzling blank signature page dated 1978, appearing between pages two and four, as well as the dissimilarity in type between pages one through three on the one hand, and the executed signature page four, on the other. The next day, Attorney Ransdell moved to offer the testimony of James Durham as an expert on the identification of documents. Ransdell contended that Durham's testimony would tend to prove that the writing dated 28 April 1977 had been tampered with and was not, therefore, the last will and testament of Edna Maynard.

Counsel for the propounders of the 1977 will objected to the testimony of Mr. Durham on the grounds that the witness was not listed on the pretrial order and the propounders were not prepared to cross-examine the witness or respond to the issue raised by his testimony. Further, that the only issue raised by the petition was whether the 1977 will had been revoked by the subsequent 1979 will. An exchange occurred between counsel and the court on the question of whether the filing of the caveat itself raised the issue of whether the probated 1977 will was the last will and testament of Edna Maynard. Counsel for the propounders then stated that if the court were to grant the caveators' motion, propounders would move for a three week continuance to enable

them to investigate and rebut the evidence. The motion for a three week continuance was denied. However, the court did advise the propounders that, "if you needed some time to respond to it if it were admitted, that would be reasonable." Subsequently, the court again indicated that the propounders would be given a reasonable amount of time to respond to the Durham testimony, stating:

> The objection to the evidence is overruled. I am going to let it in before the jury. I think it is competent as to the will in every part, is this the last will and testament of Edna Earl Maynard and I am going to have to let it in. If you need a reasonable time to respond—certainly I am not going to continue the trial for any period of any week.

The record is devoid of any acceptance by the propounders of the court's offer of reasonable additional time to meet the evidence. By their assignments of error, propounders argue that by denying their motion for a three week continuance and motion for a new trial, made in part on the basis of the unfair surprise of Mr. Durham's testimony, the trial court abused its discretion, thereby entitling propounders to a new trial.

[1] The propounders correctly contend that where a party is surprised by the calling of witnesses who were not listed in the pretrial order, and the party is not prepared to cross-examine these witnesses or present rebuttal witnesses, a motion for a continuance is appropriate. *State v. Hoffman*, 281 N.C. 727, 735, 190 S.E. 2d 842, 848 (1972). However, such testimony need not be suppressed. The admissibility of that testimony is a matter resting in the discretion of the trial judge, not reviewable on appeal in the absence of a showing of abuse. *Id.; State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972). We find no abuse of discretion by the admission of Mr. Durham's testimony into evidence. The pleadings in this caveat proceeding adequately raised the general issue of the due execution and validity of the 1977 will, despite the fact that the primary basis of the will contest was the alleged revocation of the 1977 will by the subsequent 1979 will.

A motion for a continuance is also addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion. 12 Strong's N.C. Index 3d, Trial, § 3.1. The trial judge offered the

propounders a reasonable time to consider and meet the surprise testimony regarding the validity of the 1977 will. The propounders did not avail themselves of that opportunity, but rather sought a continuance of three weeks, which was unreasonable in the context of the nearly completed trial and in relation to the issue raised. Inasmuch as the trial judge offered the propounders a reasonable continuance, denial of a three week continuance was not an abuse of discretion.

[2] The propounders also assign error to the trial court's admission of the contract between Troy Maynard, one of the propounders and the testatrix, on the grounds that it was not listed as an exhibit in the pretrial order. This contract bears the same execution date as the will offered by the propounders, and calls for a provision in the testatrix' will to leave 2.2 acres and her home to Troy. Apparently the caveators argued to the jury that because there was a contradiction between the 1977 will offered for probate and the contract, the 1977 will, although bearing the date 28 April 1977 on its execution page, must have been written at a later date. The propounders argue that they were unfairly surprised by this evidence, and that, with sufficient opportunity, they would have been able to offer evidence explaining the discrepancies.

We note first that the propounders did not make a timely objection to evidence of the contract, and only objected after it had been fully discussed by the witness on cross-examination. Therefore, the objection was not timely and the trial judge was not required to sustain the objection even if it was meritorious. 1 Brandis on N.C. Evidence, § 27, p. 101 (1982). Consequently, there was no error in allowing testimony relating to the contract or in allowing the contract itself into evidence.

Finally, as to both the testimony of James Durham and the contract, the evidence indicates that both the 1977 will and the contract were prepared by the same law firm, of which the executor of the 1977 will and his counsel in this proceeding were members, and a deceased member of the firm had been the testatrix' attorney for decades. It would seem reasonable to assume (1) that the files of that law firm would contain sufficient materials to enable the propounders to meet the caveators' "surprise" evidence, and (2) that this evidence could have been

located during the reasonable time offered by the trial court to the propounders to meet the caveators' evidence. Under these circumstances, the court correctly admitted this evidence and did not abuse its discretion by denying propounders' motion for a continuance and motion for a new trial on the grounds of unfair surprise.

II

The propounders' principal contention is that the trial court erred by denying their motion to set aside the verdict and grant a new trial on the grounds that the jury's verdict was contrary to the law relating to the testamentary capacity of one under guardianship and against the greater weight of the evidence.

[3] As to the former ground, it is well established that when the presiding judge grants or refuses to grant a motion to set aside the verdict because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review it. *McNeill v. McDougald*, 242 N.C. 255, 87 S.E. 2d 502 (1955); *Akin v. Bank*, 227 N.C. 453, 42 S.E. 2d 518 (1947); *In re Will of Herring*, 19 N.C. App. 357, 198 S.E. 2d 737 (1973); *see generally* 12 Strong's N.C. Index 3d, Trial, § 48, p. 471. By contrast, where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion. *Pruitt v. Ray*, 230 N.C. 322, 52 S.E. 2d 876 (1949); *Goodman v. Goodman*, 201 N.C. 808, 161 S.E. 686 (1931); *In re Will of Herring, supra; Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). A motion to set aside the verdict as being contrary to the weight of the credible evidence is addressed to the sound discretion of the presiding judge and therefore his decision will not be disturbed on appeal in the absence of a showing of abuse. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974). We note here that both the propounders and the caveators presented substantial, credible testimony as to the testamentary capacity of Edna Maynard on 13 November 1979, the date on which the 1979 will was executed. The evidence before the jury on this issue was squarely in conflict. The jury specifically found that Edna Maynard had sufficient mental capacity to make and execute a valid last will and testament on

13 November 1979. The propounders do not argue in their brief that the court abused its discretion, and the record with regard to this issue discloses no abuse of discretion. Therefore, the trial court's denial of the motion on the ground that the verdict was against the greater weight of the evidence will not be disturbed on appeal.

[4] The legal issue presented by the propounders' contention that the verdict was contrary to law is whether the prior adjudication of the testatrix' incompetency from want of understanding to manage her affairs raised a conclusive presumption of mental incompetency so as to deprive the subsequently executed will of testamentary effect.

The propounders argue that the mental capacity required to make and execute a valid will is no different from the mental capacity required for a person to execute a contract or manage his affairs. Further, that the decision in *Sutton v. Sutton*, 222 N.C. 274, 22 S.E. 2d 553 (1942) established that insofar as parties and privies to the guardianship proceedings are concerned, the adjudication of incompetency sets up a *conclusive* presumption of mental incompetency at a subsequent date. The caveators on the other hand, argue that testamentary capacity differs from the mental capacity to manage one's affairs, and, therefore, a person who has been declared incompetent may subsequently have the testamentary capacity to execute a will. They argue that *Sutton* itself recognizes the difference between the two capacities and establishes only a *rebuttable* presumption that one under guardianship lacks testamentary capacity. We agree.

The issue here is whether the testatrix had sufficient testamentary capacity on 13 November 1979, the date of execution of her subsequent will, which expressly revokes the 1977 will. Generally, the same mental capacity necessary to make a will is required to revoke one. *Sutton v. Sutton, supra.* A person has sufficient testamentary capacity within the meaning of the law if he (1) comprehends the natural objects of his bounty; (2) understands the kind, nature, and extent of his property; (3) knows the manner in which he desires his act to take effect; and (4) realizes the effect his act will have upon his estate. *In re Womack*, 53 N.C. App. 221, 280 S.E. 2d 494, *disc. rev. denied*, 304 N.C. 391, 285 S.E. 2d 837 (1981); *see generally* 13 Strong's N.C. Index 3d, Wills § 22;

Wiggins, Wills and Administration of Estates in North Carolina, § 43 (2d Ed. 1983). The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity. *In re York*, 231 N.C. 70, 55 S.E. 2d 791 (1949).

The effect of an adjudication of incompetency on the issue of testamentary capacity at a later date was stated by the *Sutton* court as follows:

> Where a person has been adjudged incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age, disease or like infirmities, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his affairs, insofar as parties and privies to the guardianship proceedings are concerned; and, while not conclusive as to others, it is presumptive proof of the mental incapacity of the ward, and this presumption continues unless rebutted in a proper proceeding. *Johnson v. Insurance Company*, 217 N.C. 139, 7 S.E. 2d 475; *Parker v. Davis*, 53 N.C. 460; *Ripply v. Gant*, 39 N.C. 443; *Christmas v. Mitchell*, 38 N.C. 535; *Armstrong & Arrington v. Short*, 8 N.C. 11. *Therefore, in any event, in the absence of proof to the contrary, a person for whom a guardian has been appointed pursuant to the provisions of Consolidated Statutes of North Carolina, Vol. 3, Sec. 2285, as amended by Public Law 1929, Chap. 203, is presumed to lack the mental capacity to make or revoke a will.* (Emphasis added.)

222 N.C. at 277, 22 S.E. 2d at 555. In other words, where a person has been declared incompetent to *manage his affairs*, and a guardian appointed, the person is presumed to lack mental capacity to *manage his affairs*, and this presumption is conclusive as to parties and privies to the guardianship proceedings and rebuttable as to all others. As to *testamentary capacity*, a person for whom a guardian has been appointed is presumed "*in the absence of proof to the contrary*" to lack *testamentary capacity*. The presumption as to *testamentary incapacity* is necessarily a rebuttable one, or there could be no "proof to the contrary." Therefore, the propounders' reliance upon *Sutton* to establish a conclusive presump-

tion as to Edna Maynard's testamentary incapacity in November, 1979 is untenable.

Furthermore, the rule as stated in *Sutton* is in accord with the general rule that one under guardianship for want of understanding to manage his own affairs may subsequently make a valid will.

> As a general rule, an adjudication that a person is insane or a lunatic is competent evidence, if properly authenticated, on the issue of his testamentary capacity as of a subsequent time. Proof of the appointment of a guardian or conservator for a person, as incompetent to manage his own affairs, has been held admissible in evidence on the question of his testamentary capacity at a subsequent time, notwithstanding that the appointment was on account of the impairment of mental faculties resulting from old age and did not involve a declaration of insanity.

79 Am. Jur. 2d, Wills, § 125, p. 366 (1975); Anno., 89 A.L.R. 2d 1120 (1963) (mere existence of a guardianship at the time the will was executed does not require the conclusion that the will is invalid); *see also* 79 Am. Jur. 2d, Wills, § 153, p. 386; Note, Effect of Competency Adjudication in Subsequent Will Contest, 2 Syracuse L. Rev. 329 (1951) (adjudication of incompetency does not of itself establish lack of testamentary capacity; it is only prima facie evidence of incapacity).

Implicit in the rule that a person under guardianship may make a valid will is the recognition that although a person is not capable of transacting business in general, he may be capable of understanding the business of making a will and the elements of it. The competency or incompetency of a testator to engage in or understand any complicated matter or transaction in business is not a proper test of his mental capacity to execute a will, and is higher than the law requires. 79 Am. Jur. 2d, Wills, § 75, p. 332. *See also Wiggins, supra,* § 43, p. 61 (author urges that North Carolina rule that the same mental capacity be required for making a contract or deed and a will be abandoned in favor of a rule that the testator or maker must possess the capacity to execute the particular instrument in question).

In North Carolina, neither an adjudication of incompetency, nor the appointment of a guardian is conclusive on the question of

testamentary capacity. *Wiggins, supra,* § 46. Under *Sutton,* the appointment of a guardian raises a presumption against testamentary capacity, shifting the burden of proof to the will's propounders (caveators in the case *sub judice*) to show that the disqualification had been removed at the time of the will's execution. This is consistent with the rule in those cases where "habitual" or "general" insanity has been determined, even where no subsequent sanity hearing has been held prior to the making of the will. In *In re Credle's Will,* 176 N.C. 84, 85-86, 97 S.E. 151 (1918), the Supreme Court held that prior insanity creates a presumption only, and that a will executed subsequently can be valid.

> The rule that, when insanity is proved to have existed at any particular time, it is to be presumed to continue, applies only to cases of general or habitual insanity. Therefore, where a general mental derangement or lunacy is shown to have existed not very long prior to the execution of a will, the burden of proof as to the sanity of the testator is thrown upon the propounder to show that when the will was executed the testator was of sound mind.

See also In re Thorp, 150 N.C. 487, 64 S.E. 379 (1909). Similarly, the insane person during a lucid interval can make a valid will. *Wiggins, supra,* § 46.

The reason for holding the presumption of continuing mental insanity or incompetency to be a rebuttable one in a subsequent independent proceeding was explained by the Supreme Court in *Johnson v. Insurance Co.,* 217 N.C. 139, 142-143, 7 S.E. 2d 475, 476-477 (1940).

> The mental capacity of the plaintiff was a fact, capable of proof as any other fact, regardless of the finding of the jury in the lunacy proceeding or the order of court following upon it. *Certainly if a person is adjudged sane in a lunacy proceeding, he is no more conclusively so than he might be under natural conditions before the law became concerned with the inquiry, and an adjudication of such a court, when presented in a matter not connected with the immediate purpose and scope of the proceeding, when admissible at all, is no more than evidence* . . . It may serve as evidence of the condition it purports to find, but such presumptions as arise from it are rebuttable . . . (Emphasis added.)

See also Medical College v. Maynard, 236 N.C. 506, 73 S.E. 2d 315 (1952).

In the case under discussion, the propounders of the 1977 will introduced evidence that on 21 February 1979 Edna Earl Maynard was adjudged incompetent for want of understanding to manage her affairs by reason of mental and physical weakness on account of hardening of the arteries, congestive heart failure, emphysema, and high blood pressure and a mental condition connected therewith. Pursuant to G.S. 35-2, a guardian was appointed and the guardianship was active until the time of the testatrix' death. At no time thereafter was a proceeding to restore Mrs. Maynard's competency instituted, although it was considered. Approximately nine months later, Mrs. Maynard executed a will dated 13 November 1979. All of the parties to the will caveat were parties to the guardianship proceedings.

In *Sutton v. Sutton, supra*, the testator had been declared mentally incompetent to handle his affairs and one of the plaintiffs (children of the testator from a previous marriage) was appointed general guardian and continued to act as such until the testator's death. The defendant in *Sutton* was the testator's second wife. Plaintiffs filed a complaint alleging the foregoing facts and alleging fraud in connection with defendant's subsequent prevention of the testator's revocation of his will. The Supreme Court held that the complaint should have been dismissed for failure to state a claim entitling plaintiffs to relief, apparently because the complaint contained no allegations as to the testator's having regained his competency at the time of the attempted revocation, or of his otherwise possessing sufficient testamentary capacity to make a valid revocation. In other words, the complaint disclosed on its face the existence of facts giving rise to a presumption of testamentary incapacity, but contained no factual allegations which would rebut that presumption.

In the present case, in addition to evidence of the testatrix' prior adjudication of incompetency and active guardianship, the propounders introduced testimonial evidence regarding her lack of testamentary capacity from Johnson Howard, Mrs. Maynard's first guardian, Dr. Boyles, her doctor from 1976 to 1979, and various other health care professionals who attended Mrs. Maynard in 1979. The testimony of all of the foregoing witnesses

was to the effect that in their opinion, on 13 November 1979, Mrs. Maynard did not have sufficient mental capacity to make a will in that she tended to get her children's names confused and did not know the natural objects of her bounty, that she was easily swayed by her children, that she did not know the nature and extent of her property or the legal consequences of making a will.

The caveators, on the other hand, presented testimonial evidence to the effect that on 13 November 1979, Mrs. Maynard had testamentary capacity by the testimony of Larkin Kirkman, Mrs. Maynard's second guardian, Attorney Carl Holleman, who drafted the 1979 will, Attorney Paul Stam, Holleman's law partner and Susan Williams, their legal secretary, both of whom were attesting witnesses to the 1979 will, and Dr. Eddie Stiles, who saw the testatrix in December, 1979 and January, 1980. Holleman, Stam, Kirkman and Williams all testified that, in their opinions, on the date in question, Mrs. Maynard had sufficient mental capacity to execute a valid will, that she knew the natural objects of her bounty, that she knew who her children were and knew the nature and extent of her property and the legal consequences of making a will. Holleman, Stam and Williams testified that the testatrix indicated that she provided in her later will for only three of her children (Raymond, Ruby and Mildred) because the other two (Troy and Edna) had already received their share. Dr. Stiles testified that he saw the testatrix on 13 December 1979, 7 January 1980, and on 6 January 1980; that on the latter date he performed a mental status evaluation of the testatrix; that he concluded that she was competent to handle her affairs and so advised the guardian, Larkin Kirkman. Attorney Brian Howell saw the testatrix and also spoke with her by telephone in October, 1979 and he was also of the opinion that the testatrix had testamentary capacity at these times. Thus, whether this testimony was sufficient to rebut the presumption of incapacity was a question for the jury to determine.

Initially, the trial court instructed the jury as follows on the effect of the incompetency adjudication on the issue of the testatrix' testamentary capacity:

> Members of the Jury, ordinarily the law is that there is a presumption that the testatrix possessed sufficient mental capacity to execute a valid will in the absence of evidence to

the contrary. However, the Court instructs you in this case where the testatrix had previously been declared incompetent by want of understanding to manage her own affairs on February the 21st, 1979, the Court instructs you that the law presumes in the absence of any proceeding to restore her competency the law presumes that that same condition existed on November the 13th, 1979.

This presumption, however, is not conclusive and may be rebutted by the caveators. The burden of proof, therefore, is upon the caveators to prove by the greater weight of the evidence that at the time of the execution of the paper writing on November 13, 1979, that the testatrix, Edna Earl Maynard did have sufficient mental capacity to make and execute a valid last will and testament.

The court later reinstructed the jury as follows:

I instruct you that the burden of proof on that issue was on the caveators to prove by the greater weight of the evidence that on November 13, 1979, at the time of the signing and executing the paper writing that Edna Earl Maynard did have sufficient mental capacity to make and execute a valid last will and testament.

I instruct you that ordinarily there is a presumption in the law that a testatrix possessed sufficient mental capacity to execute a valid will in the absence of evidence to the contrary but in this case I instruct you that the testatrix having been declared mentally incompetent by want of understanding to manage her own affairs on February the 21st, 1979, and no proceeding having been instituted to restore her competency, I instruct you that the law presumes that that condition of mind continued on up until November the 13th, 1979, and I further instruct you that where one has been declared incompetent by want of understanding to manage her own affairs, then there is a presumption that that person would lack the sufficient mental capacity to make and execute a valid last will and testament but that that presumption was not conclusive; that that presumption merely shifted the burden of proof to the caveators to prove that she did have sufficient mental capacity to execute a valid last will and testament on November the 13th, 1979, and to prove that by the greater

> weight of the evidence. Whereas, if there had not been any incompetency proceeding, that burden of proof would have been upon the propounders to prove that she did not have sufficient mental capacity to execute a valid last will and testament.
>
> Thus, you must decide whether Edna Earl Maynard had the testamentary capacity to make a will.

It is elemental that the credibility of each witness who testified and the weight to be given any evidence are issues of fact for the jury to decide. The caveators presented substantial evidence of the testatrix' mental capacity to execute a valid will on 13 November 1979, which, if believed, was sufficient to rebut the presumption of incapacity arising from the adjudication of incompetency and support a verdict in favor of the caveators on the issue of the testatrix' testamentary capacity. Therefore, the jury's verdict was not contrary to law and the trial judge did not err in denying the propounders' motion to set aside the verdict on that basis.

The propounders also argue that the verdict finding the 1979 will to be valid was contrary to law and against the greater weight of the evidence because the evidence at trial showed that, with regard to her son Troy, the testatrix was laboring under an insane delusion which deprived her of testamentary capacity. We note here that the issue of mental incapacity due to insane delusion or "monomania" was not submitted to the jury. The record discloses no request that the jury be instructed on the law regarding insane delusions as it relates to the facts of this case, nor was any objection to the instructions entered on the basis of that omission.

North Carolina requires that the testatrix must be of "sound mind." G.S. 31-1; *see In re Will of Pridgen*, 249 N.C. 509, 107 S.E. 2d 160 (1959). Generally, partial insanity will invalidate a will which is the direct offspring thereof, and a will which is the product of an insane delusion is also invalid for want of testamentary capacity. 79 Am. Jur. 2d, Wills, § 87, p. 339; Anno., 175 A.L.R. 882 (1948).

> If a person has sufficient mental ability to make a will but is subject to an insane delusion, i.e., monomania, as to one of

> the essential requirements of testamentary capacity, the will would not be valid. For example, if the testator has an insane delusion as to the objects of his bounty, it would invalidate his will.
>
> * * *
>
> An insane delusion must be distinguished from prejudice, hate, bad judgment, ill will, and any number of other conditions which might be associated with sanity. To be sufficient to invalidate the will, the delusion must have no foundation in fact and must be the product of the testator's diseased or deranged mind.

Wiggins, supra, § 47, p. 65-66. However, to justify the setting aside of a will on the ground that the testatrix was possessed of an insane delusion, it must also be shown that the insane delusion was *actually operative* in the production of the will. 79 Am. Jur. 2d, Wills, § 88, p. 341.

Both of the attorneys who served as guardian to Mrs. Maynard testified that at times Mrs. Maynard expressed a fear that Troy was going to harm or try to kill her. Larkin Kirkman characterized this belief as an "irrational fixation," and both guardians testified that, in their respective opinions, Mrs. Maynard's fear of Troy was unfounded. However, Kirkman also characterized Mrs. Maynard's attitude towards Troy as one of "anger," and Johnson Howard testified that Mrs. Maynard's attitude towards Troy was not fixed, but changeable. Apart from the opinion of the two guardians, the record is devoid of evidence that Troy had, or that he had not, actually threatened his mother or attempted to harm her. Therefore, the evidence produced on Mrs. Maynard's beliefs about her son is simply insufficient to justify a conclusion, as a matter of law, that her belief was an "insane delusion," that is, the product of a *diseased* or *deranged* mind and that it had no foundation in fact. On the evidence produced at trial, Mrs. Maynard's expressions concerning Troy are indistinguishable from expressions of simple misjudgment, ill will or extreme anger, conditions which are equally consistent with sanity. Nor does the evidence demonstrate that Mrs. Maynard's belief about Troy was actually operative in the production of the 1979 will. Although there was evidence that relations between Mrs. Maynard and her children Troy and Edna Grubbs were somewhat strained in the

year preceding her death, there was also substantial evidence presented that the 1979 will omitting these two children was executed because the testatrix felt that Troy and Edna had already received their portion of her estate, and that the fair thing to do would be to leave the balance of her estate to her other three children, Mildred, Ruby and Raymond. Furthermore, we note that there is no contention that the testatrix had an insane delusion as to her daughter Edna, and Edna was also omitted from the 1979 will. Edna's omission, according to the attesting witnesses, was for the same reason that Troy was omitted.

Consequently, the record in the case does not support the propounders' contention that the jury's verdict finding the testatrix to have possessed sufficient mental capacity to execute a valid will is contrary to law. Nor have the propounders demonstrated that the trial court abused its discretion in ruling on the motion to set aside the verdict as contrary to the greater weight of the evidence. Therefore, the ruling will not be disturbed on appeal. *Britt v. Allen, supra; In re Brown, supra.* In sum, there is no merit to the propounders' contention that a new trial should be granted because of a claimed "insane delusion" of the testatrix.

III

[5] By their assignments of error 7, 8, and 9 propounders argue that the trial court erred in its instructions to the jury on the issues of testamentary capacity and undue influence in relation to the execution of the will. However, no objection to any portion of the jury charge or omission therefrom was entered before the jury retired to consider its verdict. Rule 10(b)(2) of the Rules of Appellate Procedure provides:

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

Therefore, pursuant to Rule 10(b)(2), the propounders waived their right to assert an assignment of error based on the jury instruc-

tions. However, by their memorandum of supplemental authority, propounders argue that the "plain error" rule, recently adopted by the Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), is applicable to the errors assigned in this case.

The plain error rule allows for appellate review of errors normally barred by waiver rules such as Rule 10(b)(2). The propounders' argument that the plain error rule applies to the jury instructions on testamentary capacity and undue influence raises the issue of whether the rule is applicable to civil actions. In *State v. Odom*, the Supreme Court expressly adopted the "plain error" rule that is used by the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. The federal Rule 30 is virtually identical to North Carolina's Rule 10(b)(2), and it would ordinarily require that all errors in jury instructions be brought to the attention of the trial court in order to preserve the question for review. However, Rule 52(b) states that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The plain error rule followed by several of the federal courts, and specifically adopted in *Odom*, has been defined as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original).

307 N.C. at 660, 300 S.E. 2d at 378. Our research discloses no decision of the Supreme Court subsequent to *Odom* in which the plain error rule has been applied in a civil action.

We note that federal appellate review of "plain errors or defects affecting substantial rights" is specifically authorized by the Federal Rules of Criminal Procedure. The North Carolina Rules of Appellate Procedure contain no exact counterpart to the federal Rule 52(b), although Rule 2 does allow suspension of the requirements of the rules "to prevent manifest injustice to a party." However, in *Odom*, the Court emphasized that indiscriminate use of the plain error rule would undermine the purpose of Rule 10(b)(2), which is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case, and thereby eliminate the need for a new trial. It is clearly for these reasons that the federal courts apply the rule *cautiously* and only in the *exceptional* case and have defined the instances in which the plain error rule is applicable with such restrictive terms.

In *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A. 2d 114 (1974), a civil negligence action, the issue before the Supreme Court of Pennsylvania was whether the appellate court must consider errors in jury instructions claimed to be "basic and fundamental" despite the absence of any objection or specific exception at trial. Justice Roberts (now Chief Justice), writing for the majority, reasoned that the basic and fundamental error doctrine suffers from two major weaknesses: (1) "[a]ppellate court consideration of issues not raised in the trial court results in the trial becoming merely a dress rehearsal," and (2) "[t]he theory has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental." 322 A. 2d at 116, 117. The majority noted further that the ad hoc nature of the rule rendered it unworkable and that to date it had not been judicially developed into a predictable, neutrally applied standard. In view of these practical problems, the majority declared that basic and fundamental error would no longer be recognized as a ground for consideration on appeal of allegedly erroneous jury instructions; a specific exception must be taken. Justice Pomeroy concurred in the result, but dissented from the complete exclusion of the doctrine of basic and fundamental error, reasoning that the doctrine has long been established in Pennsylvania and other jurisdictions, and has a useful role to play in protecting the fundamental constitutional rights of litigants to a fair and impartial trial.

> This right is an integral part of due process of law, guaranteed to all litigants by the Fifth and Fourteenth Amendments. Obviously it is only an unusual trial error that will amount to a denial of due process, and in my view, the doctrine should be available to remedy only those trial errors so contrary to fundamental fairness as to reach the dimensions of a constitutional violation.

322 A. 2d at 118 (Pomeroy, J., dissenting). Although the result reached in *Dilliplaine* is contrary to *State v. Odom*, the majority's concerns regarding the practical problems attendant to appellate review of "basic" or "plain" errors must be taken into account when considering the rule's applicability to a particular case. We find no express indication in either *Odom* itself, or in *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) ("plain error" rule applicable to Rule 10(b)(1) waiver), that our Supreme Court intended to restrict the doctrine exclusively to criminal appeals, despite the rule's derivation from the Federal Rules of Criminal Procedure. Therefore, assuming that "plain error" applies to civil actions, we are persuaded by the reasoning of the dissenting opinion in *Dilliplaine*, that the doctrine of plain error should be available to remedy only those unusual trial errors so contrary to fundamental fairness as to amount to a denial of the litigant's due process right to a fair and impartial trial. This test is roughly analogous to the definition of plain error in criminal appeals stated by the federal courts pursuant to Rule 52(b), and adopted by the Supreme Court in *State v. Odom* and *State v. Black*.

Therefore, assuming "plain error" is applicable to this civil appeal, we are unable to conclude, after reviewing the entire record, that the alleged errors regarding the instructions on testamentary capacity and undue influence reach the dimensions of an unconstitutional deprivation of the propounders' right to a fair and impartial trial, or that the error is a "fundamental error, something so basic, so prejudicial, so lacking in its element that justice cannot have been done," in the words of *State v. Odom, supra*.

We have discussed the substance of the propounders' contentions regarding the effect of a prior adjudication of incompetency on the issue of testamentary capacity, and set forth the trial

court's instruction and reinstruction on that issue in Part II of this opinion. Although the court misstated the law in the initial instruction, the error was not prejudicial to the propounders as it placed a greater burden on the caveators than the law requires, the caveators having only the burden of showing testamentary capacity, not capacity to manage business affairs. Furthermore, the trial court reinstructed the jury on this point after deliberations began, and this time the instructions were a substantially correct statement of the law, thus curing any prior error.

Propounders present a two-part argument regarding the trial court's instruction on undue influence: (1) that the court, by reading, virtually verbatim, the North Carolina Pattern Jury Instructions, adding only a short statement relating the law to the evidence adduced, did not adequately apply the law to the specific facts pertinent to the issue, in violation of G.S. 1A-1, Rule 51,[1] and (2) that the court failed to instruct the jury that where all the indicia of undue influence are present in the making and execution of a will, there arises a presumption of undue influence, and the burden is cast upon the propounders of that will to rebut this presumption.

In general, the propounders of the 1977 will sought to demonstrate that the making and execution of the 1979 will was procured by the undue influence of caveator Ruby Maynard. The trial court fairly and accurately summarized the contentions and the evidence of both the propounders and the caveators. The court's detailed summary covered 18 pages of the trial transcript. Following this summary, the court fully explained the law on testamentary capacity and the law on undue influence. The instructions given the jury declared and explained the law arising on the evidence given in the case. The court's charge, "considered contextually, was in substantial compliance with the statute." *In re Will of Goodson*, 4 N.C. App. 257, 261, 166 S.E. 2d 447, 450 (1969). The propounders' contention that the court violated G.S. 1A-1, Rule 51 is without merit.

With respect to the substance of the court's instruction on the law of undue influence, the propounders' contention that the

1. Propounders also argue this point with respect to the instruction on testamentary capacity.

evidence raised a *presumption* that the 1979 will was procured by undue influence, to be rebutted by the caveators (propounders of the 1979 will) is also without merit. Whether the testatrix' 1979 will was the product of undue influence is a question of fact for the jury to determine. The general rule is that in a caveat proceeding, the burden of proof is upon the propounders (caveators in this case) to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator (propounders in this case) to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *In re Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980). We have carefully examined the instruction on the law of undue influence and find that it adequately and correctly states the factors to be considered by the jury in making its determination in accordance with the elements of undue influence set forth in *In re Andrews, supra.* In sum, to the extent that the trial court erred in its jury instructions, such errors did not amount to a denial of the propounders' due process right to a fair and impartial trial, and, therefore, did not constitute "plain errors" which would mandate a new trial.

We have carefully examined the propounders' remaining assignments of error and find that they are without merit. We conclude that the propounders had a fair trial, free from plain and prejudicial error.

No error.

Judges WELLS and WHICHARD concur.

TAR LANDING VILLAS OWNERS' ASSOCIATION, ET AL. v. THE TOWN OF ATLANTIC BEACH

A PLACE AT THE BEACH—ATLANTIC BEACH HOMEOWNERS' ASSOCIATION, INC., ET AL. v. THE TOWN OF ATLANTIC BEACH

No. 823SC968

(Filed 4 October 1983)

1. **Judgments § 37.4— validity of second annexation ordinance—scope of statute—collateral estoppel inapplicable**

A previous trial court judgment involving an earlier attempted annexation of the lands in question by defendant town and ruling that condominium projects should each be treated as one residential tract under the subdivision test of G.S. 160A-36(c) did not collaterally estop the town from annexing the lands in question or the Court of Appeals from determining the scope of G.S. 160A-36(c) in an action contesting the validity of the second ordinance, notwithstanding the issues in the two actions are identical and the parties in the present action are identical or in privity with the parties in the prior judgment, since it would be inequitable to allow petitioners to assert offensively the doctrine of collateral estoppel in this case when the validity of the new annexation ordinance has never been determined by any court, and the issue in the present case as to how condominium units should be considered under G.S. 160A-36(c) has never been addressed by an appellate court in this State.

2. **Judgments § 35— *offensive assertion of collateral estoppel—strict scrutiny required***

When a party asserts offensively the doctrine of collateral estoppel, a court should strictly scrutinize whether to apply the doctrine in light of judicial economy and fairness to the other party.

3. **Judgments § 35— *collateral estoppel—questions of fact or law***

The doctrine of collateral estoppel may be applied regardless of whether the issue involves questions of fact or law.

4. **Municipal Corporations § 2.2— subdivision test for annexation—individual condominium units considered as lots or tracts**

Individual condominium units may be counted as lots or tracts in determining whether an area to be annexed meets the subdivision test of G.S. 160A-36(c) whereby at least 60% of the area must consist of lots or tracts five acres or less in size.

APPEAL by petitioners and respondent from *Reid, Judge.* Order entered 10 August 1982 in Superior Court, CARTERET County. Heard in the Court of Appeals 22 August 1983.

Petitioners filed two petitions, consolidated by consent, contesting the validity of an annexation ordinance adopted by re-

spondent, the Town of Atlantic Beach, on 14 January 1982. There are two questions presented on appeal. The first question, which petitioners raise on appeal, is whether a previous judgment involving an earlier annexation by the Town of the land in question barred the Town from annexing petitioners' lands under the doctrine of collateral estoppel or res judicata. The second question, which the Town raises on appeal, is whether condominium units owned by petitioners were "lots" or "tracts" under the subdivision test of G.S. 160A-36(c).

The facts are as follows: On 14 January 1982, the Town enacted an ordinance effective 1 June 1982, annexing land east of its existing town limits. The area annexed included petitioners' properties. Petitioners are the individual owners of condominium units and the corporate associations of condominium owners in the condominium projects; "Tar Landing Villas," "A Place At The Beach," and "A Place At The Beach—II."

The 1982 ordinance was the Town's second attempt to annex petitioners' properties: On 16 October 1980, it had enacted an ordinance effective 1 December 1980 annexing property east of its then existing town limits. The 1980 ordinance annexed a larger area and included the area presently in dispute. Corporate petitioners and individual unit owners, some of whom are petitioners in this action, had brought suit attacking the 1980 annexation ordinance. Judgment, entered on 16 September 1981, found, in pertinent part, that the condominium projects owned by petitioners should "each be treated, for purposes of 160A-36(c) as one residential tract in use, over five acres." Upon entry of the final judgment, the parties stipulated to a waiver of the rights of appeal.

Some individual petitioners are the same as in the first suit. There are some new petitioners. Some petitioners in the prior action are not parties to this suit. Finally, certain units within the condominium projects were sold or transferred between the time of the first and second annexations.

At the time of the first action, "A Place At The Beach" had 180 condominium units on 14.2 acres; "A Place At The Beach—II" had 84 condominium units on 11.74 acres; and "Tar Landing Villas" had 54 condominium units on 14.37 acres. In the present action, "A Place At The Beach" has 180 condominium units on 13.44 acres; "A Place At The Beach—II" has 180 condominium

units on 12.86 acres; and "Tar Landing Villas" has 69 condominium units on 10.5 acres.

The documents from "A Place At The Beach" and "A Place At The Beach—II" provided in part: "Every condominium unit, together with its undivided interest in the common areas and facilities, shall for all purposes, . . . constitute a separate parcel of real property and the unit owner thereof shall be entitled to the exclusive ownership and possession of his condominium unit . . ."

The documents from "Tar Landing Villas" provided in part: "Unit shall mean and refer to each designated plot of land as shown on the map of the property of Tar Landing, Inc., and the improvements situate thereon, excluding any land or improvements designated as common area."

The trial judge, held, in essence:

(1) Since there were significant differences in the areas to be annexed, the doctrines of res judicata and collateral estoppel were not applicable and did not bar the Town from annexing petitioners' properties; and

(2) The area to be annexed by the Town did not meet the subdivision test of G.S. 160A-36(c) since the condominium units were not lots or tracts.

Dennis M. Marquardt, for petitioners appellees and cross appellants Tar Landing Villas Owners' Association, et al.

Darden and Pierce, by Robert D. Darden, Jr., for petitioners appellees and cross appellants A Place At The Beach, Atlantic Beach, et al.

Mason and Phillips, by L. Patten Mason, for respondent appellant and cross appellee The Town of Atlantic Beach.

VAUGHN, Chief Judge.

The first question raised by petitioners on appeal is whether the trial court erred in refusing to apply the doctrine of collateral estoppel or res judicata. We affirm that part of the judgment holding that neither the doctrine of res judicata nor collateral estoppel precluded the Town from annexing petitioners' properties.

The doctrine of res judicata, which bars subsequent lawsuits on a cause of action previously litigated and decided on the merits, is inapplicable in this case. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). Petitioners' cause of action arises under an annexation ordinance enacted subsequent to the ordinance resulting in the 1981 judgment.

[1] It is the doctrine of collateral estoppel, which precludes relitigation of issues actually litigated, determined and necessary to a former judgment, that concerns this court. *See King v. Grindstaff, supra.* Unlike res judicata, collateral estoppel may bar relitigation of an issue arising under a new cause of action. We find that the issue of whether to count each condominium unit as a tract or lot under G.S. 160A-36(c) was litigated, determined on the merits and necessary to the 1981 judgment. Furthermore, unlike the trial court, we find that the expansion of the condominium projects since the 1981 judgment and the increased number of unit owners does not present a significant factual difference. The scheme of condominium development and ownership is the same. Nevertheless, we refuse to apply the doctrine of collateral estoppel.

In this State, we have, with a few exceptions, followed the traditional view of collateral estoppel, which requires not only that issues be identical but that parties be identical or in privity with parties to the prior judgment. *See Mortgage Corp. v. Insurance Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980). Under the rule of mutuality, a party to a subsequent action "who was not a party [or is not privy to a party] to the former action and, therefore, is not estopped by the judgment therein, cannot assert the judgment as an estoppel against his opponent, even though the opponent was a party to the action in which the judgment was rendered." *Kayler v. Gallimore*, 269 N.C. 405, 407, 152 S.E. 2d 518, 520 (1967). This court has cited with approval such definitions of privity as: "persons connected together or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them," Black's Law Dictionary; persons who "have acquired an interest in the subject matter of the action, either by inheritance, succession, or purchase of a party subsequent to the action . . .," Ballentine's Law Dictionary; persons "having a mutual or successive relationship to the same right of property," Webster, *quoted in Blake v. Norman*, 37 N.C.

App. 617, 626, 247 S.E. 2d 256, 262, *cert. denied*, 296 N.C. 106 (1978). *See also Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976).

Petitioners in this action are the individual owners of condominium units and the corporate associations of condominium owners in three condominium projects. Corporate petitioners and many of the individual condominium unit owners are the same parties who instituted the 1981 suit. Furthermore, those who purchased units from petitioners in the 1981 suit are privies to such former petitioners, since, pursuant to the above definitions, they purchased "an interest in the subject matter of the action," acquiring a "successive relationship" in the same property. Respondent is the same in both suits. Under the traditional view, thus, corporate petitioners and individual petitioners who acquired units from former petitioners could successfully assert the former judgment as an estoppel against the Town. While it is questionable whether privity exists among owners of units built subsequent to the 1981 suit, we need not decide this question since our holding is not based on the rule of mutuality.

We have recognized exceptions to the mutuality rule. *See King v. Grindstaff, supra; Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655 (1958); Note, Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff; 52 N.C. L. Rev. 836 (1974). While we recognize these exceptions and approve of the expanded doctrine as a way to end vexatious litigation, we, nevertheless, find that it would be inequitable to allow petitioners, even those with privity, to assert the doctrine in this case. The policies behind collateral estoppel are: "(1) that each person have his day in court to completely adjudicate the merits of his claim for relief, and (2) that the courts must demand an end to litigation when a court of competent jurisdiction has ruled on the merits of his right." 37 N.C. App. at 624, 247 S.E. 2d at 261. Pursuant to G.S. 160A-36, the Town enacted a new annexation ordinance, the viability of which has never been determined by this Court. Petitioners instituted suit and now demand that we declare the new ordinance void without judicial review on the merits. Petitioners, however, having instituted suit, are not now entitled to protection under the doctrine of collateral estoppel.

[2] In *King v. Grindstaff*, the Supreme Court allowed a nominal party to the prior action to assert the prior judgment offensively. When a party asserts the doctrine offensively, however, as did petitioners in this case, we believe that a court should strictly scrutinize whether to apply the doctrine in light of judicial economy and fairness to the other party. Offensive assertion of the doctrine occurs when a plaintiff attempts to prevent a defendant from relitigating issues it previously and unsuccessfully litigated. Defensive assertion of the doctrine occurs when a defendant attempts to prevent a plaintiff from bringing a claim previously and unsuccessfully litigated. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). We agree with the Supreme Court in *Parklane* that offensive use of collateral estoppel may increase rather than decrease litigation and may, in certain circumstances, be unfair to the respondent. "[T]he preferable approach for dealing with these problems . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Id.* at 331, 99 S.Ct. at 651, 58 L.Ed. 2d at 562. The trial court was within its discretion in determining that the doctrine did not apply. Collateral estoppel developed as a means of protecting a person from legal harassment and redundant legal fees. *See Divine v. C.I.R.*, 500 F. 2d 1041 (2d Cir. 1974). Refusing to apply the doctrine, in this case, subjects petitioners to neither.

[3] The doctrine of collateral estoppel may be applied regardless of whether the issue involves questions of fact or law. *See King v. Grindstaff, supra; Masters v. Dunstan, supra.* When the issue, however, as in this case, involves the scope and formulation of a law never before addressed by an appellate court in this State, we believe that our duty to develop the law outweighs the resulting burden on petitioners.

> [T]he policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and the courts.

Restatement (Second) of Judgments § 28(5) comment g (1980). We find the policy considerations in the Restatement of Judgments

against applying the doctrine when the issue concerns a fresh determination of the law to be persuasive.

> [The] function of developing the law . . . is especially pertinent when there is a difference in forums in which the two actions are to be determined, as when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court . . . [or] when the issue is of general interest and has not been resolved by the highest appellate court that can resolve it . . . [I]t is also pertinent that the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons.

Restatement (Second) of Judgment § 29(7) comment i (1980). The Town of Atlantic Beach will, in all likelihood, continue to grow and expand. Furthermore, in light of continued future growth in our State and the burgeoning of condominium developments, we believe our decision today has statewide importance. By determining the scope of G.S. 160A-36(c), we believe we will discourage litigation from persons similarly situated to petitioners.

For the above reasons, we affirm such part of the judgment of the trial court, and hold that the doctrine of collateral estoppel does not preclude this court from determining the scope of G.S. 160A-36(c).

[4] The second question raised by the Town on appeal is whether the subdivision test in G.S. 160A-36(c), whereby at least 60% of an area to be annexed must consist of lots or tracts five acres or less in size, is satisfied by counting individual condominium units as tracts or lots. We reverse the judgment for petitioners and hold that individual condominium units may be counted as lots in determining the 60% requirement of G.S. 160A-36(c).

G.S. 160A-36(c) states that an "area to be annexed must be developed for urban purposes." Under the statute, an area is developed for urban purposes if two tests are met: First, at least 60% of the total number of tracts or lots in the area to be annexed must be used for residential, commercial, industrial, institutional or governmental purposes. Second, at least 60% of the total

acreage that is vacant or used for residential purposes must consist of lots or tracts five acres or less in size. The Town must meet both tests in order to extend its municipal corporate limits. *Lithium Corp v. Bessemer City,* 261 N.C. 532, 135 S.E. 2d 574 (1964).

At trial the Town established that 97% of the lots and tracts in the area in question were used for residential or governmental purposes. The question before this Court, therefore, concerns the second test of G.S. 160A-36(c). If condominium units are counted as tracts or lots under the statute, then 87.79% of the properties in dispute are tracts or lots five acres or less in size, and the subdivision test in G.S. 160A-36(c) is met.

> It is . . . an accepted rule of [statutory] construction that in ascertaining the intent of the Legislature in cases of ambiguity, regard must be had to the subject matter of the statute, as well as its language, i.e., the language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter . . . And where the meaning of a statute is doubtful, the history or legislation on the general subject dealt with . . . may be considered in connection with the object, purpose and language of the statute, in order to arrive at its true meaning.

Cab Co. v. Charlotte, 234 N.C. 572, 576, 68 S.E. 2d 433, 436 (1951).

Following such recognized principles of statutory construction and in view of the legislative history behind Chapter 160A showing a general intent to seek economic growth and development, we construe the word "lot" in G.S. 160A-36(c) to include the concept of a condominium unit. Specifically, the legislative history behind G.S. 160A-36(c) suggests that the tests in G.S. 160A-36(c) were not meant to undermine the general principle that a town can annex property developed for urban purposes. G.S. 160A-36(c), enacted in 1959, was the result of a Study and recommendations of the "Municipal Government Study Commission." *See Lithium Corp., supra*; Act of June 16, 1959, ch. 1010, 1959 N.C. Sess. Laws 1031-1038. According to such Study, "[T]he requirement that land be 'undergoing urban development' is made general on purpose . . . [M]ore specific definition would rob the cities of necessary

flexibility in fixing boundary lines . . .," *quoted in* 261 N.C. at 537, 135 S.E. 2d at 578. The urban purposes of condominium developments do not change merely because the common areas shared by unit owners extend beyond five acres. As stated by the 1959 Study Commission, "[T]he legislative standard should act as a brake only with respect to attempted annexation of large tracts of agricultural or vacant land where no evidence of urban development can be shown," *quoted in* 261 N.C. at 537, 135 S.E. 2d at 578.

In holding that petitioners' properties are subject to annexation, we are upholding the policy in G.S. 160A-33 that "sound urban development is essential to continued economic development . . ." and that "municipal boundaries should be extended . . . to provide the high quality of governmental services needed therein for the public health, safety, and welfare." Condominium unit owners need municipal services like water, sewage disposal, and police and fire protection just as do homeowners in any new development. The purpose of the Town's annexation ordinance was to "provide services to the area being annexed." It would lead to anomalous results and violate legislative intent to construe the statute as applying to the property of homeowners but not to property of condominium unit owners.

In formulating plans for enacting G.S. 160A-36(c) the 1959 Study Commission had in mind "typical suburban area undergoing development, containing subdivisions with streets, lots, and tracts, having a substantial portion in actual use, and being adaptable to water, sewer and other service extensions. The Commission recognized that there would be variations from this pattern." 261 N.C. at 538, 135 S.E. 2d at 578, 579. The modern surge of condominium development is a variation of the 1959 pattern of urban development which, we believe, falls within the scope of G.S. 160A-36(c).

In *Adams-Millis Corp. v. Town of Kernersville*, 6 N.C. App. 78, 169 S.E. 2d 496, *cert. denied*, 275 N.C. 681 (1969), this Court noted several methods which can be used to determine what is a lot. The method used by the Town, which we adopt in this case, is to count each numbered lot separately. Our acceptance of the Town's method accords with G.S. 160A-42, which states that "for purposes of meeting the requirements of G.S. 160A-36, the munici-

pality shall use methods calculated to provide reasonably accurate results . . ." and that "the reviewing court shall accept the estimates of the municipality . . . [a]s to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records . . ." The Town based its land estimates on tax records and recorded plat maps—procedures both the Legislature and this Court have specifically approved. *See* G.S. 160A-42(1), (2); *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 293 S.E. 2d 240, *review denied*, 306 N.C. 559 (1982); *Adams-Millis Corp., supra.*

Webster defined "lot" as "a measured parcel of land having fixed boundaries and designated on a plot or survey." Webster's 7th New Collegiate Dictionary (1969). Including "condominium unit" within the scope of the definition accords with the general view of condominium ownership, which regards a unit as a special form of real property. A condominium is said to be "an estate in realty consisting of separate interests in residential buildings together with an undivided interest in common . . . portions of the same property. The unit is a separate interest in common areas and in [the] entire condominium except units rented," 6 Thompson on Real Property, § 3011 (Supp. 1981), or put another way, it is a "form of ownership under which the separate units of a multi-unit improvement of real property are subject to ownership by different owners, and there is appurtenant to each unit an undivided share in the common elements." Boger, Survey of the Law of Property 667 (1981).

We regard each condominium unit as a separate lot even though unit owners may also own an undivided interest in common areas and facilities. Our holding is in line with the Unit Ownership Act, Chapter 47A which treats a unit owner like any other owner of real property. Specifically, under G.S. 47A-5, unit ownership is said to "vest in the holder exclusive ownership and possession with all the incidents of real property." The statute further provides that such condominium unit "may be individually conveyed, leased and encumbered and may be inherited or devised by will, as if it were solely and entirely independent of the other condominium units in the buildings of which it forms a part." Under G.S. 47A-6(c), "the undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with

the unit . . ." Finally, under G.S. 47A-21, each condominium unit and its percentage of undivided interest in the common areas and facilities is deemed a parcel, separately assessed and taxed.

In accordance with the general view of condominium ownership and with Chapter 47A, we regard each condominium unit as a parcel of real property. In further accordance with both Webster's definition of lot and the legislative intent behind the annexation statutes, we hold that each condominium unit is a separate lot and that the Town, therefore, met the subdivision test of G.S. 160A-36(c).

On petitioners' appeal, the order is affirmed. On respondent's appeal, the order is reversed. The case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges HILL and BECTON concur.

SHARON LYNN WOLFE, PLAINTIFF v. RONALD CHARLES WOLFE, DEFENDANT v. JAMES THOMAS SUGG, II, ADDITIONAL PARTY DEFENDANT

No. 8220DC1096

(Filed 4 October 1983)

1. **Rules of Civil Procedure § 14— additional party defendant in custody action improper**

The trial court in a child custody action erred in making the person with whom plaintiff was living an additional party defendant since he was not liable to defendant for all or part of plaintiff's claims against him. G.S. 1A-1, Rule 14(a).

2. **Divorce and Alimony § 24.9— insufficient findings to justify child support order**

Where the trial court made no findings concerning the relative abilities of the defendant and plaintiff to pay child support, the order awarding child support must be reversed.

3. **Divorce and Alimony § 25— custodial agreement after custody order—improper**

Husband and wife could not enter into a temporary order concerning child custody and, by agreement, override an order of a trial judge concerning

custody without a proper showing of substantial changed circumstances. To sanction such an agreement would undermine the statutory policy promoting custodial stability for children, and would allow one district judge improperly to overrule a prior custody order of another district court judge.

4. **Divorce and Alimony § 25.10— child custody—failure to show changed circumstances**

In a child custody action, plaintiff failed to show a substantial change of circumstances affecting the welfare of the children had occurred since the original custody order granting custody to defendant where the trial court found that plaintiff had removed the children from the State in violation of a former custody order, that plaintiff was living in an adulterous relationship, that the party with whom she was living had a history of alcohol and drug abuse, and that the person with whom she was living had attempted to demean and deride the defendant in front of the children.

5. **Divorce and Alimony § 25.3— child custody—consideration of child's preferences**

The record clearly showed that a trial court in a child custody case permitted both children to testify concerning custody; however, the court was not bound by this testimony and could assign what weight it chose to the children's stated preferences.

6. **Divorce and Alimony § 25.12; Mortgages and Deeds of Trust § 21— bonds secured by interest in marital home—no ability to foreclose**

An order which provided that should plaintiff fail to comply with visitation conditions, a bond would be forfeited and foreclosures would be instituted without notice or hearing was error since North Carolina statutes provide for two means by which foreclosure proceedings may be brought against real property and those means are exclusive. G.S. 1-339.1 through 1-339.40 and G.S. 45-21.1 through 21.45.

7. **Divorce and Alimony § 23— inability of judge to retain exclusive jurisdiction over custody case**

Although the court which first obtains jurisdiction and enters an order concerning child custody or support is the only proper court in which to bring an action for modification of custody or support, an individual judge may not retain exclusive jurisdiction over a case, and the trial judge erred in attempting to do so.

APPEAL by plaintiff and additional party defendant from *Honeycutt, Judge.* Order entered 28 June 1982 in RICHMOND County District Court. Heard in the Court of Appeals 1 September 1983.

Plaintiff-wife and defendant-husband separated in November, 1980, after more than 10 years of marriage. Plaintiff moved into a nearby apartment with additional party defendant James Thomas

Sugg, II, retaining custody of the two minor children of the marriage.

Soon thereafter, plaintiff filed suit seeking, among other relief, divorce from defendant and custody of the children. A hearing was held before Judge Burris in Richmond County District Court on 8 December 1980, in which custody of both children was awarded to defendant. Plaintiff was represented by counsel but was not personally present. A second hearing was held before Judge Honeycutt on 5 January 1981. The trial court ordered the family home sequestered for the use of defendant and the children, ordered plaintiff to pay $200.00 per month in child support, and divided certain items of marital property.

Despite entry of the custody order of December, 1980, plaintiff failed to surrender custody of the children to defendant until December 1981. During at least part of the intervening twelve months, plaintiff lived in Florida and Virginia with the children and Sugg. In December, 1981, plaintiff and defendant reached an agreement, approved by Judge Honeycutt. According to the terms of the agreement, plaintiff delivered custody of the children to defendant, but the prior orders of Judges Honeycutt and Burris concerning sequestration of the marital home, division of property and child support, were suspended pending a hearing in May, 1982. The parties and Judge Honeycutt agreed that the issue of custody would be considered *de novo* in the May hearing, without requiring proof of substantial changed circumstances to modify placement of the children with defendant.

The case was heard May 11 - 13 by Judge Honeycutt, without a jury. In his order, Judge Honeycutt awarded custody of both children to defendant, ordered plaintiff to pay $300.00 per month in child support, sequestered the family home for use by defendant and the children; made provision for division of some marital property; ordered visitation by plaintiff on each Tuesday and alternate weekends, on the condition that plaintiff post a $3000.00 bond, secured by her interest in the marital home, and ordered that failure to comply with terms of the visitation order would result in forfeiture of the bond, without notice or hearing. Judge Honeycutt joined Sugg as an additional party defendant, ordered plaintiff to prevent Sugg from having any contact whatsoever with the children during visitation, and enjoined Sugg from seeing or speaking with the children at any time.

From this order, plaintiff and additional party defendant Sugg appealed.

Henry T. Drake for plaintiff and additional party defendant.

Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin, for defendant.

WELLS, Judge.

[1] Plaintiff and additional party defendant Sugg assign as error the trial court's order joining Sugg as a party to the action below. Sugg was purportedly brought into the suit pursuant to the motion of defendant. Under G.S. 1A-1, Rule 14 of the Rules of Civil Procedure, a defendant may bring in an additional party who "is or may be liable to (defendant) for all or part of the plaintiff's claims against him." Rule 14(a). Clearly, Sugg could not possibly be liable to defendant for any of plaintiff's claims against defendant for child custody or child support. The trial court erred in making Sugg a party and was without power to enter orders concerning Sugg.

[2] Plaintiff also assigns as error the failure of the trial court to find sufficient facts to award child support or sequester the family home for defendant and the children. Plaintiff fails to include arguments in her brief supporting her assignment of error concerning sequestration of the home, and therefore this argument is not preserved on appeal. Rule 28(b)(5) of the Rules of Appellate Procedure. We agree, however, with plaintiff that the trial court erred in awarding child support to defendant. Before awarding child support, a trial court must consider the "reasonable needs of the child and . . . relative ability of the parties to provide that amount . . . [and] estates, earnings, conditions, [and] accustomed standard of living." *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). [Citations omitted.] G.S. 50-13.4(b) (1976 and 1981 Supp.). The trial court below made no findings concerning the relative abilities of the defendant and plaintiff to pay child support and this requires that the support portion of the order be reversed.

Plaintiff also asserts two errors related to the trial judge's award of custody of the children to defendant. Plaintiff argues there were insufficient facts to support the judge's conclusion that the best interests of the children would be served by placing

custody with defendant, and further argues the trial court erred in failing to find as a fact that both children preferred to live with plaintiff.

[3] In the case at bar, Judge Burris entered an order in December, 1980, concluding the best interest of the children would be met by placing custody of the children with defendant. Plaintiff therefore had the burden of showing a substantial change of circumstances affecting the welfare of the children, to warrant changing custody. *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429 (1980); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978). *See also* 3 Lee, North Carolina Family Law § 226 (1981) and cases cited therein.

Both plaintiff and defendant argue, however, that they agreed in December, 1981, that *temporary* custody of the children would be placed with defendant, pending a "full" hearing in May, 1982, and that permanent custody would be awarded based on a "best interests of the child" standard. This agreement was apparently approved by Judge Honeycutt. Similar agreements have been recognized by our courts in the past. *See e.g., Clark v. Clark*, 23 N.C. App. 589, 209 S.E. 2d 545 (1974). In *Clark* the Court held that where a temporary custody order is entered pending trial on the merits, and both parents agree that custody at trial will be awarded without requiring the noncustodial parent to show a substantial change of circumstances since the temporary custody award, the parties will be bound by their agreement. Plaintiff and defendant argue that they made such an agreement and, therefore, no showing of substantial changed circumstances was required in the May, 1982 hearing. We hold, however, that the case at bar is distinguishable from *Clark*, and that plaintiff was therefore required to prove a substantial change of circumstances in order to win custody of her children. Unlike the facts in *Clark*, there was no indication that the December, 1980 custody award was meant to be temporary, or that a later hearing on the subject would be held. Plaintiff and defendant may not, by agreement a year later, override the order of Judge Burris without a proper showing of substantial changed circumstances. To sanction such an agreement would undermine the statutory policy promoting custodial stability for children, and would allow one district court judge improperly to overrule a prior custody order of another district court judge.

[4] Plaintiff failed to show a substantial change of circumstances affecting the welfare of the children had occurred since December, 1980. If anything, the evidence presented at the May, 1982 hearing, presented additional evidence supporting the original award of custody with defendant. The trial court found that plaintiff had removed the children from the state in violation of Judge Burris' order, that plaintiff was living in an adulterous relationship with additional party defendant Sugg, that Sugg had a history of alcohol and drug abuse, and that Sugg had attempted to demean and deride the defendant in front of the children. "The findings of fact made by the trial judge, like a jury verdict, conclude the parties and are binding on (appellate courts) when supported by competent evidence received at a properly constituted hearing." 3 Lee, § 224, *supra, citing Griffith v. Griffith*, 240 N.C. 271, 81 S.E. 2d 918 (1954). Plaintiff, on the other hand, failed to present evidence of a substantial change of circumstances which would support changing custody of the children from defendant to plaintiff.

[5] Plaintiff also assigns as error that the trial court failed to find facts concerning the minor children's preferences concerning custody. When minor children reach the "age of discretion" courts should permit the child to testify in a proceeding to determine the child's custody. In re Peal, 54 N.C. App. 564, 284 S.E. 2d 347, *rev'd on other grounds*, 305 N.C. 640, 290 S.E. 2d 664 (1981), *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969), *overruled on other grounds*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981). The record clearly shows that the trial court in the case before us permitted both children to testify concerning custody. The trial court was not bound by this testimony, however, and could assign what weight it chose to the children's stated preferences. *Id.* Furthermore, it is well established that a court's failure to find facts as to a child's preference concerning custody is not grounds for reversing an award of custody. *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971), *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966). *See also* 5 N.C. Index 3d, *Divorce and Alimony*, § 25.3 (1977 and 1983 Supp.) and cases cited therein. This assignment of error is overruled.

[6] Plaintiff next argues the trial judge erred in ordering plaintiff to post a $3000.00 bond secured by plaintiff's interest in the marital home. The order provided that should plaintiff fail to com-

ply with visitation conditions, the bond would be forfeited and foreclosure proceedings would be instituted without notice or hearing. This was error. North Carolina statutes provided for two means by which foreclosure proceedings may be brought against real property. Foreclosure may be by judicial sale pursuant to G.S. 1-339.1 through 1-339.40, or, if expressly provided in the deed or mortgage, by power of sale under G.S. 45-21.1 through 21.45. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. *See generally* Webster, Real Estate Law in North Carolina, §§ 280, 281 (1981 Hetrick Ed.), and note, "Real Property—Changes in North Carolina's Foreclosure Law," 54 N.C.L. Rev. 903 (1976).

[7] Plaintiff next assigns as error that Judge Honeycutt purported to retain exlcusive jurisdiction over the case. It is well established in North Carolina that the court which first obtains jurisdiction and enters an order concerning child custody or support is the only proper court in which to bring an action for modification of custody or support. *Tate v. Tate*, 9 N.C. App. 681, 177 S.E. 2d 455 (1970), *citing Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). *See also* 3 Lee, §§ 222, 226, *supra*. Thus, once jurisdiction attaches in the district court of one county, a parent may not attempt to bring a modification action in the district court of another county. *Tate v. Tate, supra*. The rule does not mean, however, that a particular, individual *judge* may retain exclusive jurisdiction over a case. Indeed, such a rule would be highly impractical given North Carolina's practice of rotation of judges. While we agree that Judge Honeycutt erred in attempting to maintain exclusive jurisdiction, we fail to see how plaintiff has been harmed in any way by his *action*, and thus we hold no relief is necessary.

Plaintiff's final assignment of error alleges there was insufficient evidence to support many of the trial judge's findings of fact. We have given careful consideration to plaintiff's arguments and find they are without merit, or are non-prejudicial, or have been dealt with in the foregoing discussion of plaintiff's other assignments of error.

The trial court's orders joining Sugg as an additional party, providing for foreclosure of plaintiff's property interests in the

marital home, requiring payment of $300.00 per month in child support and retention of exclusive jurisdiction are

Reversed.

As to the trial court's award of custody of the children to defendant, and sequestration of the marital home,

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. YOULES JOHNSON, JR.

No. 8212SC828

(Filed 4 October 1983)

Searches and Seizures § 10— warrantless entry into house—seizure of heroin in plain view—absence of exigent circumstances

No exigent circumstances justified an officer's warrantless entry into defendant's house and his seizure of heroin in plain view in the house, and the heroin was inadmissible in defendant's trial, where the officer had warrants for the arrest of a female and a male; the officer had reasonable cause to believe that the female and the male could be found at defendant's house; the officer had photographs showing the heads and faces of the two persons to be arrested; when the officer approached defendant's house with the arrest warrants, there were six persons standing in the driveway area, and one female began to run to the rear of the house; the officer pursued such female because he thought she might be one of the persons to be arrested, although she was not actually such a person; and the officer followed the fleeing female through the rear door and into the den area of defendant's house where he saw packets containing heroin.

Judge HEDRICK dissenting.

APPEAL by defendant from *Hobgood (Robert), Judge.* Judgment entered 16 February 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 February 1983.

On 1 December 1980, defendant was charged in a proper bill of indictment with felonious possession of more than 14 but less than 28 grams of heroin. Defendant was found guilty of the in-

dicated offense by a jury. Judgment in accordance with the jury verdict was entered and defendant was sentenced to a prison term and fined one hundred thousand dollars ($100,000). Defendant appealed from the judgment.

On 17 July 1981, defendant had made a pretrial motion pursuant to G.S. 15A-974 to suppress all of the evidence found in a search of his home on 17 September 1980. This evidence formed the basis of defendant's arrest, indictment and conviction. In his motion, defendant contended that the search of his home was conducted without a search warrant and therefore violated his constitutional rights.

A *voir dire* hearing on the motion was held on 6 August 1981. On 9 February 1982, Judge Winberry entered an order containing the following findings of fact:

> That the parties hereto stipulated that the residence located at 1605 Grandview Drive, Fayetteville, North Carolina, is owned and occupied by the Defendant, Youles Johnson, Jr.
>
> That J. D. Bowser is a Deputy Sheriff assigned to the City/County Bureau of Narcotics and that he has known the Defendant, Youles Johnson, Jr. for approximately 1½ years and knew that he resided at 1605 Grandview Drive, Fayetteville, North Carolina.
>
> That about noon on Wednesday, September 17, 1980, Deputy Bowser was contacted by a Bondsman named Collins from Wake County. That Mr. Collins provided Deputy Bowser with certified copies of arrest warrants from Wake County for two (2) persons, Edith Mae Williams and John Wortham. That the arrest warrants for Williams and Wortham were for failure to appear upon charges of possession of heroin and possession of phenmetrazine. That, additionally, there were warrants for Wortham for assault on a Police Officer by firing a gun and for being an habitual felon.
>
> That the Bondsman, Collins, requested assistance from Deputy Bowser in apprehending Williams and Wortham and advised Deputy Bowser that he had reliable information that both Williams and Wortham were at 1605 Grandview Drive at that time. That Deputy Bowser and Sgt. Baker at the

City/County Narcotics Bureau verified the information received from Mr. Collins by placing various telephone calls and by Sgt. Baker going to the area of 1605 Grandview Drive.

That Mr. Collins provided Deputy Bowser with a photograph showing the head and face of a black female said to be Edith Mae Williams and with a photograph showing the head and face of a black male said to be John Wortham. That Deputy Bowser received no other description of Williams and Wortham.

That, at approximately 3:45 p.m., Deputy Bowser in an unmarked car accompanied by uniform officers in marked patrol cars, went to the residence at 1605 Grandview Drive. That Mr. Collins was not with Deputy Bowser at this time. Upon his arrival, Deputy Bowser observed approximately six (6) people standing in the driveway area of the house. These people consisted of several black males and several black females. Deputy Bowser was approximately six feet from the nearest person when his car was brought to a halt and he got out. That the marked patrol cars also came to a halt.

That as soon as he got out of his car, he observed a black female begin to run toward the rear of the residence. Deputy Bowser began to pursue her because he thought she might be Edith Mae Williams. As Deputy Bowser ran behind her into the back yard, he identified himself as a police officer and ordered her to halt by calling out, "police, halt." That Deputy Bowser hollered, "halt, police officer," several times as he ran. That the black female did not halt, but proceeded into the back yard of the residence and ran though [sic] the back door into the house. That Deputy Bowser was approximately ten feet behind her and followed her into the house, through a utility room and into the den area of the house where she stopped. That there were two (2) black females and two (2) black males also in the den.

That Officer Bowser saw a tinfoil packet on the floor with a white powdery substance spilling out of it. Near the black female he had followed into the house, Deputy Bowser observed a clear plastic packet containing white powder and another tinfoil packet containing white powder. That one of

the black females in the room which Deputy Bowser entered was Edith Mae Williams. That the black female who ran into the house turned out to be Ruby Wright. That Deputy Bowser determined that Edith Mae Williams weighed approximately 200 pounds and was approximately 5½ feet tall. That Ruby Wright weighs approximately 140 pounds and is 5/7" tall.

That Deputy Bowser did not have a search warrant to search the residence of Youles Johnson, Jr. for Edith Mae Williams and John Wortham. That no one gave Deputy Bowser permission to enter the residence.

Based on these findings, the court concluded:

(1) That Deputy Bowser had probable cause to believe that Edith Mae Williams and John Wortham were located at the residence at 1605 Grandview Drive.

(2) That under all the circumstances as appeared to him at the time, and particularly in light of the meager descriptions provided of Williams and Wortham and the nature of the assault charges against Wortham, Deputy Bowser acted reasonably in pursuing the black female into the back yard and into the house. That exigent circumstances existed which justified Deputy Bowser's entry into the residence at 1605 Grandview Drive, even though he had no search warrant for the residence.

(3) That the discovery of a controlled substance in the residence at 1605 Grandview Drive was inadvertent.

(4) That the Defendant's rights under the Constitution of the United States, and the Constitution of the State of North Carolina and the General Statutes of North Carolina were not violated.

In accordance with these conclusions, the court denied defendant's motion to suppress.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Brown, Fox and Deaver, by Bobby G. Deaver, for defendant appellant.

JOHNSON, Judge.

The facts in this case, recited in the above-quoted order, are not in dispute. While defendant excepted to several rulings by the trial court, the only assignment of error advanced by defendant on appeal concerns the denial of his pretrial motion to suppress evidence. Defendant's exception was only an exception to the entry of the order. Therefore, the assignment of error, the exception on which it is based and the appeal itself present for our consideration the question of whether the facts found by the court support the conclusions of law drawn therefrom and the ruling denying defendant's motion. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975); *State v. Mallory*, 266 N.C. 31, 145 S.E. 2d 335 (1965), *cert. denied sub nom. Mallory v. North Carolina*, 384 U.S. 928, 16 L.Ed. 2d 531, 86 S.Ct. 1443 (1966); 1 Strong's N.C. Index 3d Appeal & Error, § 28.

Defendant argues that the evidence he seeks to suppress was discovered in a search that violated his rights under the Fourth Amendment and that the trial court should therefore have allowed his motion to suppress the evidence at trial. We agree.

With regard to the first conclusion of law in the Order, we may assume without deciding, since there was no exception to the findings of fact, that there was probable cause to believe that Williams and Wortham were located at defendant's residence. It was the trial court's second conclusion of law that was determinative of its ruling on the motion and it is our disagreement with that conclusion that is determinative of this appeal.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, . . . against unreasonable searches and seizures." U.S. Const. Amend. IV. To protect this right, the U.S. Supreme Court has consistently held that the entry by law enforcement officers into a house to conduct a search is unreasonable under the Fourth Amendment unless done pursuant to a warrant. *See Payton v. New York*, 445 U.S. 573, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980); *Elkins v. United States*, 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960). The constitutional requirement of a warrant is subject to certain exceptions, recognized by the Supreme Court and the courts of this state, which preclude its *per se* application. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969); *State v. Allison*,

298 N.C. 135, 257 S.E. 2d 417 (1979); *State v. Mackins*, 47 N.C. App. 168, 266 S.E. 2d 694, *cert. denied*, 301 N.C. 102 (1980). One of the exceptions, the one on which the State relies, is where exigent circumstances exist. *State v. Allison*, *supra*.

In the case before us, law enforcement officers had warrants for the arrest of Edith Mae Williams and John Wortham. The officers did not have a warrant for the arrest of Youles Johnson, defendant, or for the search of his house. The Fourth Amendment challenge to the search in question is raised by a person, not named in any warrant, who was indicted and convicted on the basis of evidence discovered by police officers who, without consent, entered his home in the course of executing arrest warrants for persons who did not live there.

Thus, the issue to be resolved is whether, on the facts of this case, the arrest warrants for Williams and Wortham adequately protected the right of the defendant to be free from an unreasonable search of his home and seizure of evidence therefrom. Phrased differently, the issue is whether the trial court properly concluded that the circumstances surrounding the execution of the arrest warrants were of such compelling exigency as to justify a warrantless search of defendant's home.

The United States Supreme Court recently considered this question on facts only slightly different from those of this case in *Steagald v. United States*, 451 U.S. 204, 68 L.Ed. 2d 38, 101 S.Ct. 1642 (1981). In *Steagald*, the Supreme Court pointed out that Fourth Amendment rights are personal in nature. Therefore, the Court said, a warrant for the arrest of one person does not provide adequate protection of a third party's right to be free from unreasonable searches, even when it is necessary that the arrest warrant be executed in the house of the third party. The Court said that a search warrant would generally be required to enter the house of a third party in such a situation. However, the Court recognized exigent circumstances as one exception to this requirement and cited "hot pursuit" of a fugitive as an example of such circumstances.

On the facts of *Steagald*, the Supreme Court held that the search in question violated the defendant's Fourth Amendment rights and that the evidence seized as a result of the search could not be used against him at trial. The same legal principles relied

on by the Court in *Steagald* apply to the case before us. The reasonableness of a search, and the existence of exigent circumstances are factual determinations that must be made on a case by case basis. *See State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied sub nom. Reams v. North Carolina*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971). The cases cited by both the State and defendant in their respective briefs can only be considered as illustrations of the application of the legal principles involved but not as controlling the result here.

In its argument, the State relies on the "hot pursuit" by Officer Bowser of a person he suspected to be the subject of one of the arrest warrants to justify his intrusion into defendant's house and the seizure of the evidence sought to be suppressed. In so doing, the State seeks to focus our attention on events that occurred after the point in time when a judgment as to whether a search warrant was required should already have been made. It is not apparent from the record that such a judgment was ever made. Whether the failure to procure a search warrant for defendant's house was the result of a conscious judgment of the police or whether it was due to a failure to recognize the necessity for such a judgment, it was an error that had occurred before Officer Bowser began his "hot pursuit."

Federal and state courts, when considering situations allegedly involving exigent circumstances, incorporate into their analysis some consideration of whether the police in those fact situations had an opportunity to procure a search warrant. *See e.g., U.S. v. Calhoun*, 542 F. 2d 1094 (9th Cir. 1976) *cert. denied sub nom. Stephenson v. United States*, 429 U.S. 1064, 50 L.Ed. 2d 781, 97 S.Ct. 792 (1977); *U.S. v. Houle*, 603 F. 2d 1297 (8th Cir. 1979) and *Steagald v. United States, supra.* In reconciling the decisions of the various state and federal courts, LaFave has made the following instructive analysis:

> A "planned" arrest is one which is made after a criminal investigation has been fully completed at another location and the police made a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into custody. . . . Illustrative . . . are the facts of the Court's recent decisions on the warrant requirement, *PAYTON v. NEW YORK* and

> *STEAGALD v. UNITED STATES*. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained. In the "planned" arrest situation, then, the only exception to any existing warrant requirement would be the presence of exigent circumstances prior to the time the officers went out into the field for the purpose of making the arrest.

LaFave, *Search and Seizure; A Treatise on the Fourth Amendment* § 6.1 (Supp. 1983) (footnotes omitted).

From the record here, it is apparent that over three and a half hours elapsed between the time that the police were supplied with arrest warrants and the time the arrest was made. Although copies of the warrants are not in the record, it appears that the police were supplied at the same time with the information that the person named in the arrest warrants could be found at defendant's home. Officer Bowser testified that he had received information from the bondsman, Sgt. Baker and several other sources that Williams and Wortham were located at defendant's residence; that he knew defendant and knew his address and that his specific purpose in going to defendant's residence was to arrest Williams and Wortham. From the time the warrants were received until they were executed, no attempt was made to procure a warrant authorizing entry into defendant's house. Thus, it would appear that the arrest raid was in fact a planned raid. There was ample time to secure a search warrant and ample reason to anticipate the need for one. That the subject of the arrest warrants were believed to be at defendant's house is sufficient by itself to put the police on notice that they might need to gain entry to the house in order to effect the arrest. With these facts in mind, we need not consider whether Officer Bowser was in "hot pursuit" and whether that alone was sufficient to justify his entry into defendant's home. The need for a search warrant should have been anticipated in this case.

Because it is necessary that our decision stand on the specific facts contained in the record, we have not emphasized the factual similarity between this case and *Steagald*. The Court in *Steagald*,

however, did make some general comments that directly support our decision here:

> [I]n those situations in which a search warrant is necessary, the inconvenience incurred by the police is simply not that significant. First, if the police know of the location of the felon when they obtain an arrest warrant, the additional burden of obtaining a search warrant is miniscule. The inconvenience of obtaining such a warrant does not increase significantly when an outstanding warrant already exists. . . . In routine search cases such as this, [where there are no exigent circumstances] the short time required to obtain a search warrant will seldom hinder efforts to apprehend a felon. . . .
>
> Whatever practical problems remain, however, cannot outweigh the constitutional issues at stake. Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognized that this restraint is necessary to protect against unreasonable searches and seizures.

Steagald v. United States, 451 U.S. at 222, 68 L.Ed. 2d at 51-52, 101 S.Ct. 1642.

On the basis of the facts of this case, we conclude that no exigent circumstances existed that would justify the warrantless entry into defendant's house and the later seizure of the evidence which defendant seeks to suppress. The evidence was seized in a manner that violated defendant's Fourth Amendment rights and the trial court's failure to grant defendant's motion to suppress the evidence was, therefore, error. The judgment of the trial court is accordingly

Reversed.

Judge BRASWELL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

I respectfully dissent from the majority decision that no exigent circumstances existed justifying entry into the house owned

and occupied by defendant and seizure of the drugs found in plain view. In my opinion, the officer was where he had a right to be and doing what he had a right to do, and Judge Winberry did not err in denying defendant's motion to suppress. The case relied on by the majority, *Steagald v. United States*, 451 U.S. 204, 68 L.Ed. 2d 38 (1981), while similar in many respects to the instant case, is, in my opinion, clearly distinguishable in the very manner Justice Marshall went to great lengths to point out: "We have long recognized that such 'hot pursuit' cases fall within the exigent-circumstances exception to the warrant requirement . . . and therefore are distinguishable from the routine search situation presented here." *Id.* at 218, 68 L.Ed. 2d at 49. The Court went on to say:

> We are convinced . . . that a search warrant requirement will not significantly impede effective law enforcement efforts. . . . [The] exigent-circumstances doctrine significantly limits the situations in which a search warrant would be needed. For example, a warrantless entry of a home would be justified if the police were in "hot pursuit" of a fugitive.

Id. at 221, 68 L.Ed. 2d at 51.

In the present case, the officer had a reasonable description of the person he sought. When he approached the house with an arrest warrant, he saw a person fitting that description break away from her companions and run to the back of the house and through the door. Under these circumstances the officer was not only justified in pursuing the person into the house to make an arrest—he had a positive duty to do so. The fact that the person he pursued was not the one for whom the warrant was issued is of no legal significance under the circumstances here presented. The record discloses the officer had probable cause to believe that the person he pursued was a fleeing felon, and, indeed, the person he sought was within the house. Furthermore, under the exigent circumstances depicted by this record, the officer had a duty to seize the contraband, which was in plain view. I vote to find no error.

State ex rel. Utilities Commission v. Conservation Council

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY (APPLICANT); NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION; PEOPLES ALLIANCE; AND PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION v. CONSERVATION COUNCIL OF NORTH CAROLINA; GREAT LAKES CARBON CORPORATION; AND KUDZU ALLIANCE

No. 8210UC854

(Filed 4 October 1983)

1. **Utilities Commission § 34— power company rates—allowance for funds used during construction**

The Utilities Commission did not err by including in the rate base of a power company an allowance for funds used during construction which arose after 1 July 1979 but accrued on construction work in process occurring prior to that date. G.S. 62-133(b)(1).

2. **Utilities Commission § 34— power company rates—construction work in progress—later abandonment of project**

The Utilities Commission's determination that construction work was in progress at a nuclear power plant and that the costs associated with the nuclear plant should be included as construction work in progress in the power company's rate base was supported by the evidence before the Commission, notwithstanding the power company abandoned the nuclear plant project during the pendency of the present rate case on appeal. G.S. 62-94(b).

3. **Utilities Commission § 44— power company rates—extending hearing for additional evidence**

The Utilities Commission did not abuse its discretion in extending the hearing of a general rate case for a power company to allow evidence on the "used and useful" status of a nuclear generating unit.

4. **Utilities Commission § 32— power company rates—nuclear plant as "used and useful"—accounting adjustments**

A finding by the Utilities Commission that a nuclear generating plant was "used and useful" to a power company was supported by evidence that it was operating well at 50% of its rated capacity and that the power company expected to increase capacity without problems or delays. Furthermore, the inclusion of the nuclear unit in the power company's rate base was not done without necessary accounting adjustments where evidence at the hearing indicated that the nuclear unit would be producing less expensive power as a substitute for power from generating plants with higher fuel costs, the Commission accounted for this by reducing the power company's base fuel cost for fuel savings related to operation of the nuclear unit, and no adjustment in revenues was needed because the power company was not going to sell additional power that would bring in extra revenues.

5. **Utilities Commission § 34— power company rates—reasonableness of construction work in process**

G.S. 62-133(b)(1) did not require the Utilities Commission to make a finding on the reasonableness of including construction work in process in the rate base of a power company but required the Commission to include construction work in process in the rate base once it determined that such expenditures were reasonable and prudent. Furthermore, findings as to the reasonableness of construction work in process were not inadequate because they failed separately to address specific expenditures for each plant, how much each plant will ultimately cost, when it will be needed, and when it will be completed.

6. **Utilities Commission § 38— power company rates—fuel costs from fuel adjustment proceeding—failure to find reasonableness of costs**

While it was proper for the Utilities Commission to use fuel costs of a power company from a fuel adjustment proceeding under G.S. 62-134(e), adjusted for fuel savings due to a new nuclear unit, as the basis for fuel costs in a general rate case, the Commission erred in failing to consider and rule upon the reasonableness of the fuel costs.

Chief Judge VAUGHN concurring in part and dissenting in part.

APPEAL by intervenors Conservation Council of North Carolina, Great Lakes Carbon Corporation, and Kudzu Alliance from an order entered by the North Carolina Utilities Commission on 11 February 1982. Heard in the Court of Appeals 6 June 1983.

Applicant-appellee Duke Power Company (hereinafter Duke) filed an application for rate increases on 18 March 1981 with the North Carolina Utilities Commission (hereinafter Commission). Duke requested about a 19.7% increase in revenues, amounting to approximately $211,000,000. The Commission ordered that the application be treated as a general rate case. Public hearings were conducted at several different locations across the State on 28 and 29 July and 31 August 1981. Duke presented part of its case in Raleigh from 26 August to 10 September 1981. Upon Duke's request for a continuance, the Commission held the hearing open for additional testimony on 23 November 1981 concerning the operational status of Duke's McGuire Nuclear Generating Unit One. The Commission issued its final order on 11 February 1982 allowing $166,403,000 of the $211,000,000 annual revenue increase Duke had requested. In determining Duke's revenue requirements, the Commission used data from a test year ending 31 December 1980 and decided that 11.92% was an overall fair rate of return.

Intervenors Conservation Council of North Carolina, Great Lakes Carbon Corporation, and Kudzu Alliance appealed the Commission's order.

Kennedy, Covington, Lobdell & Hickman, by Clarence W. Walker and Stephen K. Rhyne, and Steve C. Griffith, Jr., George W. Ferguson, Jr., and William L. Porter for applicant-appellee Duke Power Company.

Daniel V. Besse for intervenor-appellant Conservation Council of North Carolina.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, P.A., by Robert B. Byrd and Sam J. Ervin, IV, for intervenor-appellant Great Lakes Carbon Corporation.

Edelstein and Payne, by M. Travis Payne for intervenor-appellant Kudzu Alliance.

BECTON, Judge.

The scope of review for this appeal is set forth in N.C. Gen. Stat. § 62-94(b) (1982). Appellants contend the Commission committed prejudicial error by arbitrarily and capriciously keeping the hearing open until 23 November 1981, and by including expenditures for McGuire Nuclear Generating Unit One and for certain construction work in progress (CWIP) in Duke's rate base despite a lack of competent, material, and substantial evidence. We disagree. However, the case must be remanded because of the failure of the Commission to set forth all the findings and reasons for its order as required by N.C. Gen. Stat. § 62-79(a)(1) (1982).

I

[1] Appellants contend the Commission erred by including in the rate base $29,685,371 of allowance for funds used during construction (hereinafter AFUDC) which arose after 1 July 1979 but accrued on CWIP occurring prior to that date. AFUDC represents the cost to a utility of financing new construction, similar to the interest charge on a loan. It has been recognized as a legitimate part of construction costs: "The interest [AFUDC] on the investment in this addition to plant, during the construction, is a part of its costs, just as truly as is the purchase price of the bricks, steel, copper wire, labor, etc., which go into the construction." *State ex*

rel. Utilities Commission v. Morgan, 278 N.C. 235, 240, 179 S.E. 2d 419, 422 (1971). Because AFUDC accrues during construction, it is a CWIP expenditure.

The version of N.C. Gen. Stat. § 62-133(b)(1) effective for the present rate case provided that "reasonable and prudent expenditures for construction work in progress after [1 July 1979] shall be included . . ." as part of the utility's cost of property upon which the Commission was to fix a fair rate of return. G.S. § 62-133(b)(1) (Supp. 1979) (amended 1982). The $29,685,371 AFUDC questioned by appellants was a reasonable CWIP expenditure, it accrued after 1 July 1979; and, therefore, it was properly included in the rate base.

While some of us may question the wisdom of the legislation, G.S. § 62-133(b)(1) is designed to make utility customers finance reasonable construction costs arising after 1 July 1979, regardless of whether that construction becomes useful to the customers. Consequently, this Court will uphold the Commission's inclusion of post-1 July 1979 AFUDC in Duke's rate base. The fact that actual construction upon which the AFUDC is based took place before 1 July 1979 does not alter this result since the AFUDC costs were incurred after 1 July 1979. Nor are we convinced that Duke will receive a "double recovery" on AFUDC which is part of CWIP expenditures included in the rate base since N.C. Gen. Stat. § 62-133(b)(4a) (1982) requires the utility to discontinue capitalization of that AFUDC.

II

[2] Appellants contend the Commission erred by including $103,880,000 of costs related to the Cherokee Nuclear Station as CWIP in Duke's rate base. Appellants essentially argue that the Cherokee costs were not for construction work in progress because Duke had indefinitely delayed construction of the plant. Although some evidence supports the appellants' claim that no progress was being made, this Court does not have the authority to substitute its judgment for factual findings of the Commission. The Commission's findings are conclusive when supported by competent, material, and substantial evidence in view of the entire record. G.S. § 62-94(b); *State ex rel. Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770 (1982).

We are aware that Duke, during the pendency of this action on appeal, abandoned its Cherokee Nuclear Plant and now seeks to pass on to its customers part of the cost of constructing, financing, and abandoning the plant. The Commission may well have reached a different decision had they known then what they know now. But at the hearings, Duke's witnesses testified that they hoped and expected to resume construction on Cherokee. They attributed the delay to unfavorable economic conditions that forced Duke to spend less on new construction. They felt the Cherokee units would eventually be needed to bolster declining reserve margins. Duke had begun construction on Cherokee, continued to have about 200 people working there, and had not cancelled any contracts relating to construction of the plant. This evidence, while not convincing enough to satisfy all reasonable persons, supports, considering our scope of review under G.S. § 62-94(b), the Commission's finding and conclusion that construction work was in progress on Cherokee and that the costs should be included as CWIP in Duke's rate base. Considering what has now happened with Cherokee, the legislature may be inclined to graft onto N.C. Gen. Stat. § 62-133(b) (1982) a requirement that utilities set a definite completion date for new projects before they qualify as construction work in progress. The statute does not now require that, and we, therefore, uphold the Commission's decision based on the law and evidence which the Commission had to consider.

III

[3] Appellants next contend the Commission illegally kept the hearing open to receive additional evidence concerning McGuire Nuclear Generating Unit No. One, and that McGuire should not have been included in the rate base as "used and useful" utility property. Appellant Great Lakes Carbon Corporation further contends the Commission failed to make the proper accounting adjustments when including McGuire in the rate base.

N.C. Gen. Stat. § 62-72 (1982) authorizes the Commission to make rules of procedure. The North Carolina Supreme Court has interpreted the legislative grant of authority to the Commission to mean "the Commission may regulate its own procedure within broad limits" and that it may suspend or waive its rules. *State ex rel. Utilities Commission v. Carolinas Committee*, 257 N.C. 560, 569, 126 S.E. 2d 325, 332 (1962). Thus, the Commission has the

power, within its discretion, to grant a continuance or extend a hearing. Appellants claim the Commission abused its discretion in the present case by acting arbitrarily and capriciously. The evidence does not support appellants' charge. The Commission extended the hearing to allow evidence on the "used and useful" status of McGuire Unit One because the Commission felt it was "in the best interest of the company and its customers" to do so. The Commission estimated that postponing inclusion of McGuire Unit One in the rate base for one year as appellants wished would mean capitalization of an additional $48,500,000 in AFUDC, raising the retail cost of service by $224,400,000 over the life of the plant.

[4] The Commission did not err in finding McGuire Unit One to be "used and useful" pursuant to G.S. § 62-133(b)(1). The record is replete with evidence supporting the Commission's finding: By 23 November 1981 over 279,000,000 kWh had been produced by McGuire Unit One; it was operating well at 50% of rated capacity; and Duke expected to increase capacity without problems or delays. A power plant can be "used and useful" without operating at full capacity. This Court cannot reverse or modify the Commission's finding merely because we might have reached a different result on the evidence or because subsequent developments may have cast a different light on the evidence. *See State ex rel. Utilities Commission v. General Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

Appellant Great Lakes Carbon Corporation is mistaken in asserting that the inclusion of McGuire Unit One in the rate base was done without necessary accounting adjustments. Testimony at the hearing indicated McGuire would be producing less expensive power as a substitute for power from generating plants with higher fuel costs. The Commission accounted for this by reducing Duke's base fuel cost by .1567¢ per kWh for fuel savings related to operation of McGuire Unit One. Contrary to appellant's assertions, no adjustment in revenues was needed because Duke was not going to sell additional power that would bring in extra revenues.

IV

Appellants further contend that the Commission's findings on CWIP expenditures included in the rate base are inadequate as a matter of law. G.S. § 62-79(a) requires that:

All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

(1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

A finding that fails to meet the requirements of G.S. § 62-79(a) may cause the case to be remanded under G.S. § 62-94(b)(4).

In the present case, the Commission's Finding of Fact Number 7 is a conclusory recitation of the factors in the relevant statute, G.S. § 62-133(b)(1):

7. The reasonable original cost of Duke's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense, plus the reasonable original cost of investment in plant under construction (construction work in progress or CWIP) less cost-free capital is $2,138,009,000.

Standing alone, this finding of fact does little to facilitate appellate review or satisfy G.S. § 62-79(a). However, the Commission's lengthy order also includes a section entitled "Evidence and Conclusions for Finding of Fact No. 7." While it would be more appropriate to include the "reasons or bases" for the finding of fact with the finding of fact, the Commission has not violated G.S. § 62-79(a) or prejudiced appellants by stating the evidence with its conclusions of law instead of with its findings of fact.

The "evidence" which constitutes the "reasons or bases" for Finding of Fact Number 7 consists of a summary of the arguments of statutory interpretation made by appellants. The Commission then rejects appellants' argument, concluding that all Duke's CWIP expenditures, and specifically those for the Cherokee plant and for post-1 July 1979 AFUDC, were reasonably in-

curred and needed to provide adequate electric service to Duke's customers in the future.

The Commission's findings and reasons with regard to inclusion of CWIP in the rate base are scant and barely pass muster under G.S. § 62-79(a). But the Commission does satisfy the need under G.S. 62-79(a) "to enable the court on appeal to determine the controverted questions" since appellants' arguments were clearly summarized and rejected.

[5] Appellants insist that in fixing rates pursuant to G.S. § 62-133(b)(1) the Commission must make specific findings not only on the reasonableness of CWIP costs, but also on the reasonableness of including CWIP in the rate base. We disagree. G.S. § 62-133(b)(1), in the version relevant to this case, stated, ". . . reasonable and prudent expenditures for construction work in progress after [1 July 1979] *shall* be included . . . ." (emphasis added). The plain and unambiguous wording of the statute required that the Commission include CWIP in the rate base once it determined that the expenditures were reasonable and prudent.

Appellants also maintain that findings as to the reasonableness of CWIP are inadequate unless they separately address specific expenditures for each plant, how much the plant will ultimately cost, when it will be needed, and when it will be completed. As this Court recently stated in *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Assoc.*, 59 N.C. App. 240, 249, 296 S.E. 2d 487, 493 (1982):

> To require the Company to introduce evidence with respect to every item comprising CWIP would be an exercise in futility. The burden of proof would be unduly and unnecessarily burdensome, and the ratemaking process would become even more time consuming and difficult of administration.

V

[6] Appellants contend the Commission failed to ascertain Duke's reasonable operating expenses as required by N.C. Gen. Stat. § 62-133(b)(3) (1982) when it determined the base fuel cost from a fuel cost previously set in an expedited N.C. Gen. Stat. § 62-134(e) (Supp. 1979) (repealed 1982) fuel cost adjustment proceeding. Finding of Fact Number 16 indicates the Commission in the present general rate case established a base fuel cost of

1.3093¢ per kWh by taking the 1.4660¢ per kWh cost set in a recent G.S. § 62-134(e) proceeding and reducing it by .1567¢ per kWh for fuel savings related to operation of McGuire Unit One. The "Evidence and Conclusions for Finding of Fact No. 16" note that a Public Staff witness recommended a base fuel cost of 1.1944¢ per kWh, calculated from the cost set in an earlier G.S. § 62-134(e) proceeding less the fuel savings due to McGuire. The only difference between the Public Staff recommendation and the Commission's finding is that the Commission used a fuel cost from a more recent G.S. § 62-134(e) proceeding.

The G.S. § 62-134(e) proceeding was intended to allow a utility to frequently change its rates based solely on fluctuations in fuel costs. *State ex rel. Utilities Commission v. Public Staff*, --- N.C. ---, --- S.E. 2d --- (filed 7 September 1983). The reasonableness of a utility's fuel costs may not be considered in a G.S. § 62-134(e) proceeding. *Id.* Indeed, "[t]he words of G.S. § 62-134(e) make it clear that only changes in rates *based solely upon the increased cost of fuel* are to be considered." *Utilities Commission v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). In contrast, the N.C. Gen. Stat. § 62)133(b)(3) (1982) requirement that the Commission ascertain "reasonable operating expenses" has been interpreted to mean the reasonableness of fuel costs must be considered in general rate cases. *Id.* This Court recently held that fuel costs from a fuel adjustment proceeding may be used as the basis for fuel costs in a general rate case if the Commission also considers the reasonableness of the fuel costs in the general rate case:

> The statute, G.S. 62-134(e), requires the Commission to investigate an application filed pursuant to it, requires the Commission to hold a public hearing, and provides that the Commission's order shall be based upon the record adduced at the hearing, "such record to include all pertinent information available to the Commission at the time of the hearing." The action of the Commission is subject to appellate review. Under the statutory procedure provided, we perceive no reason to reconsider the same fuel costs in a general rate case, although questions concerning efficiency of operations, heat rate, and plant availability should, of course, be considered in a general rate case.

State ex rel. Utilities Commission v. N. C. Textile Mfrs. Assoc., supra, at 244.

According to the preceding case law, the Commission did not err in using fuel costs from a G.S. § 62-134(e) proceeding, adjusted for fuel savings due to McGuire Unit One, to determine the fuel costs for this general rate case, to the extent that the fuel costs determined in the G.S. § 62-134(e) proceeding were based solely upon the increased cost of fuel. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). However, the Commission must also examine Duke's fuel costs, which are a major component of operating expenses, for reasonableness. G.S. § 62-133(b)(3). The Commission must make findings and give reasons concerning the reasonableness of the base fuel cost it set for Duke in its order since the reasonableness of fuel costs is a material issue. G.S. § 62-79(a). Although the hearing transcript contains some testimony on the reasonableness of costs incurred by Duke for fuel, there is no indication in the order of the Commission that it ever considered and ruled upon the reasonableness of fuel costs. This case is therefore remanded to the Commission to make proper findings on the reasonableness of Duke's fuel costs. Absence of proper findings is an error of law and basis for remand under G.S. § 62-94(b)(4) because it frustrates appellate review.

Appellants' other arguments lack merit.

Affirmed in part and remanded in part.

Chief Judge VAUGHN concurs in part and dissents in part.

Judge BRASWELL concurs.

Chief Judge VAUGHN concurring in part and dissenting in part.

I am in agreement with the majority's ultimate decision on all of the questions discussed except the last.

I dissent from the part of the decision that remands the case to the Commission for findings on the reasonableness of Duke's fuel costs. The Commission heard evidence, including testimony from an accountant for the Public Staff, that Duke's fuel expenses

were reasonable. We have no reason to doubt that the Commission considered this evidence when it ascertained the utilities' reasonable operating expenses as required by G.S. 62-133(b)(3). I would affirm the order of the Commission.

KENT R. MAY, EMPLOYEE v. SHUFORD MILLS, INC., EMPLOYER AND AMERICAN MUTUAL INSURANCE COMPANY, CARRIER

No. 8210IC1073

(Filed 4 October 1983)

1. **Master and Servant § 68— occupational disease—filing of claim timely**

In a workers' compensation case, the Industrial Commission properly found that plaintiff's claim was timely filed in February 1981 where plaintiff, mill worker, was told in 1957 to get out of the dust if he wanted to live longer but he was not advised that he had an occupational disease or condition and he was not advised that his breathing problems would be permanent. It was not until January 1981 that plaintiff was advised he had byssinosis which was caused by exposure to cotton dust, and this was the first time that plaintiff was advised by competent medical authority of the nature and work-related quality of his disease. G.S. 97-58(b) and (c).

2. **Master and Servant § 68— workers' compensation—occupational disease—pre-1957 version of statute not controlling**

Plaintiff's rights under the workers' compensation statute were not governed by the pre-1957 version since January 1, 1970 was the date plaintiff became incapable of earning wages and had to stop working due to his health, and an employee's right to compensation for an occupational disease is governed by the law in effect at the time of the disablement. G.S. 97-2(9); G.S. 97-55; G.S. 97-54; and G.S. 97-53(13).

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission entered 15 June 1982. Heard in the Court of Appeals 31 August 1983.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellants.

Frederick R. Stann, for plaintiff appellee.

BECTON, Judge.

I

The issues in the appeal of this occupational disease case relate (a) to the date plaintiff was first advised by competent medical authority of the nature and work-related quality of his disease, and (b) to whether a pre-1957 version of N.C. Gen. Stat. § 97-53(13) pertains to plaintiff's claim.

II

Plaintiff filed a claim for compensation with the Industrial Commission on 27 February 1981. Plaintiff's testimony before the Deputy Commissioner tends to show the following:

Plaintiff was born in 1907. When he was 29 years old, he began working for defendant Shuford Mills (defendant) at its Highlands plant in the opening room where he remained for approximately twelve years. The opening room was very dusty. He left the Highlands plant because of the dust and worked in a West Virginia coal mine for a year. Upon returning to North Carolina, he worked at the Quaker Meadows plant for four years, starting in the dusty opening room and finishing as a picker operator. After he left, the Quaker Meadows plant was purchased by defendant. Plaintiff next worked in defendant's Dudley plant operating the pickers. The air in the Dudley plant was dusty but not as dusty as his previous textile jobs. He began to experience breathing difficulties and went to a Dr. Jones for treatment in 1957. According to plaintiff, Dr. Jones told him: "Kent, that dust is going to kill you. If you want to get any older, you better get out of it."

Based upon this advise, plaintiff decided to leave the Dudley plant. He advised management that he could not work in the dust any more. He was placed on a 30 day sick leave and transferred to a yard maintenance crew, where he worked until he retired in 1970 because of his health and breathing problems. While on the maintenance crew, he occasionally had to work inside the mill where he was exposed to dust.

On 9 January 1981, plaintiff was examined by Dr. Fred T. Owens, who testified that it was his opinion that plaintiff had byssinosis caused by exposure to cotton dust. It was also his opin-

ion that plaintiff's occupational exposure to cotton dust between 1957 and 1970 did not significantly affect plaintiff's disease, but that plaintiff's worsening condition was due to the natural course of the disease.

The Deputy Commissioner found as a fact and concluded as a matter of law that plaintiff has a compensable occupational disease. He also found as a fact and concluded as a matter of law that plaintiff's claim was barred because of his failure to file his claim either within two years of the date of the onset of his permanent disability, or within two years of the date on which he was advised by competent medical authority of the nature and work-related quality of his disease. The Full Commission reversed, finding as a fact that plaintiff was first advised by competent medical authority of the nature and work-related quality of his occupational disease on 9 January 1981. From an award of compensation to plaintiff, defendant and the Insurance Carrier (defendants) appeal.

III

[1] Defendants first contend that the Commission erred in finding as a fact and concluding as a matter of law that there was no evidence that plaintiff was advised by Dr. Jones in 1957 of the nature and work-related quality of plaintiff's occupational disease and in further finding that plaintiff was first informed of the nature and work-related quality of his occupational disease on 9 January 1981 since Dr. Jones told plaintiff in 1957: "Kent, that dust is going to kill you. If you want to get any older, you better get out of it." We disagree.

N.C. Gen. Stat. § 97-58(b) and (c) (1979 & Supp. 1981) provide in pertinent part:

> (b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in cases of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Com-

> mission within two years after death, disability, or disablement as the case may be. . . .

Our Supreme Court has interpreted these two sections and has held that "with reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease." *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980). "[T]he two-year time limit for filing claims under G.S. 97-58(c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim." *Poythress v. J. P. Stevens & Co.*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982).

In *Singleton v. D. T. Vance Mica Co.*, 235 N.C. 315, 321, 69 S.E. 2d 707, 711 (1952), our Supreme Court held that a letter to a workers' compensation claimant from his physician which stated that an examination of claimant revealed "evidence of dust disease" with a suggestion that the claimant "be transferred to some other location . . . where the dust hazard would be negligible" was not sufficient notice from competent medical authority that he had silicosis. The information given in the letter did not reveal the seriousness of the claimant's condition, nor was there any evidence that any diagnostic findings were communicated to the claimant. Similarly, citing *Singleton*, this Court in *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 562, 284 S.E. 2d 175, 178 (1981), *disc. rev. denied*, 305 N.C. 301, 291 S.E. 2d 150 (1982), held that a physician's informing the plaintiff in 1966 that he had a "breathing problem and if it didn't soon get better to get out of the mill," and in 1970 that he had "brown-lung," "neither advised plaintiff of the nature nor work-related cause of his condition." Although the plaintiff in *McKee* was told he had brown lung, there was no evidence that he knew or was advised that the disease was related to his work environment.

In the present case, plaintiff was told to get out of the dust if he wanted to live longer. He was not advised that he had an occupational disease or condition, nor was he advised that his breathing problems would be permanent. There is no evidence in the record of plaintiff being diagnosed in 1957 as having

byssinosis or an obstructive lung disease. "[O]ur Legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim." *Taylor v. J. P. Stevens*, 300 N.C. at 102, 265 S.E. 2d at 149. We find defendants' argument that plaintiff was aware of the causal relation between his breathing problems and his work environment as indicated by his testimony and his request for a transfer to be unpersuasive. Plaintiff simply took his physician's advice to avoid a hazard.

In support of their arguments, defendants cite several cases which are distinguishable on their facts. In *Payne v. Cone Mills Corp.*, 60 N.C. App. 692, 299 S.E. 2d 847, *disc. rev. denied*, 308 N.C. 387, 302 S.E. 2d 252 (1983), the plaintiff was informed by his physician that he would always have a breathing problem and that the physician could not completely cure it. The plaintiff in *McCall v. Cone Mills Corp.*, 61 N.C. App. 118, 300 S.E. 2d 245, *disc. rev. denied*, 308 N.C. 544, 304 S.E. 2d 237 (1983), was clearly advised of the nature and work-related quality of disease when a physician advised him in 1965 that he had byssinosis, and to change his employment at the mill and to avoid exposure to cotton dust. In *Poythress*, a physician diagnosed plaintiff's condition in 1963 as byssinosis caused by exposure to cotton dust and advised the plaintiff to stop working at the mill. In *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 304 S.E. 2d 215 (1983), the plaintiff was diagnosed by one physician in 1973 as having a chronic obstructive lung disorder and was advised by a second physician in 1974 that he had byssinosis caused by exposure to cotton dust and to stop working at the mill.

In this case, the record shows that plaintiff was examined by Dr. Owens on 9 January 1981, and was advised that he had byssinosis caused by exposure to cotton dust. This was the first time that plaintiff was advised by competent medical authority of the nature and work-related quality of his disease, as the Commission properly found. Plaintiff's claim filed 27 February 1981 was, therefore, timely filed.

IV

[2] Defendants contend that the Commission erred in finding as a fact and concluding as a matter of law that plaintiff was entitled

to compensation for his occuaptional disease, byssinosis. They argue that a pre-1957 version of G.S. § 97-53(13), under which they contend byssinosis was not a compensable occupational disease, applies to plaintiff's claim. We disagree.

An employee's right to compensation for an occupational disease is governed by the law in effect at the time of the disablement. *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). The Commission properly found that plaintiff was disabled on 1 January 1970, which was the date he became incapable of earning wages and had to stop working due to his health. N.C. Gen. Stat. § 97-2(9); N.C. Gen. Stat. § 97-55; N.C. Gen. Stat. § 97-54; *Taylor v. J. P. Stevens.* The version of G.S. § 97-53(13) in effect at the time of plaintiff's disablement provided that the following shall be deemed to be occupational diseases within the meaning of this article:

> Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.
>
> The provisions of this subsection shall not apply to cases of occupational diseases not included in said subsection prior to July 1, 1963 unless the last exposure to an occupation subject to the hazards of such disease occurred on or after July 1, 1963.

N.C. Gen. Stat. § 97-53(13) (1965). The record shows that plaintiff was exposed to dust after 1 July 1963. G.S. § 97-53(13) (1965), effective on 1 July 1963, simply required *exposure* after 1 July 1963, not *injurious exposure.* Plaintiff's claim thus falls within G.S. § 97-53(13) (1965). This section clearly includes byssinosis, an occupational disease of the lungs.

V

For the foregoing reasons, we affirm the opinion and award of the Commission.

Affirmed.

Judges JOHNSON and BRASWELL concur.

MCNAIR CONSTRUCTION COMPANY, INC. v. FOGLE BROTHERS COMPANY v. KING SASH AND DOOR, INC. AND LIFETIME DOORS, INC.

No. 8221DC590

(Filed 4 October 1983)

1. **Sales § 17.1— breach of warranty of doors—no exclusion of warranty by method of installation**

In an action to recover for breach of express warranty of doors sold to plaintiff by defendant which was contingent upon proper installation of the doors, the warranty was not excluded for warped doors because the doors were over seven feet long and were hung with only three hinges where the evidence showed that the warpage was on the outside edge of the doors rather than down the hinge line and that the defect in the doors was not caused by the number of hinges used by plaintiff.

2. **Sales § 19— breach of warranty of doors—sufficient allegation of damages**

In an action to recover for breach of express warranty of doors sold by defendant to plaintiff, plaintiff alleged its damages with sufficient certainty to support summary judgment with regard to damages where plaintiff alleged that "upon information and belief the present cost of replacing the doors would be in the neighborhood of $150.00 for each door, plus an installation cost of approximately $100.00 for each door, or approximately $250.00 per door."

3. **Appearance § 2— general appearance—waiver of objection to lack of service of process**

The trial court did not err in entering summary judgment on a cross-claim against a third-party defendant who had never been served with the cross-claim where the third-party defendant against whom summary judgment was entered waived its defense of lack of personal jurisdiction by appearing in the action without objecting to the lack of service of process after it had been informed of the cross-claim. G.S. 1-75.7.

4. **Rules of Civil Procedure § 56.1— hearing on motion for summary judgment—waiver of notice**

A third-party defendant waived its right to ten days notice of the hearing on a motion for summary judgment on a cross-claim against it by participating in the hearing and failing to request a continuance with respect to the cross-claim.

APPEAL by defendant and third-party plaintiff Fogle Brothers Company, and third-party defendants King Sash and Door, Inc., and Lifetime Doors, Inc. from *Alexander, Judge.* Orders entered 11 January and 18 January 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 20 April 1983.

In this civil action plaintiff seeks to recover damages from the defendant Fogle Brothers Company (Fogle) for breach of war-

ranty arising out of the sale of 15 allegedly defective doors. Fogle denied plaintiff's allegations and filed a third-party complaint against King Sash and Door, Inc. (King), who ordered the doors for Fogle, and Lifetime Doors, Inc. (Lifetime), who manufactured the doors. Third-party defendant King denied the doors were defective, and alleged by way of cross-claim that any defects in the doors were due to actions of the manufacturer, Lifetime. Third-party defendant Lifetime denied the doors were defective, but admitted it had manufactured the doors and shipped them to Fogle. All of the defendants raised as an additional defense that plaintiff had not properly installed the doors and was therefore responsible for its own injuries.

In May 1980, Lifetime filed a motion to dismiss and a motion for summary judgment against Fogle and King. In November 1980, Fogle moved for summary judgment against plaintiff who then filed a motion for summary judgment against Fogle. A hearing was held on the motions made by Lifetime and plaintiff on 15 December 1981. Just prior to the hearing, Fogle filed a motion for summary judgment against King and Lifetime.

At the hearing, Lifetime argued that the complaint filed against it by Fogle should be dismissed because no privity of contract existed between it and Fogle. King noted that it was in privity of contract with Lifetime and informed the court of its cross-claim. At this point, Lifetime asked to see the cross-claim. After reviewing it, counsel for Lifetime informed the court that the certificate of service indicated that Lifetime had not been served with the cross-claim, and that he personally had no prior notice of such claim.

Judge Alexander took the case under advisement. On 11 January 1982, the court entered an order granting summary judgment in favor of plaintiff and against Fogle and awarding damages in the amount of $3,750.00. On 18 January 1982, the court entered a further order denying Lifetime's motions to dismiss and for summary judgment, and granting summary judgment in favor of Fogle against King in the amount of $3,750.00, and granting summary judgment in favor of King against Lifetime in the same amount. Fogle, King and Lifetime all appealed.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr. and H. Lee Davis, Jr., for defendant and third-party plaintiff appellant Fogle Brothers Company.

Harper, Wood and Brown, by William Z. Wood, Jr., for third-party defendant appellant King Sash and Door, Inc.

Graham, Cooke, Miles & Bogan, by Donald T. Bogan, for third-party defendant appellant Lifetime Doors, Inc.

Ruff, Bond, Cobb, Wade & McNair, by William H. McNair and Moses Luski, for plaintiff appellee.

JOHNSON, Judge.

[1] The first issue presented in this appeal is whether the trial court erred in granting summary judgment for plaintiff. The evidence presented tends to show the following: in July 1976, plaintiff purchased 24 solid core birch doors of approximately 3 feet by 8 feet from defendant for installation in a building being constructed by plaintiff. In December 1976, after the doors had been hanging in place for about five months, plaintiff notified Fogle that 15 of the doors were defective in that they were warped. A salesman for Fogle, Robert Ogburn, inspected the doors and agreed they were defective in that each door was warped along its outside edge where its latch is located. Mr. Ogburn noted that the doors were straight on the sides connected to the door hinges. Fogle told plaintiff to let the doors hang for a year to see if they would straighten themselves out. Plaintiff asked Fogle to take steps to replace the defective doors but Fogle refused.

Plaintiff contends Fogle made an express oral warranty with respect to the doors and that Fogle breached that warranty by providing plaintiff with defective doors. Fogle does not dispute the fact that its customary policy in selling building materials is to warrant them for one year from the date of manufacture, but notes that replacement under its warranty is contingent upon proper installment of the goods. Fogle claims plaintiff improperly installed the doors by hanging them with only three hinges each when the doors were over seven feet long.

In his deposition, Mr. Ogburn stated that Fogle basically follows the warranties of its suppliers. The supplier in this case is

Lifetime who has a warranty set out in its "Limited Guarantee" which in essence says that all standard doors manufactured by it, except those expressly excluded, are guaranteed for one year from the date of manufacture. This guarantee expressly excludes doors over seven feet long which are hung with less than four hinges. Defendant contends its warranty follows Lifetime's warranty and therefore contains the exclusion noted above. It claims that since the doors bought by plaintiff are approximately eight feet long and are hung with three hinges each, they are excluded from its warranty.

Fogle also noted that the National Woodwork Manufacturers Association's "Standard Door Guarantee" excludes from warranty coverage any interior door seven feet, six inches or higher which is hung with less than four hinges. Fogle maintains that this latter guarantee establishes that there is an industry wide practice which requires that all eight feet solid core doors be hung with four hinges. Thus, Fogle claims plaintiff is not entitled to replacements for the defective doors because it failed to comply with Fogle's warranty and with the industry standard. We disagree.

It is clear Fogle had an express one year replacement warranty which was part of the basis of the bargain under which plaintiff purchased the doors. *See* G.S. 25-2-313(1)(a). Plaintiff's claim against Fogle is based on the separate express warranty given by Fogle, and not on the warranty given by Lifetime to Fogle. The warranty given by Fogle does not contain a per se exclusion for doors over seven feet long hung with less than four hinges. In fact, the evidence indicates that Fogle was not even aware of Lifetime's warranty or its exclusion until May 1977. Therefore, Fogle may not now argue that it intended to include an exclusion in its warranty which it was not even aware of at the time.

That Fogle's warranty does not precisely parallel Lifetime's warranty and does not contain the same exclusion discussed previously is demonstrated by the following deposition testimony of George Brannock, Chief Executive Officer of Fogle:

> Q. Well, let me get back to the one question I was trying to get you to answer with respect to your replacement policy.

If, through some inadvertence, you shipped a door in the middle of a pack that had a hole in the middle of it that was six inches in diameter, all the way through the door—

(Brannock) A. —We would have replaced it.

Q. You would have replaced it irrespective of whether it had two hinges or three hinges or eight hinges, wouldn't you?

A. Yes, but let me go a little bit further. That would have been impossible for that hole to have been in that door, because we inspect those doors.

Q. I understand that, but the point I'm making is, that if the improper hanging or the improper installation, if that has nothing to do with the defect which you complain about you'd replace it anyway, wouldn't you?

A. Yes, sir.

It appears plaintiff is only excluded from replacement under Fogle's warranty if the defects in the doors were caused by improper installation. More specifically, plaintiff's right to recovery depends upon whether the fact the doors were hung by only three hinges each caused the doors to warp. In our opinion, defendant has totally failed to produce any evidence which indicates that the number of hinges used had anything to do with the warping of the doors. Our conclusion is based on the testimony of Fogle's own officer, George Brannock, who answered as follows:

Q. Okay. Now, with respect to doors and the warping, if the door warped on the outside, away from the hinges as opposed to down the hinge line itself, do you think that an additional hinge would have anything to do with that?

* * *

WITNESS: I think that—no, I don't think an additional hinge would have kept it from warping on the opposite end for the hinges.

Q. (Mr. McNair) And if it is true, as was testified to by Mr. Ogburn, that those doors were warped on the outside edges of the door, then it would be your judgment also that that additional hinge wouldn't have had anything to do with these bad doors?

* * *

WITNESS: If that's where the warpage is, that is correct.

As stated previously, Fogle's own salesman said the warpage was on the outside edges of the doors, as opposed to down the hinge line. It appears that Fogle has shown by the deposition testimony of its two representatives that the defect in the doors was not caused by the number of hinges used by plaintiff. Defendant has failed to show that a material issue of fact exists with respect to the breach of warranty claimed by plaintiff. Accordingly, we hold the court did not err in granting summary judgment for plaintiff.

From our holding it follows that the granting of summary judgment for Fogle and against King Sash and Door, Inc. was also appropriate. King supplied Fogle with the defective doors; therefore, Fogle is entitled to recover its loss from King. As stated by the Supreme Court in *Wilson v. Chemical Co.*, 281 N.C. 506, 189 S.E. 2d 221 (1972):

> Where the retailer purchases personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer.

Id. at 512, 189 S.E. 2d at 225.

[2] The second issue raised on appeal is whether the evidence is sufficient to support an award of summary judgment with regard to damages. In its complaint, plaintiff alleged that "upon information and belief the present cost of replacing the doors would be in the neighborhood of $150.00 for each door, plus an installation cost of approximately $100.00 for each door, or approximately $250.00 per door." When this figure is multiplied by the number of defective doors (15), the total is $3,750.00, which is the amount of damages awarded by the court.

Third-party defendants King and Lifetime argue that this pleading, which is the only evidence of damages presented, is stated too vaguely to support summary judgment. Neither party has produced any evidence which would indicate that the damages would be any amount other than that alleged by plaintiff, or

requested additional time to produce such evidence. Lifetime argues that plaintiff's evidence refers only to a policy by Fogle to *replace* defective goods, not *replace* and *reinstall* them; yet it does not offer any evidence in support of its interpretation of the warranty. Interestingly, Fogle has not argued this issue on appeal. Since no evidence has been presented in opposition to plaintiff's allegations, it cannot be said there is a material issue as to damages. The plaintiff is not required to prove his damages with absolute certainty but is required to introduce evidence showing his damages with sufficient specificity and completeness to permit the jury to arrive at a reasonable conclusion. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963). We hold plaintiff alleged his damages with sufficient certainty to support summary judgment.

[3] The final issue presented by this appeal is whether the court erred in awarding summary judgment for King and against Lifetime when King failed to serve its cross-claim on Lifetime, and when King never made a motion for summary judgment. Lifetime first contends King's cross-claim against it should be dismissed for lack of personal jurisdiction, insufficiency of service of process, and as a violation of Lifetime's due process rights because it was never served with the cross-claim.

In order for a court to exercise personal jurisdiction over a defendant, the defendant must be given notice of service of process. But personal jurisdiction may also be invoked where a defendant waives the defense by appearing in the action without objecting to the insufficiency of process or service of process. *See* G.S. 1-75.7. Such appearance, called a "general appearance," is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 183 (1979).

Lifetime appeared at the 15 December 1981 hearing to argue its motion to dismiss and its motion for summary judgment against Fogle and King. During the hearing it was informed of the cross-claim but did not enter a formal objection to the lack of service of process. We hold that Lifetime, by its actions, waived its defense of lack of personal jurisdiction.

[4] Lifetime next contends the award of summary judgment was improper because it was not afforded ten days notice of the hearing as required by statute and due process of law. It is well settled that a party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it. *Story v. Story,* 27 N.C. App. 349, 219 S.E. 2d 245 (1975). Here, Lifetime waived its right to notice by attending and participating in the hearing and by failing to request a continuance with respect to the cross-claim. Furthermore, Lifetime was not prejudiced by the lack of notice as it was given ample opportunity at the hearing to present its claim that it was not liable to either Fogle or King. Furthermore, it makes no difference that King did not file a motion for summary judgment. G.S. 1A-1, Rule 56(c) does not require that a party move for summary judgment in order to be entitled to it. *Greenway v. Insurance Co.,* 35 N.C. App. 308, 241 S.E. 2d 339 (1978). We hold the court did not err in awarding summary judgment for King. The judgment of the court below is

Affirmed.

Judges HILL and PHILLIPS concur.

WACHOVIA BANK & TRUST CO., N.A., v. P. H. GROSE, JR., INDIVIDUALLY, AND D/B/A GROSE'S CORNER

No. 8229SC1141

(Filed 4 October 1983)

Rules of Civil Procedure § 56.4— failure to offer evidence or affidavits in opposition to summary judgment motion

The trial court properly granted summary judgment for plaintiff in an action wherein plaintiff bank sought to recover from defendant car dealer money allegedly due pursuant to security agreements executed by the parties and a ready reserve account maintained by defendant where at the hearing on plaintiff's motion, plaintiff offered into evidence the affidavit of the vice president of its bank in charge of financial arrangements and transactions with automobile dealers, admissions contained in the pleadings, defendant's answers to interrogatories, defendant's admission to the genuineness of certain documents, defendant's response to requests for admissions as to the truth of certain facts, and numerous exhibits including sight drafts, security agree-

ments and memorandums of advance and financing statements, and where defendant offered no evidence or any affidavits in opposition to plaintiff's motion as authorized by G.S. 1A-1, Rule 56 and where defendant's counterclaims were not based on personal knowledge but were alleged upon advice, information and belief.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 13 July 1982 in Superior Court, HENDERSON County. Heard in the Court of Appeals 22 September 1983.

This is a civil action wherein plaintiff bank seeks to recover from defendant car dealer money allegedly due pursuant to security agreements executed by the parties and a ready reserve account maintained by defendant. Defendant answered and asserted as counterclaims that he was entitled to $25,000 for his interest in certain notes and security agreements in the possession of plaintiff and seeking damages caused by a fraudulent misrepresentation allegedly made by plaintiff. Plaintiff filed a motion for summary judgment on all claims which motion was granted. From the entry of summary judgment for plaintiff, defendant appealed.

Russell and Greene, by William E. Greene, for plaintiff appellee.

Atkins and Craven, by Lee Atkins and Susan S. Craven, for defendant appellant.

HILL, Judge.

For the purpose of obtaining cash to purchase automobiles to be resold by defendant in the operation of his business, defendant, on 23 May 1974, executed and delivered to plaintiff a Wholesale Security Agreement which plaintiff accepted. Pursuant to said agreement, plaintiff agreed to advance cash to defendant upon request which defendant agreed to repay with interest plus costs and expenses incurred in connection with the cash advances including attorney's fees. In its complaint, plaintiff set forth three claims, all relating to money owed by defendant to plaintiff. First, plaintiff alleged defendant breached the Wholesale Security Agreement and that $49,569.62 was due thereunder plus interest, costs and expenses, including attorney's fees of $42,939.09.

Secondly, plaintiff claimed that during June, 1980, defendant falsely represented to plaintiff that he had purchased 39 automo-

biles and that he could convey to plaintiff a first security interest in such automobiles upon plaintiff's acceptance and payment of sight drafts prepared by defendant as evidenced by security agreements and memorandums of advance also prepared by defendant. Plaintiff allegedly believed and relied on defendant's false representations and as a result, was damaged in the amount of $359,373.11 which it seeks to collect with interest. On 25 June 1980, defendant allegedly signed and delivered to plaintiff a handwritten note in which he acknowledged his unsecured indebtedness to plaintiff in the amount of $335,000 in connection with the aforementioned false representations. Two days later, defendant again acknowledged this debt and gave plaintiff a promissory note for $335,000. In its third claim, plaintiff alleged defendant maintained a ready reserve account with Wachovia pursuant to which defendant owes plaintiff $870.89 which he has refused to pay.

In his answer, defendant denied plaintiff's allegations and asserted two counterclaims. In his first counterclaim, defendant seeks to recover $25,000 for his interest in notes and security agreements in the possession of plaintiff covering vehicles sold by defendant and financed by plaintiff. Secondly, defendant claimed he is entitled to $500,000 in damages caused by the false representation allegedly made by plaintiff that it would lend defendant $15,000 for working capital if defendant would execute the promissory note dated approximately 26 June 1980 in the sum of $335,000.

In its reply to the counterclaims, plaintiff denied defendant is entitled to receive any monies under the notes and agreements in its possession as long as defendant is indebted to plaintiff, and denied that any representation was made to induce the defendant to sign the promissory note for $335,000.

Defendant assigns as error the court's granting of summary judgment for plaintiff. He argues there are genuine issues of material fact with respect to plaintiff's claims and his counterclaims and that plaintiff is not entitled to judgment as a matter of law. At the hearing on plaintiff's motion, plaintiff offered into evidence the affidavit of C. W. Payne, admissions contained in the pleadings, defendant's answers to interrogatories, defendant's admission of the genuineness of certain documents,

defendant's response to request for admissions as to the truth of certain facts, and numerous exhibits including sight drafts, security agreements, memorandums of advance and financing statements. Defendant was present at and participated in such hearing and responded to inquiries by the trial judge but offered no evidence or any affidavits in opposition to plaintiff's motion as authorized by G.S. 1A-1, Rule 56.

G.S. 1A-1, Rule 56(c) permits the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." It is clear and well established that the party opposing summary judgment is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing upon motion for summary judgment, be able to evince the existence of a triable issue of material fact. *Kidd v. Early*, 289 N.C. 343, 368, 222 S.E. 2d 392, 409 (1976). When the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *Conner Co. v. Spanish Inns*, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978); *Moore v. Fieldcrest Mills*, 36 N.C. App. 350, 353, 244 S.E. 2d 208, 210 (1978), *aff'd*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

In our opinion, plaintiff's forecast of evidence was sufficient to entitle plaintiff to summary judgment. Defendant, by failing to come forth with affidavits or other evidence beyond the mere allegations of the pleadings did not meet his burden of coming forth with facts sufficient to present a genuine issue of material fact. Therefore, we hold the court did not err in allowing plaintiff's motion for summary judgment with respect to plaintiff's claims or defendant's counterclaims.

With respect to plaintiff's first claim, we note defendant admitted in his answer that he entered into the Wholesale Security Agreement with plaintiff, that he obtained cash from plaintiff pursuant to the agreement, and that any financing by plaintiff pursuant to the agreement of automobiles purchased, sold or delivered by him was subject to the terms and provisions con-

tained in the agreement. Thus, the only remaining question is the amount owed by defendant, if any, to plaintiff pursuant to such transactions. Defendant did not plead in his answer the affirmative defense of payment and at no time has defendant ever contended in any of the documents filed by him in this action that he is not indebted to plaintiff.

In his affidavit, C. W. Payne, who is vice president of Wachovia in charge of financial arrangements and transactions with automobile dealers including defendant, confirmed in full the allegations of the complaint and plaintiff's denials in its reply. He affirmatively states that defendant failed to pay plaintiff in accordance with the terms and conditions of the agreement although requested to do so, and that the sums set forth in the affidavit were then owed by defendant.

Grose filed no affidavit either denying he owed such sum to plaintiff or contradicting Payne's affidavit. This is so even though defendant was allowed to inspect and copy documents in plaintiff's possession relating to this claim. Had such documents indicated a different sum was owed by defendant, such documents could have been offered in evidence at the hearing, but they were not.

The affidavit of C. W. Payne similarly supports plaintiff's second claim in that Payne stated as follows in relevant part:

> Grose admitted to Deponent on several occasions that he received from Wachovia total amount of cash shown on said documents and exhibits W-1 through W-36, inclusive, that he never owned or purchased 39 of the automobiles described in such documents and exhibits, that he made up and fabricated identification numbers, year models and types of such 39 motor vehicles, that he had no records with respect to such 39 vehicles, that such 39 vehicles were never entered in either the New Vehicle Journal or Used Car Journal of his automobile business, that no inventory index card was ever made with respect to such 39 motor vehicles and none of such 39 motor vehicles were ever included in any monthly written inventory of motor vehicles which inventories were prepared for physical damage insurance coverage;
>
> . . . .

> On 25 June 1980 Grose acknowledged to Deponent Grose's debt to Wachovia of at least $335,000.00 by virtue of his aforesaid actions with respect to such 39 vehicles and Grose wrote out and handed to Deponent document, copy of which is marked Exhibit B. . . .
>
> On 27 June 1980 Grose signed and delivered to Wachovia $335,000 written Promissory Note . . . .

At the hearing, plaintiff offered into evidence numerous sight drafts, security agreements and memorandums of advance relating to plaintiff's second claim, the genuineness of which was not denied by defendant. Each such document is directed to plaintiff, contains defendant's name and what he admits appears to be his personal signature, and contains the representation that the vehicles described therein were purchased by him and that he grants and conveys to plaintiff a security interest in such vehicles. Again, defendant failed to produce any affidavits or other evidence to support his pleadings or to deny or contradict the affidavit of Mr. Payne.

With regard to plaintiff's third claim, which is for the recovery of the balance due on defendant's ready reserve account, the court considered the allegations of the complaint, defendant's general denial of same, and the affidavit of Payne wherein he confirmed that defendant owes such amount and has refused to pay same. Defendant offered no evidence to support his denial of such claim.

Similarly, defendant offered no evidence to support the allegations of his counterclaims. The counterclaims are not based on personal knowledge but are alleged upon advice, information and belief. Therefore, they do not meet the requirements for affidavits specified in G.S. 1A-1, Rule 56(e). Given the evidence produced by plaintiff at the hearing, it was necessary for defendant to do more than merely rely on his allegations if he wished to avoid summary judgment. Since defendant did not produce any evidence to support his defenses or his counterclaims, we hold summary judgment for plaintiff was appropriate. The judgment of the trial court is

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. RAMON A. PAGON

No. 8211SC1213

(Filed 4 October 1983)

1. **Criminal Law § 76.3— failure to exclude confession on court's own motion**

There was sufficient evidence of voluntariness of defendant's in-custody statements to eliminate the trial court's duty to exclude the statements on its own motion where there was evidence that defendant had been read his rights twice and that, although defendant's native language was Spanish, he could carry on a conversation in English, and where there was no evidence of threats or promises of reward.

2. **Narcotics § 4— possession of marijuana—possession with intent to sell—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendant for possession of marijuana and possession of marijuana with intent to sell where it tended to show that defendant was the occupant of a mobile home in which marijuana was found; handheld scales were found in a search of the mobile home; and defendant admitted to officers that he was selling marijuana because it was his only way of making a living.

3. **Criminal Law § 26.5; Narcotics § 1.3— possession of more than ounce of marijuana—possession with intent to sell—punishment for both offenses—double jeopardy**

The constitutional prohibition against double jeopardy forbids punishment of a defendant for both possession of more than one ounce of marijuana and possession of marijuana with intent to sell when the convictions are based upon possession of the same substance and arise out of the same transactions.

4. **Criminal Law § 127— two sentences of equal severity—arrest of judgment on one sentence**

Where judgment must be arrested upon one of two sentences of equal severity because of a double jeopardy violation, the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken.

5. **Constitutional Law § 48— effective assistance of counsel**

A defendant charged with narcotics offenses was not denied the effective assistance of counsel because of the failure of his counsel to object to hearsay testimony concerning control of the mobile home in which narcotics were found, failure of his counsel to object to defendant's confession, failure of his

counsel to object to the results of a test conducted on substances seized during the search of the mobile home, and failure of his counsel to object to imposition of jail terms for both offenses with which defendant was charged.

APPEAL by defendant from *Britt, Judge.* Judgments entered 25 May 1982 in JOHNSTON County Superior Court. Heard in the Court of Appeals 1 September 1983.

Defendant Ramon A. Pagon was arrested 22 January 1982 and, after a search of his mobile home, charged with possession of more than one ounce of marijuana and possession of marijuana with intent to sell. Evidence for the State tended to show the following events. Police officers knocked at defendant's door before the search, and when there was no response, broke a small window, reached through it, and unlocked the door. The officers entered the home and found defendant and another man, named Lawhorn, sitting in the living room. Police read the search warrant and *Miranda* warnings to both men. Neither responded. A search of the home was conducted and revealed about thirty cigarettes in a pepper shaker in the kitchen, two or three cigarettes in defendant's pocket and a plastic bag in a dresser in a bedroom. Later tests identified the substance in the cigarettes and in the bag as marijuana. Pipes, handheld scales and cigarette papers were also discovered during the search. Lawhorn was not arrested, but defendant was placed under arrest and taken to the police station with the officers. On the way to the station, while still in the squad car, defendant was again read his *Miranda* warnings. Although defendant's native language is Spanish, the *Miranda* warnings were given both times in English and no attempt was made to speak to defendant in Spanish. After the second warnings, defendant made several statements in English to police. He stated that he was angry that the trailer window had been broken, that he was selling marijuana because it was his only way of making a living, and that he had a doctor's prescription for the marijuana. Defendant did not expressly indicate that he understood the *Miranda* warnings before he made the statement, nor did he expressly waive his right to remain silent.

A two-count indictment was returned against defendant, charging him with possession of more than one ounce of marijuana and possession of marijuana with intent to sell. Following a one-day trial, the jury returned a verdict of guilty of both counts

of the indictment. Defendant was sentenced to two two-year jail sentences, to run consecutively. From judgment entered on the verdict, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant.

WELLS, Judge.

[1] Defendant assigns as error that the trial court failed to exclude on its own motion statements defendant made in the police car, despite the fact that defendant's trial counsel did not object to introduction of the statements. A defendant who fails to object to admission of evidence may not later complain about its introduction, even on constitutional grounds. *State v. Mitchell*, 276 N.C. 404, 172 S.E. 2d 527 (1970). Where, however, it appears on the face of the record that defendant's confession was obtained in violation of his constitutional rights, the court may have the duty of excluding the confession on its own motion. *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966). In *Pearce*, the defendant was charged with a capital offense, held in jail for two months without being permitted an attorney and was frequently subjected to interrogations by police. The court noted that in the absence of the protection of an attorney "at a time when (the defendant) . . . was under a charge which could cost his life, the officers continued their questioning which obviously was for the sole purpose of extracting damaging admissions." Under the peculiar circumstances there disclosed the trial court's failure to exclude the statement on its own motion as involuntarily made was error.

The record of the case at bar is bare of the kind of coercive circumstances required to trigger the court's duty to exclude a confession *sua sponte*. *Pearce, supra.* There was evidence on the face of this record which could lead the trial court to conclude that defendant's confession was voluntarily given and that defendant waived his right to remain silent. First, there was evidence that defendant had lived in the United States for four years and could carry on a conversation with the police officers in English. Second, there was evidence that defendant had validly waived his right to remain silent. Such a waiver need not be express. *North*

Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed. 2d 286 (1979). North Carolina courts look to a variety of factors to determine whether an effective implied waiver has been given. For instance, in *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982), our Supreme Court found a valid waiver based on evidence showing the defendant was advised of his rights, acknowledged he understood those rights, was coherent at the time, and was neither coerced nor promised a reward for making the statement. Similar factors were cited in *State v. Whitt*, 299 N.C. 393, 261 S.E. 2d 914 (1980), in which a court found a valid waiver based on a showing that the defendant had been read his rights, signed a form indicating he understood those rights, was sober at the time, had not been coerced or threatened, and could write his name.

In the case before us, there was no evidence of threats or promises of reward, and there was evidence defendant could carry on a conversation in English and that he had been read his rights twice. This was sufficient evidence of voluntariness to eliminate the trial court's duty to exclude the confession *sua sponte*. This assignment is overruled.

[2] Defendant next argues the trial court erred in failing to grant his motion to dismiss on the grounds that there was insufficient competent evidence to go to the jury on either charge against defendant. We disagree. A motion for dismissal, like a motion for nonsuit, tests the sufficiency of the evidence to go to the jury. *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980), *citing State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). A motion for dismissal or nonsuit should be considered in the light most favorable to the State and the State is entitled to every reasonable inference from the evidence presented. *Jenkins, supra, citing, State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). "If there is substantial evidence—whether direct, circumstantial or both—to support a finding that the offense charged has been committed and that the defendant committed it, a case for the jury is made and nonsuit should be denied." *Id.* (Additional citations omitted.)

In reviewing a denial of a motion for nonsuit or dismissal, appellate courts may consider only whether there is sufficient evidence to go to the jury. *State v. Jenkins, supra, State v. Stevens*, 9 N.C. App. 665, 177 S.E. 2d 339 (1970).

In the case at bar, the evidence in the light most favorable to the State, was ample to permit the case to go to the jury. Evidence for the State tended to show that defendant was the occupant of the mobile home and that the contraband found there was in his actual or constructive control. Finally, there was evidence of defendant's intent to sell, based on defendant's statements and the fact that scales were found in the search of the home. This assignment is overruled.

[3] Defendant next argues that the trial judge erred in sentencing defendant to two jail terms. We agree. This issue is controlled by our Supreme Court's decision in *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979), in which the court held that the constitutional prohibition against double jeopardy forbids punishment of a defendant for both possession with intent to sell marijuana and possession of more than one ounce of marijuana, when the convictions are based upon possession of the same substance and arise out of the same transactions.

In cases in which a defendant is convicted of two offenses in violation of the double jeopardy bar, judgment must be arrested upon one of the convictions. Where the offenses are of equal severity, there appears no set rule concerning which sentence should be stricken. *See, e.g., State v. Carter*, 55 N.C. App. 192, 284 S.E. 2d 733 (1982) (defendant convicted of larceny and felonious possession of same property, possession of stolen property conviction stricken); *State v. Raynor*, 33 N.C. App. 698, 236 S.E. 2d 307 (1977) (conviction of assault on an officer and resisting arrest. Judgment arrested on assault charges); *State v. Fambrough*, 28 N.C. App. 214, 220 S.E. 2d 370 (1975) (defendant convicted of armed robbery of a pistol and armed robbery of money, judgment arrested on armed robbery of money). *Compare*, where there are convictions for two crimes, one of which is a lesser included offense of the other, the court will strike the sentence for the lesser included offense. *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970).

[4] We hold, for the sake of consistency, that where judgment must be arrested upon one of two sentences of equal severity because of a double jeopardy violation, the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken.

See State v. Fambrough, supra, arresting second charge on docket, *but see State v. Raynor, supra,* setting aside first charge. Applying this rule to the case at bar, judgment must be arrested on the conviction of possession of marijuana with intent to sell.

[5] Defendant's final argument is that he was denied effective assistance of counsel and should therefore be granted a new trial. Defendant bases his argument on the following acts (or lack thereof) by his trial attorney: failure to object to hearsay testimony concerning control of the mobile home, failure to object to introduction of defendant's confession, failure to object to introduction of the result of a test conducted on substances seized during the search of defendant's home and failure to object to imposition of jail terms for both offenses with which defendant was charged, in violation of the *McGill* rule.

Formerly, our appellate courts measured effectiveness of counsel based on the "farce or mockery" standard. Under this test, a defendant who sought a new trial based on charges of ineffective assistance of counsel had the burden of proving: (1) the conduct of counsel rendered the trial a "mockery" or "farce" and (2) that counsel's incompetence prejudiced the defendant in some way. *State v. Pennell,* 54 N.C. App. 252, 283 S.E. 2d 397 (1981), *appeal dismissed,* 304 N.C. 732, 288 S.E. 2d 804 (1982); Note, "Competence, Prejudice and the Right to 'Effective' Assistance of Counsel," 60 N.C. L. Rev. 185 (1981).

The "farce or mockery" test was abandoned in favor of a "range of competence" test in *State v. Weaver,* 306 N.C. 629, 295 S.E. 2d 375 (1982). Under the test adopted in *Weaver,* counsel must perform "within the range of competence demanded of attorneys in criminal cases." *See also State v. Vickers, supra, citing McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). While relatively few cases have been decided since the "range of competence" test was adopted, there has been no indication that our Supreme Court intended to change the requirement that defendant carry the burden of proof of showing prejudice. In the case before us, defendant has either failed to show prejudice, or has failed to demonstrate that trial counsel's performance fell below the range of competence required of attorneys in criminal trials.

The judgment and sentence for possession of marijuana with intent to sell is

Vacated.

As to the judgment and sentence for possession

No error.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. MARCUS JAMERSON

No. 8224SC1267

(Filed 4 October 1983)

1. Criminal Law § 7— evidence of entrapment sufficient to go to jury

In a prosecution for possession of cocaine with intent to sell and deliver and for sale and delivery of cocaine, the defendant presented sufficient evidence of entrapment to require a jury instruction where defendant testified that an undercover agent and a police informer initiated a conversation about drugs, that he made no attempt to find drugs for the men between 8:30 and 11:30 p.m., and that defendant finally agreed to make the purchase only after considerable urging by the informant, and only after the undercover agent located a person who would sell the drugs to defendant. Further, defendant's evidence tended to show that the undercover agent drove defendant to the college campus to buy the drugs, and that the informant supplied the money for the purchase.

2. Criminal Law § 26.5; Narcotics § 1.3— possession of cocaine with intent to sell or deliver and sale or delivery of cocaine—no violation of double jeopardy

Dual indictments charging defendant with possession of cocaine with intent to sell or deliver and with actual sale or delivery of the same drugs did not violate the constitutional bar against double jeopardy.

APPEAL by defendant from *C. Walter Allen, Judge.* Judgment entered 20 May 1982 in WATAUGA County Superior Court. Heard in the Court of Appeals 20 September 1983.

Defendant, a varsity football player at Appalachian State University at the time of his arrest, was indicted in May, 1981, for possession of cocaine with intent to sell and deliver, and for

sale and delivery of cocaine. Defendant was tried in May, 1982 and convicted of both charges. Evidence for the State tended to show that on May 4, 1981, defendant was approached by Ross Sheets, an undercover agent working with the Watauga County Sheriff's Department, and Keith Greer, an acquaintance of defendant who secretly worked as a police informant. Sheets and Greer asked defendant if he would sell them some drugs, but defendant said he had no drugs on hand. Defendant told the pair to return that night, when defendant would take them to someone who would sell them the drugs they were looking for. Sheets and Greer returned about 11:30 p.m. and drove with defendant to the ASU campus in Greer's car. Sheets gave defendant money, and defendant entered a nearby dormitory alone, returning after about 20 minutes with a substance later identified as cocaine. The three men returned to defendant's apartment where defendant and Greer sampled the cocaine. Defendant told the men to return a few days later if they wished to buy some other drugs.

Evidence for defendant tended to show that Sheets and Greer appeared at defendant's apartment about 8:30 p.m., May 4, 1981. Greer introduced Sheets as his cousin from West Virginia. Sheets asked defendant to sell him some drugs, but defendant said he didn't have any drugs. Greer asked defendant to try to find someone who had drugs, and promised to return with Sheets around 11:30 p.m. Instead of making calls or attempts to obtain drugs, however, defendant dismissed the matter and took a nap. When Greer and Sheets returned, defendant again said he had no drugs to sell. Sheets told defendant repeatedly that he was an addict and was desperate for drugs. Finally, Greer told defendant he knew of a student on campus who would be willing to sell drugs to defendant, and offered defendant $15.00 to make the purchase. Greer then took Sheets and defendant to the campus, where defendant made the purchase from the person identified by Greer, while Sheets and Greer waited in the car.

At trial, defendant did not deny that he played a role in obtaining the drugs. Instead, his sole defense was that he was entrapped by Greer and Sheets. The trial court, however, ruled there was insufficient evidence of entrapment and refused to instruct the jury on the defense. Defendant was convicted of both charges and the offenses were consolidated for sentencing. From

the verdicts of guilty, and entry of a sentence of one to four years in prison, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Newton G. Pritchett, Jr., for the State.

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

WELLS, Judge.

[1] Defendant first argues that the trial court erred in failing to instruct the jury on the defense of entrapment. We agree. In order to establish the defense of entrapment, the defendant must prove "(1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) . . . the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities." *State v. Walker*, 295 N.C. 510, 246 S.E. 2d 748 (1978).

A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant. *State v. Walker, supra, State v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191 (1955). The instruction should be given even where the state's evidence conflicts with defendant's. *Id.*

Viewed in the light most favorable to defendant, there was sufficient evidence in the case at bar to require a jury instruction on the entrapment defense. Defendant testified that Greer and Sheets initiated the conversation about drugs, that he made no attempts to find drugs for the men between 8:30 p.m. and 11:30 p.m. on May 4, 1981, and that he agreed to make the purchase only after considerable urging by Sheets, and only after Greer located a person who would sell drugs to defendant. Further, defendant's evidence tended to show that Greer drove defendant to the college campus to buy the drugs, and that Sheets supplied the money for the purchase.

Similar facts have been previously held sufficient to warrant entrapment instructions. *See e.g., State v. Grier*, 51 N.C. App.

209, 275 S.E. 2d 560 (1981) (undercover agent supplied money for drug purchase and drove the defendant to home of supplier, after ingratiating himself with the defendant by making frequent visits and giving the defendant presents); *State v. Hartman*, 49 N.C. App. 83, 270 S.E. 2d 609 (1980) (defendant promised a job if he would sell LSD that afternoon); *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466, *app. dismissed*, 291 N.C. 449, 230 S.E. 2d 766 (1976) (agent picked up the defendant who was hitchhiking and when the defendant stated he was high, he was asked if he would sell drugs. The agent called the next day and drove the defendant to the home of a third person identified by the defendant, where marijuana was purchased). *But see State v. Booker*, 33 N.C. App. 223, 234 S.E. 2d 417 (1977) (no jury instruction required where only evidence was that agent asked the defendant for drugs, defendant at first refused, and then later agreed to obtain drugs when agent stated he was a junkie and needed drugs badly. Agent supplied money for the purchase and lent car to the defendant).

[2] Defendant next argues that the dual indictments, charging him with possession of cocaine with intent to sell or deliver and with actual sale or delivery of the same drugs, violated the constitutional bar against double jeopardy. This argument is controlled by *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). In that case, our Supreme Court held that the former jeopardy rule does not bar convictions of a defendant for both possession of heroin and sale of the same contraband. Defendant argues, however, that *Cameron* and its progeny do not decide whether double jeopardy is violated where the only act of possession is that required to complete the act of selling the drug.

Defendant's argument ignores both the language of *Cameron*, and a number of later cases in which the defendants were convicted of possession and sale of the same drug under facts similar to the case at bar. The *Cameron* court addressed the argument that possession of a drug should not be a separate offense when it occurs only as part of the act of selling the same contraband as follows:

> Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single *act* with two criminal labels but with *component*

> *transactions* violative of distinct statutory provisions denouncing them as crimes . . . . The incidental fact that possession goes with the transportation is not significant in law as defeating the legislative right to ban both or either.

Citing State v. Chavis, 232 N.C. 83, 59 S.E. 2d 348 (1950) (emphasis in original). The *Cameron* court went on to note that the length of time of possession is not controlling in determining whether the offense of possession has occurred.

> The unlawful sale of a narcotic drug is a specific act and a given sale occurs only at one specific time. Unlawful possession, however, is a continuing violation of the law. It begins as soon as an individual first unlawfully obtains possession of the drug, whatever the purpose of that possession might be . . . The length of time makes no difference.

Id.

The arguments and reasoning of *Cameron*, decided under G.S. 90-98, were held applicable to the current drug offense statute, G.S. 90-95, in *State v. Stoner*, 59 N.C. App. 656, 298 S.E. 2d 66 (1982). The facts of *Stoner* are also similar to those of the case at bar. In *Stoner*, the defendant was convicted of two counts each of possession and sale of marijuana. These convictions arose out of sales on two different dates to undercover agents. On the later date, the defendant did not have drugs in his possession when approached by the undercover agent. Instead, the defendant told the agent that he had no drugs, but could get some from his mother's home some distance away. Defendant got in the agent's car and the pair went to the defendant's mother's home, where defendant got the drug and sold it to the agent. There apparently was no evidence of possession of the marijuana beyond that necessarily involved in the sale. *See also State v. Neville*, 49 N.C. App. 684, 272 S.E. 2d 164 (1980), *aff'd*, 302 N.C. 623, 276 S.E. 2d 373 (1981) (drugs obtained from home of third person unrelated to defendant and handed directly into car window to undercover agent).

While the issue of double jeopardy was not directly considered by the *Stoner* and *Neville* courts, the defendants in both of those cases were convicted of possession of contraband as well

as sale, despite the fact there was no act of possession independent of the sale. Thus, it is clear from the language of *Cameron* that the rule of *Cameron* controls this case and defendant's assignment of error is therefore overruled.

Finally, defendant assigns as error that the judgment erroneously states that defendant was found guilty of two counts of selling and delivery of cocaine. This is clearly the result of a clerical error, and the judgment should be corrected to show that defendant was convicted of one count of sale and one count of possession of cocaine.

Because the trial court erred in refusing to instruct the jury on the entrapment defense, defendant must have a

New trial.

Judges ARNOLD and EAGLES concur.

STAR VARIFOAM CORPORATION OF AMERICA v. BUFFALO REINSURANCE COMPANY

No. 8222SC850

(Filed 4 October 1983)

Insurance § 122— fire insurance policy—failure to maintain sprinkler system in good order

Plaintiff was not entitled to recover under a fire insurance policy because plaintiff's sprinkler system was not maintained in good order as required by the policy where the evidence clearly showed that there was a leak or crack in the main sprinkler line which had been there for some time and which was known to plaintiff or its agents; the crack allowed the water from the storage tank to leak at such a rate that the tank completely emptied in approximately three days; the last time the tank had been filled was one to two months before the fire; the tank was empty at the time of the fire; and even if the tank had been filled with water the sprinkler system could not have operated because the valve allowing water to enter the system was closed.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 18 February 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 20 May 1983.

This is a civil action wherein the corporate plaintiff seeks to recover proceeds allegedly due under a fire insurance policy underwritten by defendant. The plaintiff, a corporation engaged in the business of manufacturing polyurethane foam for use in the furniture industry, occupied a building (hereinafter the "Star building") in Thomasville owned by its individual shareholders. In February 1979, plaintiff purchased from defendant's agent an insurance policy covering plaintiff's building and personal property located inside the building. The insurance policy, which was in effect from 19 January 1979 until 19 January 1982, provided for maximum coverage of $500,000.00 for the contents of the building subject to a $5,000.00 deductible.

On 2 April 1980, a fire destroyed the insured premises and its contents. Plaintiff filed a proof of loss statement with defendant claiming losses in excess of the $500,000.00 personal property coverage limits. Defendant, as part of its investigation of plaintiff's claim, conducted examinations of certain employees and shareholders of plaintiff under oath, and the transcripts are part of this record. After investigation, defendant denied coverage under the policy.

After plaintiff initiated this action, defendant filed an answer denying the material allegations in the complaint and asserting certain affirmative defenses including the failure of plaintiff to render a signed and sworn proof of loss statement to defendant as required, the failure of plaintiff to maintain the protection devices provided for the safety of the insured property as required, and the submission by plaintiff of false or fraudulent claims. Following pretrial discovery, defendant filed a motion for summary judgment accompanied by supporting affidavits. The affidavits included statements of Charles R. Manning, a professor of material engineering at North Carolina State University who conducted a study of the sprinkler system at the Star building, and Philip Olshinski, an investigator for the Thomasville Fire Department.

Plaintiff countered with the affidavit of James Samuel McKnight, a professional engineer employed by Research Engineers, Inc., who observed the tests done on the sprinkler system by Mr. Manning.

From the court's grant of defendant's motion for summary judgment, plaintiff appealed.

Fairley, Hamrick, Monteith and Cobb, by S. Dean Hamrick and F. Lane Williamson, and White and Crumpler, by Fred G. Crumpler, Jr., and William E. West, Jr., for plaintiff appellant.

Tuggle, Duggins, Meschan, Thornton and Elrod, by Joseph E. Elrod, III, and Joseph F. Brotherton, for defendant appellee.

JOHNSON, Judge.

Plaintiff assigns as error the court's granting of summary judgment for defendant. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." An issue is genuine if it "may be maintained by substantial evidence." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Defendant claims plaintiff forfeited its right to recovery under the insurance policy by violating certain of its conditions. A breach of a policy condition bars any recovery under the policy. As stated in Couch on Insurance, Vol. 7, § 36:53 (2d ed. 1961):

> The acceptance by the insured of a policy which includes conditions imposes upon him the duty of complying therewith, and failure so to do releases the insurer from liability in the absence of a contrary contract provision, or a waiver or estoppel.

Furthermore, G.S. 58-176, prescribes the printed form of a policy of fire insurance, the "Standard Fire Insurance Policy of the State of North Carolina." G.S. 58-176(b) provides as follows:

> No policy or contract of fire insurance except contracts of automobile fire, theft, comprehensive and collision, marine and inland marine insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it conforms in substance with all of the provisions, stipulations, agreements and conditions, of the policy form in subsection (c) of this section.

Thus, the statutory Standard Fire Insurance Policy is incorporated into every policy of fire insurance issued in North Carolina. *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957); *Glover v. Insurance Co.*, 228 N.C. 195, 45 S.E. 2d 45 (1947).

The Standard Fire Insurance Policy specifically provides that no suit or action on the policy for the recovery of any claim may be maintained unless all the requirements of the policy have been met. G.S. 58-176(c). Therefore, the question here is whether there is a genuine issue of fact as to compliance by plaintiff with *all* of the conditions of the policy. If plaintiff violated any *one* of the conditions, then recovery is barred, and summary judgment for defendant is proper.

One of the policy conditions which plaintiff allegedly violated is the protection maintenance provision. It states:

> PROTECTION MAINTENANCE: It is agreed that the whole of the protections provided for the safety of the insured property shall be maintained in good order throughout the currency of this Certificate and shall be in use at all times out of business hours or when the Insured's premises are left unattended, and that such protection shall not be withdrawn or varied to the detriment of the interests of the Underwriters without their consent.

Defendant claims plaintiff failed to maintain in good order the fire protection or sprinkler system at the Star building thus violating this provision. It is not contested that the sprinkler system is one of the fire protections referred to in the provision.

The evidence presented as to this alleged violation may be summarized as follows: The sprinkler system at the Star building was supplied with water from an open pond or cistern located on the premises which was pumped into an elevated 50,000 gallon gravity tank. The tank, in turn, supplied water to the actual sprinkler heads located throughout the building. Philip Olshinski, a fire investigator, stated in his affidavit that as part of his investigation on the day of the fire, he was present when the elevated steel gravity tank that supplied water to the sprinkler system was inspected. According to Olshinski, at the time of the inspection, the outside stem and yoke valve that controlled water flowing into the sprinkler system from the tank was closed, mak-

ing it impossible for water to flow into the sprinkler system. Moreover, when the investigators opened the valve, the steel gravity tank contained no water.

M. T. Channey, who was employed by plaintiff from the time it moved into the Star building until the fire, testified that he was at one time responsible for filling the 50,000 gallon tank with water. Channey said it was necessary to refill the tank often because there was a leak in an underground pipe. The leak was of such size that it allowed all the water to drain from the 50,000 gallon tank in approximately two days, and the leak appeared to be getting larger. Channey pointed out the leak and the need to repair it to Morris Herron and Melvin Peed, who are two of plaintiff's shareholders and part owners of the Star building, who said they would fix it later when they got caught up. Channey estimated that the last time he filled the water tank was about a month or two before the fire.

In addition, defendant presented the affidavit of Charles R. Manning who was hired by defendant to conduct tests on the sprinkler system. Manning conducted a thorough study of the sprinkler system and tested it to determine if it was in operation, or was even operational at the time of the fire. He performed a leak rate test on the sprinkler system which showed that 10 gallons of water per minute were being lost out of the system at 15 pounds per square inch system pressure. Three leaks were located and after extensive excavation, a crack and leak in the main sprinkler line was discovered. After removing a section of the pipe containing the crack and studying it, Manning determined the crack was quite old. Due to the placement of the pipe under approximately four and one-half feet of ground, and the fact the pipe was protected by poured concrete pads, Manning expressed the opinion that the pipe had not been damaged either during or after the fire. Manning stated that at normal system pressure, the cracked pipe would result in the water tower being emptied in three days or less. Finally, based on his study and tests, Manning concluded that "the sprinkler system could not have been, and indeed was not, operable at the time of the fire that occurred on April 2, 1980."

Plaintiff argues that the evidence concerning the maintenance of the sprinkler system is not conclusive and relies upon

the affidavit of its expert, James Samuel McKnight. At plaintiff's request, McKnight observed the tests performed on the sprinkler system by Mr. Manning so as to determine whether the tests were conducted fairly and whether any conclusions reached were supported fully by the test results. In his affidavit, McKnight stated that the bituminous coating on the surface of the pipe at the location of the crack was inadequate to protect the pipe from corrosion, that it appeared corrosion had been occurring for a considerable length of time, and that the crack was old. He said the crack was probably caused by differential settling of the foundations of the boiler house and the warehouse and was accelerated by the inadequate coating on the exterior of the pipe. In his opinion, the water could have leaked out of the storage tank through a crack in the underground pipe.

Mr. McKnight also stated "[t]hat based on my observation of the tests of the water system that were conducted by Mr. Manning and by my own tests . . ., I am of the opinion that no determination could have been made as to whether the sprinkler system was operable or inoperable at the time of the fire. . . ." Thus, Mr. McKnight and Mr. Manning disagree as to whether it could be determined if the sprinkler system was operable. Plaintiff argues this disagreement in itself creates a genuine issue of fact in the case.

We believe that the evidence clearly shows the sprinkler system was not maintained in good order as required by the insurance contract. The evidence conclusively shows that there was a leak or crack in the main sprinkler line which had been there for some time, and which was known to plaintiff or its agents. The crack allowed the water from the storage tank to leak at such a rate that the tank completely emptied in approximately three days. For the sprinkler system to be functional, the water tank needed to be refilled very often, and it does not appear that the tank was so refilled. In fact, the evidence suggests that the last time the tank was filled was one or two months before the fire, that the tank was empty at the time of the fire, and that even if the tank had been full of water the sprinkler system could not have operated because the valve allowing water to enter the system was closed.

The only evidence supporting plaintiff's position is the fact that the parties' experts disagree as to whether it could be deter-

mined if the sprinkler system was operable at the time of the fire. Such a determination is irrelevant, though, because it is clear that even if the system was operable it was still not maintained in good order, and was not properly operated if it was operated at all. We hold plaintiff has failed to produce substantial evidence to show that there is a genuine issue of material fact with regard to its alleged breach of the protection maintenance provision. Since there is no genuine issue as to this fact and a breach of any one of the policy provisions bars recovery under the policy, defendant was entitled to summary judgment in its favor. We uphold the court's judgment on the basis of plaintiff's breach of the protection maintenance provision, we need not discuss the parties' arguments with respect to the other alleged breaches of the policy. The judgment of the court below is

Affirmed.

Judges WHICHARD and EAGLES concur.

MARION DOUGLAS McCULLOUGH, JR. v. AMOCO OIL COMPANY

No. 8218SC953

(Filed 4 October 1983)

1. Negligence § 35.4— pedestrian accident—contributory negligence—summary judgment improper

In a negligence action, the trial court erred in entering summary judgment for defendant where plaintiff pedestrian specifically remembered stopping two feet from the edge of the pavement and watching cars pass in both directions before he was struck by defendant's truck. The weight and credit of the testimony of plaintiff and the driver of the tanker and to disinterested witnesses which contradicted plaintiff's testimony was for the jury to decide.

2. Negligence § 12.3— evidence raising issue of last clear chance

The projected evidence in a negligence case raised an issue of whether the driver of a truck had the last clear chance to avoid a collision with plaintiff, since the day was clear and sunny, the plaintiff was wearing bright clothing, the road was straight for at least one-quarter of a mile prior to the accident, there was little traffic blocking the driver's view of the highway, the driver never swerved nor slowed down prior to striking plaintiff, the driver never blew his horn before impact, and, according to the affiants, plaintiff was

oblivious to the approach of the truck and was looking in the other direction until immediately before impact.

Judge HILL dissenting.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 8 July 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 August 1983.

Forman, Fish & Hall, P.A., by Paul E. Marth, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, Daniel R. Taylor, Jr., and Leon E. Porter, Jr., for defendant appellee.

BECTON, Judge.

I

Plaintiff, Marion Douglas McCullough, Jr., instituted this action on 27 March 1981 seeking damages for personal injuries sustained when he was struck by an oil tanker driven by defendant's agent, Noel G. Mathlery, in Kernersville, North Carolina. After filing its Answer denying negligence and alleging contributory negligence, and after discovery was initiated, defendant filed a motion for summary judgment. After considering (a) the pleadings, (b) the affidavits of Mathlery and two disinterested witnesses that the plaintiff ran in front of the truck, and (c) the plaintiff's statement in his deposition that the last thing he remembers was being on the shoulder of the road before being struck by the truck, the trial court entered an order, dated 8 July 1982, granting summary judgment to the defendant and dismissing plaintiff's suit. From that order, plaintiff appeals.

II

On 7 March 1979, plaintiff McCullough was a senior at Kernersville Wesleyan Academy in Kernersville, North Carolina. Following a 10:00 a.m. class, McCullough went to his car, parked in a lot on the north side of the U.S. Highway 421 directly across from his school, to pick up a book required for his 11:00 a.m. class. McCullough was wearing a yellow shirt and white pants at the time.

Directly in front of Kernersville Wesleyan Academy, Highway 421 divides into two branches or forks heading west. The northern branch leads into downtown Kernersville; the southern branch later merges into Interstate 40. A triangular grass median separates the two branches of the highway.

After McCullough got his book from his car, he jogged to the northern branch of the road leading into Kernersville where he stopped and allowed two cars to pass by. McCullough then proceeded across the northern branch and entered the grassy median between the branches. Evidence as to what transpired thereafter is conflicting. McCullough testified in his deposition as follows:

> When I reached my car I got my business math book, which was on the passenger side in the front seat. On my way back to the school, I am not really sure, but I think I jogged back to the right branch [northern branch] of the road.
>
> I usually do not stop at that point, but I had to because two cars were coming. After both cars went by, I walked across into the median between the forks. I stopped two feet from the northern edge of the pavement of the left branch [southern branch] at old 421 and looked in a westerly direction. There were two vehicles coming headed in a easterly direction. One was a Trans Am, which I was interested in watching, so I watched it as it travelled past me. I then saw a car go past me in the westerly direction toward Winston-Salem. That is the last thing I remember.

The defendant, on the other hand, presented affidavits from Mathlery, the driver of the oil tanker, and from two eyewitnesses that McCullough ran from the grass median directly in front of the oil tanker, never turning his head toward the tanker until it was right on top of him, and that McCullough collided with the tanker around the center of its front grille in the lane of travel. Both eyewitnesses stated that the tanker came to a very quick stop upon impact and indicated that the tanker was not travelling at an excessive speed. The truck driver stated that he did not observe McCullough crossing the right fork in the highway but, rather, saw him for the first time running toward the highway from behind a large directional sign and telephone or power pole in the median. The truck driver further indicated that he hit his brakes the moment he saw McCullough, that he did not blow his

horn or change lanes prior to striking McCullough, and that the tanker never left the highway or lane of travel.

As a result of the injuries sustained, McCullough was hospitalized in excess of fifty (50) days and incurred medical expenses in excess of $40,000.00.

III

The sole exception and assignment of error on this appeal is that the trial court erred as a matter of law in granting the defendant's motion for summary judgment.

[1] Because summary judgment deprives a party of an opportunity to develop its case by witnesses, summary judgment is proper only when the pleadings, discovery responses, 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. N.C. Gen. Stat. § 1A-1, Rule 56 (1969). Not only is the burden on the moving party to establish the lack of triable issues of fact, but the court must also look at the record in the light most favorable to the party opposing the motion. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 307, 296 S.E. 2d 661, 662 (1982). As we stated in *Goode v. Tait, Inc.*, 36 N.C. App. 268, 269-70, 243 S.E. 2d 404, 406, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978):

> The rule requires that before summary judgment may be had, the materials filed must affirmatively show that not only would the moving party be entitled to judgment from the evidence contained within the materials, but they must also show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact.

The stringent requirements placed on a movant are intended, because "summary judgment is a drastic measure, and it should be used with caution. (Citation omitted.) *This is especially true in a negligence case* in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979) (emphasis added).

Had McCullough stated in his deposition that after getting his math book he started back towards school and does not

thereafter remember what happened, summary judgment clearly would have been appropriate since negligence is not presumed from the mere fact that an accident or injury occurred—the accident of injury alone does not raise an inference of negligence. *Brewer v. Green*, 254 N.C. 615, 619, 119 S.E. 2d 610, 613 (1961); *Grant v. Royal*, 250 N.C. 366, 369, 108 S.E. 2d 627, 628 (1959); *Fleming v. Twiggs*, 244 N.C. 666, 668, 94 S.E. 2d 821, 823 (1956). But in this case, McCullough stated more. He specifically remembers stopping two feet from the edge of the pavement and watching cars pass in both directions. Thereafter, plaintiff was struck. And it does not matter that the driver of the tanker and two disinterested witnesses contradict McCullough and say that he never stopped at the edge of the pavement. Judges cannot accredit the testimony of the disinterested witnesses and discredit the testimony of obviously interested witnesses, however sparse that testimony may be. The weight and credit of the testimony is for the jury to decide. Further, the evidence indicates that the driver of the tanker was travelling on a straight highway with little traffic in front of him on a clear and sunny day. Although the nothern branch and the grassy median between the two branches were visible to the truck driver, he never saw McCullough until it was too late for him to stop. McCullough had on brightly colored clothing and was visible to drivers and passengers in nearby vehicles.

This forecast of evidence is sufficient to preclude summary judgment on the negligence issue. In *Parker v. Windborne*, 50 N.C. App. 410, 273 S.E. 2d 750, *disc. rev. denied*, 302 N.C. 398, 279 S.E. 2d 352 (1981), we reversed the entry of a summary judgment noting that driving a car into a jogger on the highway when the visibility was clear was some evidence that the driver was not keeping a proper lookout or keeping the vehicle under control. It is true that *Parker* involved a jogger on the highway, but seeing what is in the highway in order to avoid a collision is not all that is required in automobile negligence cases. In *Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462 (1949), our Supreme Court reversed a judgment of nonsuit noting that a driver must give warning to one on the highway or in close proximity to it. Specifically, the Court in *Williams* said:

> Here the defendant was operating his heavily loaded truck at 45 to 50 miles per hour within 150 feet of the vehicle

> just ahead. As the road was straight he saw or should have seen the deceased on the shoulder of the highway standing at the mail box even before the first truck passed her. She had her back to him and was apparently oblivious of his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury.

Id. at 709, 55 S.E. 2d at 464.

Without again reciting the conflicts in the evidence, we summarily rule that plaintiff's contributory negligence was not proved as a matter of law. As we recently pointed out: (a) "[i]f there is *any* question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied," *Roberson v. Griffeth*, 57 N.C. App. 227, 229, 291 S.E. 2d 347, 349, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982) (emphasis added) (*quoting Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 422 (1979); and (b) "[c]ontributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible." *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 326, 291 S.E. 2d 287, 290 (1982).

[2] Finally, we hold that the projected evidence raises an issue whether the driver had a last clear chance to avoid the collision with McCullough, since the day was clear and sunny, the plaintiff was wearing bright clothing, the road was straight for at least one-quarter of a mile prior to the accident, there was little traffic blocking the driver's view of the highway, the driver never swerved or slowed down prior to striking McCullough, the driver never blew his horn before impact, and, according to the affiants, plaintiff was oblivious to the approach of the truck and was looking in the other direction until immediately before impact.

For the foregoing reasons, the summary judgment grant for defendant is

Reversed.

Chief Judge VAUGHN concurs.

Judge HILL dissents.

Judge HILL dissenting.

I do not see how the driver of the truck could have done anything more to avoid the injury. He was travelling on the paved portion of the highway. There is no evidence that his truck left it. Any evidence of the driver's negligence is pure speculation.

PEGGY W. McCLURE v. THOMAS G. McCLURE

No. 8218SC1057

(Filed 4 October 1983)

1. **Husband and Wife § 17— sale of entirety property—proceeds held as tenants in common**

When real property held as tenants by the entirety is sold, the proceeds are ordinarily held as tenants in common.

2. **Husband and Wife § 1— husband's duty to support family**

A husband has a duty to support his family regardless of the wealth of the wife, and the wife is not liable for debts incurred to meet this obligation.

3. **Husband and Wife § 1.1— spousal joint savings account—implied consent for use for family purposes**

Creation of a spousal joint savings account as a matter of law implies consent by each spouse to use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living, and upon divorce one spouse is not required to account for and reimburse sums expended for family purposes from a spousal joint account which originated in part from the other spouse's separate earnings and estate.

APPEAL by plaintiff from *Helms, Judge.* Judgment entered 25 May 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 August 1983.

Eugene S. Tanner, Jr., for plaintiff appellant.

No brief filed for defendant appellee.

WHICHARD, Judge.

I.

The issue is whether funds from a joint savings account to which a husband and wife contributed equally, which were then

used by the husband for support of the family, must upon divorce be deducted entirely from the husband's share of the account. We answer in the negative.

II.

The court made the following findings of fact, to which plaintiff does not except:

Plaintiff and defendant owned, as tenants by the entirety, real property located in Virginia. They sold this property for $64,553.58, and applied $41,736.19 of that sum toward the purchase of a house in Greensboro. They placed the remaining $22,817.39 in a joint savings account from which defendant, over a period of time, withdrew $4,849.02 for application to support or enhancement of the standard of living of his wife and children.

With these funds defendant purchased the following items: a refrigerator, a TV and table, a lawnmower, landscaping at the parties' residence, gutters for the residence, a garage door opener, and a 1974 Dodge automobile. Plaintiff now has title to the automobile and a writ of possession to the home, which contains the other items which defendant purchased with funds from the joint account.

Shortly before the parties separated, plaintiff withdrew $5,500 from the account.

III.

Plaintiff seeks to recover her share of the joint account. She claims entitlement to one-half of the original balance of $22,817.39, minus the $5,500 which she withdrew. She contends that defendant had a unilateral duty to support her and the children, and that he could not draw on her share of the joint account to fulfill that obligation.

The trial court, based on the foregoing findings of fact, concluded

> as a matter of law that the cash obtained from the sale of the Virginia residence retained its characteristic as entirety property, and, as such, the defendant was entitled to exclusive possession of that cash for such time as the parties were legally separated or divorced, but that the same could

be charged with the support of the defendant's wife and children; that the amounts previously referred to in findings of fact expended by the defendant were expended for the purpose of supporting his wife and children in the total amount of $4,849.02; that after said expenditures the amount of $17,968.37 was left remaining as entireties property, of which sum the plaintiff upon her divorce from the defendant was entitled to $8,984.19; that as the plaintiff has previously withdrawn the sum of $5,500.00 from said sum, she is presently entitled to recover from the defendant the sum of $3,484.19, as of October 7, 1981.

It accordingly entered judgment for plaintiff in the sum of $3,484.19 plus interest from 7 October 1981.

Plaintiff appeals.

IV.

[1] We note that the trial court incorrectly concluded "that the cash obtained from the sale of the Virginia residence retained its characteristic as entirety property." Under Virginia law, that would have been the case. *Oliver v. Givens*, 204 Va. 123, 126-27, 129 S.E. 2d 661, 663 (1963). The law of the situs controls, however, *see Ellison v. Hunsinger*, 237 N.C. 619, 624, 75 S.E. 2d 884, 889 (1953); and under North Carolina law, which does not recognize an estate by the entirety in personal property, when real property held as tenants by the entirety is sold the proceeds are ordinarily held as tenants in common. *Bowling v. Bowling*, 252 N.C. 527, 531, 114 S.E. 2d 228, 231 (1960); *Bowling v. Bowling*, 243 N.C. 515, 519, 91 S.E. 2d 176, 180 (1956).

The erroneous conclusion in this regard is immaterial to the ultimate result, however.

V.

[2] The following principles are generally relevant:

A husband has a duty to support his family. *Ritchie v. White*, 225 N.C. 450, 452-53, 35 S.E. 2d 414, 415 (1945); 2 R. Lee, *North Carolina Family Law* § 128 (1980). This duty exists regardless of the wealth of the wife. *Bowling v. Bowling, supra*, 252 N.C. at 533, 114 S.E. 2d at 232. The wife is not liable for debts incurred to meet this obligation. *Robertson v. Robertson*, 218 N.C. 447, 450,

11 S.E. 2d 318, 320 (1940). "The personal property of a feme covert, to which she may become in any manner entitled, shall be and remain the sole and separate estate and property of such female." *Bowling v. Bowling, supra*, 252 N.C. at 531, 114 S.E. 2d at 231. The mere fact that one party places his or her funds in a joint account does not constitute a gift to the other party. *Smith v. Smith*, 255 N.C. 152, 155, 120 S.E. 2d 575, 578 (1961). Where a wife relinquishes control over her property by transferring it to her husband, absent direct evidence that she intended to make a gift, the husband is presumed to hold the property in trust for the wife's benefit. *Etheredge v. Cochran*, 196 N.C. 681, 146 S.E. 711 (1929).

In our view, however, the facts presented differ from those of the foregoing cases; and place this case within the general rule that even though a husband has a duty to support his family, the wife has no right to reimbursement from the husband for family support expenditures from her separate estate made with her knowledge and consent. *See* Annot., 101 A.L.R. 442 (1936). The following cases are pertinent:

In *Petersen v. Swan*, 239 Minn. 98, 57 N.W. 2d 842 (1953), a husband and wife, both of whom were employed, placed their separate earnings in a joint account. The wife, who had exclusive control over the account, used it to pay household expenses. The court stated:

> Where, as here, the wife commingled her funds with those of her husband and paid the household expenses out of the common fund without any attempt to segregate her earnings from those of her husband, it must be presumed, in the absence of a showing to the contrary, that she intended to contribute her share toward the household expenses.

Id. at 104, 57 N.W. 2d at 846.

In *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935), the wife had used her separate estate during the marriage to pay the parties' rent and other living expenses. In the divorce proceeding she contended that since her husband had a duty to support her, she was entitled to reimbursement of these sums. The court rejected the argument, stating:

> While [married and living together] it is the duty of the husband to support and maintain his wife, yet such duty is not a debt within the legal acceptance of that term. If a husband uses his wife's property for the support of the family with her knowledge and consent, a gift of such property by the wife may be inferred in the absence of proof of a contrary agreement, (citations omitted) and where a wife permits her husband to receive the income from her separate estate and use it for the family support the circumstances may justify the inference of a gift. . . . The law will not imply a contract on the part of a husband to re-pay his wife for her property brought into, used and consumed in the household . . . .

Id. at 394, 198 N.E. at 139. The court also stated that "[p]ublic policy, ever interested in the maintenance of a harmonious marriage relation, prohibits a contrary rule." *Id.* at 395, 198 N.E. at 139. It reasoned that it would be "disastrous to marital felicity" to require the husband, after a number of years of using the wife's estate, to account to the wife for the sums expended. *Id.*

In *Brell v. Brell*, 143 Md. 443, 122 A. 635 (1923), the parties, like the parties here, had sold property held as tenants by the entireties. The proceeds had been paid to the husband "with the knowledge and acquiescence of the [wife]." *Id.* at 448, 122 A. at 637. The husband used part of the proceeds to pay a debt to the wife's son and to meet certain of the parties' living expenses. The court held that "in the absence of an express promise of the [husband] to repay the amount paid to the [wife's] son and for the living expenses . . ., there is no implied obligation on his part to do so." *Id.* at 449, 122 A. at 637.

We find the reasoning of these cases persuasive. That spouses today commonly contribute their separate earnings or estates to joint accounts, and periodically draw therefrom to sustain the family or enhance its standard of living, is a matter of common and general knowledge. So, too, is the fact that a standard incident of joint accounts is the unilateral right of any party to the account to make deposits thereto and withdrawals therefrom. Pursuant to the principle that courts take judicial notice of subjects and facts of common knowledge, *Smith v. Kinston*, 249 N.C. 160, 166, 105 S.E. 2d 648, 653 (1958), we take notice of these facts.

[3] Given these facts, absent clear and convincing evidence to the contrary, creation of a spousal joint account should as a matter of law imply consent by each spouse to use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living. To require one spouse, upon divorce, to account for and reimburse sums expended for family purposes from a spousal joint account, which originated in part from the other spouse's separate earnings or estate, and from which each spouse had the unilateral right to withdraw funds at any time, would be both highly impractical and disruptive of the marital relationship. We agree with the reasoning of the *Spalding* court that it would be "disastrous to marital felicity" to require one spouse, after a number of years of using for family purposes the other spouse's estate which has been deposited to a spousal joint account, to account to the other spouse for the sums expended, and that "[p]ublic policy, ever interested in the maintenance of a harmonious marriage relation, prohibits a contrary rule." *Spalding, supra*, 361 Ill. at 395, 198 N.E. at 139.

Here, the trial court found as a fact that defendant withdrew the funds in question for the purpose of supporting his wife and children; and plaintiff does not except to that finding. The record contains no basis for holding that plaintiff carried the burden of proving absence of her consent to that use of the funds. Such consent is thus implied from her volitional creation of, and deposit of funds to, the joint account; and the trial court properly declined, upon divorce, to deduct the sums expended from defendant's share of the account.

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. MICHAEL JAY HANKINS

No. 825SC1347

(Filed 4 October 1983)

Burglary and Unlawful Breakings § 5— first degree burglary—intent to commit rape or larceny—insufficient evidence

The State's evidence was insufficient to permit the jury to find that defendant broke into the victims' house with the intent to commit rape or larceny as alleged in the indictment so as to support conviction of defendant for first degree burglary where it tended to show that two females were in a downstairs room of the house at 11:45 p.m. when they heard a tap on the door; one female opened the door, and defendant pushed the screen door open and entered the house; defendant stated that he had a knife and told the females to get up against the wall; one female ran into the adjoining bedroom of the only male in the house, followed shortly thereafter by the second female; as defendant was trying to force his way into the bedroom, a third female came down the steps, and defendant told her that he had a knife and to get up against the wall or he would kill her; the male then came out of the bedroom and began struggling with defendant; defendant then fled from the house; and two of the females saw a knife in defendant's hand. Therefore, the jury's verdict of guilty will be treated as a verdict of guilty of the lesser included offense of wrongful breaking or entering under G.S. 14-54(b).

Judge HILL dissenting.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 22 July 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 22 September 1983.

Defendant was tried for first degree burglary. He was charged in the indictment with breaking into an occupied dwelling house in the nighttime with the intent to commit the crimes of rape, armed robbery, larceny and assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence showed that on 18 April 1982 at 11:45 p.m. Cheryl Denise Coates, Jane Moseley, Jean Webb, Leslie Mier, Ben Jones and Crystal Ashley were in a house in Wrightsville Beach. Ms. Coates and Ms. Ashley were in a room downstairs when they heard a "light tap" on the front door. Ms. Coates opened the door. The defendant pushed the screen door open and entered the house. He said to Ms. Coates, "This is no joke. I have got a knife. Get up against the wall." Ms. Coates ran into Mr. Jones' bedroom. Ms. Coates did not see a knife. Ms. Ashley re-

mained in the room with the defendant for a few seconds and followed Ms. Coates into Mr. Jones' bedroom. Ms. Coates roused Ben Jones while Ms. Ashley held the door to keep the defendant from entering the room.

Jane Moseley came down the steps as the defendant was trying to force his way into Mr. Jones' bedroom. He said to her, "I've got a knife. This is no joke. Get up against the wall or I will kill you." Ben Jones then came out of his bedroom and began struggling with the defendant. The defendant then fled from the house. Ms. Ashley and Ms. Moseley saw a knife in the defendant's hand. The court submitted first degree burglary to the jury on the theory that the defendant could have had the intention at the time he entered the house to have committed rape or larceny.

The defendant was convicted of first degree burglary. He appealed from the imposition of a prison sentence.

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

William Norton Mason for defendant appellant.

WEBB, Judge.

We believe we are bound by *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd*, 308 N.C. 804, 303 S.E. 2d 822 (1983) to hold there was not sufficient evidence that the defendant intended to commit rape at the time he entered the house for a charge of first degree burglary to have been submitted to the jury. In *Rushing* there was evidence that the prosecuting witness was awakened by the defendant as he came through her bedroom window. When she asked for his identity the defendant said, "Don't holler, don't scream, I got a gun, I'll shoot you," and came to the side of the bed at which time he seized the prosecuting witness' arm. She tried to turn on the light and the defendant told her not to move. She screamed which woke her small child who also screamed. The defendant then fled. A panel of this Court held, with one dissent, and was affirmed by the Supreme Court without an opinion, that this was not sufficient evidence for the jury to find the defendant intended to commit rape when he entered the bedroom. We believe the evidence in *Rushing* was

stronger against the defendant than it is in this case. We hold that we are bound by *Rushing* to hold there was insufficient evidence for the jury to find the defendant intended to rape anyone when he entered the dwelling. The State relies on *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). We agree that under *Smith* there might be sufficient evidence that the defendant in this case intended to commit rape when he entered the house. *Smith* was not cited by this Court or the Supreme Court in their opinions. In light of our Supreme Court's affirmation of *Rushing*, we do not believe we should follow *Smith*.

We also hold there was not sufficient evidence to submit to the jury the question whether the defendant intended to commit larceny. The State relied on *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981) and *State v. Redmond*, 14 N.C. App. 585, 188 S.E. 2d 725 (1972) for the rule that "a reasonable inference of felonious intent may be drawn from the fact that an individual broke and entered the dwelling of another in the night." How much validity this rule now has in light of our Supreme Court's decision in *Rushing* we do not believe we have to decide. In this case we believe the manner of the defendant's entry into the house does not give rise to an inference that he intended to commit larceny. The defendant was apparently confused when he entered the house. After Ms. Coates and Ms. Ashley left him alone he did not try to take anything. We do not believe there is a logical inference from the manner of the defendant's entry into the house that he intended to commit larceny.

The court did not submit the first degree burglary charge on the basis of armed robbery or assault with a deadly weapon with intent to kill inflicting serious bodily injury. We do not have to determine whether there was sufficient evidence to have so submitted a charge of first degree burglary.

We believe the evidence that defendant pushed the screen door open and came into the house was evidence from which the jury could have found the defendant guilty of wrongful breaking or entry, a misdemeanor under G.S. 14-54(b). *See State v. Wade*, 14 N.C. App. 414, 188 S.E. 2d 714 (1972). This is a lesser included offense of first degree burglary and we remand for sentencing on that charge. *See State v. Rushing, supra.*

Reversed and remanded.

Judge HEDRICK concurs.

Judge HILL dissents.

Judge HILL dissenting.

I dissent. On review the State is entitled to all reasonable inferences which may be drawn from the evidence. *See State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). On a charge of burglary the intent to commit a felony must exist at the time of entry, and it is no defense that the defendant abandoned the intent after entering. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

I believe there is sufficient evidence from which the jury could draw an inference that the defendant intended to gratify his passions when he entered the house, or to commit larceny, albeit he failed to complete either act under the circumstances.

At 11:45 p.m. the defendant tapped on the door to a house occupied at the time by only two ladies. When one opened the door, the defendant forcibly pushed the screen door open and entered the house, saying to the lady who opened the door, "This is no joke. I've got a knife. Get up against the wall." The lady rushed into an adjoining bedroom. The remaining lady likewise followed the first into the bedroom. She was followed by the defendant who beat on the closed bedroom door. A third lady came down the steps while the defendant was trying to force his way into the bedroom, and the defendant said to her: "I've got a knife. This is no joke. Get up against the wall or I will kill you." The lone man in the house then appeared and began struggling with the defendant, who then fled the house.

I am of the opinion there is sufficient evidence from which the jury could infer the defendant broke and entered this dwelling with the intent to commit a felony therein. The room he entered was occupied by two ladies, on whom he could have gratified his passion. The house was a dwelling occupied by them, and with occupancy the inference can be drawn that there were things of value therein, which the defendant could have taken.

The defendant actually pursued both these ladies until stopped by the bedroom door which they were holding, and continued to force himself upon them. Only when he was attacked by the man of the house did he flee.

In my opinion the trial judge correctly submitted first degree burglary to the jury on the theory that at the time he entered the house he had the intention to commit rape or larceny, and abandoned his intention only when attacked by the male occupant. *See State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Redmond*, 14 N.C. App. 585, 188 S.E. 2d 725 (1972).

I would distinguish *State v. Rushing, supra*, where the intended felony charged was rape alone, and the prosecution admitted she had invited men other than her boyfriend to come to her home. Here there is sufficient evidence from which the jury could infer rape or larceny, or both.

RONNIE STILES AND WIFE, PATRICIA A. STILES v. CHARLES M. MORGAN CO., INC.

No. 8229DC1055

(Filed 4 October 1983)

Damages §§ 5, 6— instructions on measure of damages for defect in new home incorrectly stated

In an action for breach of both express and implied warranties in the construction of a home, the trial court erred in its instructions concerning damages where the trial court instructed as to the method of measuring damages by looking at the difference in the value of the house as warranted and its value as actually built but failed to instruct as to the method of measuring damages by the cost of repair.

APPEAL by defendant from *Guice, Judge.* Judgment entered 7 May 1982 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 26 August 1983.

Plaintiffs brought this action for breach of both express and implied warranties in the construction of a house. From a judgment entered on a verdict for plaintiffs, defendant appeals.

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

Larry J. Ford for plaintiff appellees.

WHICHARD, Judge.

Plaintiffs purchased a newly constructed house from defendant for the sum of $51,500. After moving into the house, they discovered that the downstairs area leaked. The cost of repairing the leakage was $4,439.50. The cost of replacing paneling, molding, carpet, and other items damaged by the leakage was $1,131.17. The total cost to plaintiffs, then, of correcting the defect and restoring the home, was $5,570.67.

Plaintiffs brought this action for breach of both express and implied warranties in the construction of the house. The jury returned a verdict for plaintiffs in the amount of $5,500. Defendant contends the court erred in not explaining the law as it arises on the evidence as to damages. We agree, and accordingly award a new trial.

The trial court has a "duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case." *Board of Transportation v. Rand*, 299 N.C. 476, 483, 263 S.E. 2d 565, 570 (1980); *see also* G.S. 1A-1, Rule 51(a); *Investment Properties v. Norburn*, 281 N.C. 191, 197, 188 S.E. 2d 342, 346 (1972). The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. *Board of Transportation v. Rand, supra; Clifford v. River Bend Plantation*, 55 N.C. App. 514, 521, 286 S.E. 2d 352, 356 (1982).

In a breach of warranty action there are two methods of measuring damages. The first method looks at the difference in the value of the house as warranted and its value as actually built. This method is used when the trier of fact determines that a substantial part of the work would have to be redone to comply with the contract. The second method measures the damages by the cost of repairs. It is used when the trier of fact determines that the defects can be corrected without undoing a substantial part of the work. *Leggette v. Pittman*, 268 N.C. 292, 293, 150 S.E. 2d 420, 421 (1966); *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E. 2d 884, 887 (1959); *Coley v. Eudy*, 51 N.C. App. 310,

314, 276 S.E. 2d 462, 466 (1981); Dobbs, *Remedies* § 12.21, at 897-99 (1973).

Generally, before the builder makes extensive efforts to remedy the defect, either measure may be used. *See Hartley v. Ballou*, 286 N.C. 51, 63, 209 S.E. 2d 776, 783 (1974); *Stone v. Homes, Inc.*, 37 N.C. App. 97, 104, 245 S.E. 2d 801, 806-07, *disc. rev. denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978). The trier of fact must, however, determine whether a substantial part of the work would have to be redone in order to determine which method is more appropriate in a particular case. *LaGasse v. Gardner*, 60 N.C. App. 165, 169-70, 298 S.E. 2d 393, 396 (1982).

Additionally, in a breach of warranty action, the aggrieved party can recover "such special damages as were within the contemplation of the parties." *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 249, 116 S.E. 2d 780, 785 (1960). In another case based on water leakage, this Court stated: "It was within the contemplation of the parties at the time of the making of the contract that improper construction could lead to water damage with attendant expenses to the plaintiff." *Hartley v. Ballou*, 20 N.C. App. 493, 499, 201 S.E. 2d 712, 715-16, *rev'd on other grounds*, 286 N.C. 51, 209 S.E. 2d 776 (1974). Thus, plaintiffs should be allowed to recover any special damages incurred because of the water damage.

Based on the evidence presented, it would have been proper for the court to have instructed the jury that if it determined that a substantial part of the work had to be redone, it should then award plaintiffs the difference in the value of the house as warranted and as in fact received; but that if it determined that a substantial part of the work would not have to be redone, it should then award plaintiffs the cost of repair. Additionally, it would have been proper to instruct that regardless of whether the jury determined that substantial work had to be redone, plaintiffs were entitled to recover any special damages which were within the contemplation of the parties at the making of the contract. This would include expenses incurred because of the water damage.

LaGasse, supra, like this case, dealt with the measure of damages in a breach of warranty action. The evidence there showed that the cost of repairs was between $10,000 and $12,000.

The court, sitting without a jury, concluded that the damages were $10,000. This Court held that the trial court erred in not determining whether a substantial part of the work would have to be redone. It remanded for determination of which measure of damages was appropriate.

The court here gave the following instructions:

> Where there is a breach of an implied warranty of workmanlike quality the party complaining of damages is entitled to recover the difference between the reasonable market value of the property as impliedly warranted and the reasonable market value in its actual condition; that is, the amount required to bring the property into compliance with the implied warranty.
>
> * * *
>
> Where there is a breach of express warranty, the party complaining of damages, that is, the plaintiffs, are entitled to recover the difference between the reasonable market value of the property as expressly warranted and the reasonable market value in its actual condition.
>
> So, finally, members of the jury, . . . if you find by the greater weight of the evidence that the plaintiffs have sustained damages, some amount of damages, under the rules which the Court has just given you, then the plaintiffs are entitled to recover the difference between the reasonable market value of the property as impliedly warranted or expressly warranted and the reasonable market value in its actual condition.

Just as the court in *LaGasse* erred in concluding that the cost of repair constituted the plaintiffs' damages, without finding whether the appropriate measure was the "cost" rule or the "value" rule, *see Dobbs, supra*, at 897, so the court here erred in instructing only as to the difference in value measure. It should have instructed as to both measures, and that the jury should determine the applicable measure based on its finding as to whether a substantial portion of the work would have to be redone. It also should have instructed regarding plaintiffs' entitlement to any special damages which were within the contemplation of the parties at the making of the contract.

Defendant also contends the court erred in submitting breach of both express and implied warranty as a single issue. The record reveals neither objection to the issues submitted nor request for the submission of issues differently framed. Absent such, objection to the issues submitted generally is deemed waived and not tenderable on appeal. *See* G.S. 1A-1, Rule 49(c); *Foods, Inc. v. Super Markets*, 288 N.C. 213, 225-26, 217 S.E. 2d 566, 576 (1975); *Van Poole v. Messer*, 25 N.C. App. 203, 206, 212 S.E. 2d 548, 550 (1975); *Brant v. Compton*, 16 N.C. App. 184, 185-86, 191 S.E. 2d 383, 384, *cert. denied*, 282 N.C. 672, 196 S.E. 2d 809 (1972). In view of the disposition made herein, it will suffice to recommend that upon retrial separate issues be submitted.

New trial.

Judges JOHNSON and EAGLES concur.

PATRICIA MARY FRENDLICH v. VAUGHAN'S FOODS OF HENDERSON, INC.

No. 829SC800

(Filed 4 October 1983)

1. **Rules of Civil Procedure § 56— motion for summary judgment—question before the court**

On a motion for summary judgment, the question before the court is whether the pleadings, discovery documents and affidavits, viewed in the light most favorable to the non-movant, support a finding 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).

2. **Rules of Civil Procedure § 56.2— motion for summary judgment—burden of proof**

The party moving for summary judgment must show the lack of a genuine issue of material fact and that it is entitled to judgment as a matter of law, either by demonstrating the non-existence of an essential element of each claim or by presenting a defense to plaintiff's claims as a matter of law.

3. **Rules of Civil Procedure § 56.6— summary judgment in negligence cases**

While summary judgment is generally not appropriate in negligence cases, it may be appropriate when it appears that there can be no recovery for plaintiff even if the facts as alleged by plaintiff are taken as true.

4. Negligence § 48— entrances to store—duty of storekeeper

A storekeeper has a duty to exercise ordinary care to maintain the approaches and entrances to his store in a reasonably safe condition and to warn his customers of any hidden dangers or unsafe conditions of which he knows or in the exercise of reasonable care should have known, but a storekeeper is under no duty to warn his customers of a condition which is obvious.

5. Negligence § 48— bi-level sidewalk in front of store—no negligence by store-owner

In an action to recover for injuries received when plaintiff patron fell after failing to see a second step down at the street curb while carrying two bags of groceries from defendant's store, defendant was not negligent in maintaining between the store entrance and the street a bi-level sidewalk containing one step four feet from the entrance and another step down at the street curb three feet from the step absent some special circumstance such as poor construction, poor lighting, or a diversion of attention created by defendant.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 9 March 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 18 May 1983.

Plaintiff filed this action seeking to recover damages for injuries she sustained on 10 August 1976 when she fell after failing to see a second curb outside defendant's store. She alleged that defendant was negligent in maintaining a double curb at the entrance of its store and in failing to post signs or warnings instructing patrons of the danger presented by the double curb when it knew, or should have known, that the double curb would or could be unfamiliar to patrons or not readily visible to patrons carrying groceries from the store.

Defendant denied that it was negligent and alleged that the fall occurred on property owned by the City of Henderson which defendant had no duty to keep safe and that plaintiff was contributorily negligent in failing to see, through the exercise of ordinary care, the open and obvious condition of the double curb.

Defendant moved for summary judgment. At the hearing on the motion, the court had before it the pleadings and the depositions of plaintiff and her husband. Attached to the depositions were photographs and exhibits describing the scene of the accident. These materials tended to show the following: On 10 August 1976, plaintiff and her husband stopped at defendant store in the City of Henderson while returning to their New Jersey home from Florida. Plaintiff's husband let her out of the automobile

near the entrance to the store and then parked on the street directly in front of the entrance awaiting her return. Shortly thereafter, plaintiff emerged from the store carrying two bags of groceries.

Separating the entrance/exit of the store from the street was a bi-level sidewalk seven feet wide. Four feet from the store entrance was a step down which, due to the slope of the street, varied in height. Three feet from this step was the street curb.

Plaintiff observed and safely negotiated the first step leading to her car but fell and struck the car when she failed to see the step down from the curb onto the street. Plaintiff testified that she did not anticipate the second step, because she was unfamiliar with double steps since in New Jersey there were only single steps. When she looked down for the first step, she did not see the second step. As she approached the car she was looking straight ahead to the open car door. Visibility was clear that day and defendant had done nothing to divert her attention. Her eyesight was good.

From summary judgment for defendant, plaintiff appealed.

Stainback, Ellis & Satterwhite, by Kermit W. Ellis, Jr., for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr., and Hight, Faulkner, Hight & Fleming, by Lee A. Faulkner, for defendant appellee.

JOHNSON, Judge.

The question presented for review is whether summary judgment for defendant was proper. For the reasons that follow, we hold that it was.

[1] On a motion for summary judgment, the question before the Court is whether the pleadings, discovery documents and affidavits, viewed in the light most favorable to the non-movant, support a finding 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); *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E. 2d 297 (1982); *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

[2, 3] The moving party must show the lack of a genuine issue of material fact and that it is entitled to judgment as a matter of law, either by demonstrating the non-existence of an essential element of each claim or by presenting a defense to plaintiff's claims as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Tolbert v. Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). If the material before the court at the summary judgment hearing would require a directed verdict for defendant at trial, defendant is entitled to summary judgment. *Whitaker v. Blackburn*, 47 N.C. App. 144, 266 S.E. 2d 763 (1980). While summary judgment is generally not appropriate in negligence cases, it may be appropriate when it appears that there can be no recovery for plaintiff even if the facts as alleged by plaintiff are taken as true. *Id.; Cox v. Haworth and Cox v. Haworth*, 54 N.C. App. 328, 283 S.E. 2d 392 (1981).

A *prima facie* case of negligence liability is alleged when a plaintiff shows that: defendant owed her a duty of care; defendant breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E. 2d 602 (1982). Taking all the facts alleged by plaintiff as true, we conclude that defendant has shown that it has not breached any duty owed to plaintiff.

[4] The duty a storekeeper owes to his business invitees is well stated in *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461 (1959). A storekeeper has a duty to exercise ordinary care to maintain the approaches and entrances to his store in a reasonably safe condition and to warn his customers of any hidden dangers or unsafe conditions of which it knew or in the exercise of reasonable supervision should have known. A storekeeper is not an insurer of the safety of his customers, and is liable only for injuries resulting from negligence on his part. He is under no duty to warn his customers of a condition which is obvious.

We also find *Garner, supra*, to be particularly instructive because of its striking factual similarity to the case at bar. In front of defendant's gift shop was a sidewalk which sloped downward to the south. At the south end of the entryway, there was a six inch perpendicular drop-off to the sidewalk; in the middle a three inch drop-off; and at the north end the entryway and side-

walk were approximately flush. There was a downward slope from the doors toward the sidewalk. Upon exiting defendant's store, plaintiff fell when she failed to see the six inch drop-off. Plaintiff alleged that defendant was negligent in that defendant knew, or in the exercise of due care should have known, of the dangerous condition and failed to correct that condition. Plaintiff alleged that the entryway was dangerous and defective in that it sloped; it fell off vertically at the sidewalk at varying distances up to six inches; it had the appearance of going straight into the sidewalk, thus creating an optical illusion and camouflaged effect, and constituted a latent defect; no handrails or supports were provided; and no warnings were posted. The court rejected each of these allegations in holding that a motion for judgment of involuntary nonsuit should have been allowed. As the court stated:

> "The mere fact that a step up or down, or a flight of steps up or down, is maintained at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view. . . . If the step is properly constructed, but poorly lighted, and by reason of this fact one entering the store sustains an injury, recovery may be had. On the other hand, if the step is properly constructed and well lighted so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability."
>
> In the instant case, the weather was clear, the entryway was not crowded, only a few persons were passing on the sidewalk, and the plaintiff was not carrying bundles of merchandise. In the absence of some unusual condition, the mere fact that the entryway and sidewalk sloped, and that there was a drop-off of varying height at the sidewalk, did not constitute negligence. (Citation omitted.)

250 N.C. at 159, 108 S.E. 2d at 467. Because the step down was obvious, being in plain view in broad daylight, the defendant had no duty to warn or to provide handrails.

Similarly, in *Harrison v. Williams*, 260 N.C. 392, 132 S.E. 2d 869 (1963), the plaintiff fell when she failed to see a step down. The court held that the employment of steps is negligence only when by the step's character, location or surroundings, a reasonably prudent person would not be likely to expect a step or see it.

[5] The mere existence of a condition which causes an injury is not negligence per se, and the occurrence of the injury does not raise a presumption of negligence. *Spell v. Contractors*, 261 N.C. 589, 135 S.E. 2d 544 (1964). Here, the mere presence of a double step is insufficient to constitute negligence, absent some special circumstance, such as poor construction of the step, poor lighting, or a diversion of attention created by defendant.

Plaintiff argues that a distinguishing factor between her case and the others cited is that she was carrying two bags of groceries. This distinction is not persuasive. In *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338 (1963), the plaintiff was carrying bags of groceries when he tripped over a four foot metal screen. In affirming a judgment of involuntary nonsuit, the court held that the defendant was under no duty to warn its customers of a condition which was obvious to any ordinarily intelligent person. The plaintiff's evidence plainly showed he failed to exercise ordinary care for his own safety.

Here, plaintiff's deposition testimony negates any contention that the bags obstructed her view. Mrs. Frendlich testified that she was looking straight ahead with her attention focused on the open car door when she fell. She stated that she fell because she did not anticipate a second step. She specifically looked for and safely negotiated the first step. Defendant did nothing to divert her attention. Indeed, her husband and family were the ones who had diverted her attention. There was no allegation or evidence that the bags of groceries prevented her from seeing the second step down, which was actually a street curb in plain view in broad daylight. If anything, Mrs. Frendlich's testimony shows that she was contributorily negligent.

Because our decision has mooted defendant's cross-assignment of error, we need not consider it.

The judgment of the trial court is

Affirmed.

Judges WHICHARD and EAGLES concur.

VONNIE RAY MINTZ v. LUTHA D. MINTZ

No. 825DC1070

(Filed 4 October 1983)

Divorce and Alimony § 25.13— improper child visitation order—noncompliance with due process

A trial judge improperly ordered that the mother of a child would be incarcerated upon the father's oral report to the sheriff of her noncompliance with a visitation order since, on its face, the order failed to comply with the due process of law before depriving the mother of her right to liberty.

APPEAL by plaintiff from *Rice, Judge.* Order entered 2 July 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 31 August 1983.

Mitwol and Gillespie by Michael R. Mitwol for plaintiff appellant.

No counsel contra.

BRASWELL, Judge.

This case concerns a domestic confrontation between mother and father over forced visitation of their 11-year-old child with the father. The trial judge had ordered that the mother would be incarcerated upon the father's oral report to the sheriff of her noncompliance with visitation. As a result of that order the plaintiff-mother appeals. The issue before the court is the validity of the trial court's order of 2 July 1982. We hold the order to be invalid and remand for a new hearing.

The matter arose through the defendant-father's motion in the cause in a divorce action which had awarded to the plaintiff-mother custody of their son, Lutha David Mintz, III, and had granted certain visitation rights to the defendant-father. The motion sought to have the plaintiff-mother show cause why she should not be adjudged in contempt for a violation of the visitation portion of the earlier order. In a unique sense, the dispute is not over a right to visitation, or the times, place, or terms of visitation. The mother's position in response to the contempt proceeding, and later in evidence, is that the child refused to visit the father and that she could not make him go. She felt she

"could not force David to go with his dad." She "left it up to him." "[T]his is one decision he makes himself."

The evidence reflects that David is an intelligent, well-behaved, young man, has never made below a "B" in school, has never missed a day of school, and will be in the sixth grade. He had read the divorce papers and court orders himself concerning the award of visitation. For reasons satisfactory to himself, David simply did not want to visit his father, and his mother did not insist on his compliance with the visitation order.

The findings of fact in the challenged order of 2 July 1982 reflect the details of the visitation rights awarded in the order of 12 February 1981, and state that the father has been unable to pick up the son as specified. The father was found to be a person of good character and to be in compliance with all orders entered in the cause. Therefore, no reasons existed as to why the father should not be allowed his visitation rights.

The single, separately listed conclusion of law declared that:

> 1. Defendant, LUTHA D. MINTZ, is legally entitled to be awarded visitation rights with his son, LUTHA DAVID MINTZ, III.

In the final portion of the order, the court set specific hours and days of visitation. Then the judge ordered that:

> c. If defendant goes to plaintiff's residence to pick up his son and his son is not at the home and ready to go with his father, defendant shall remain at plaintiff's residence until seven o'clock p.m. (7:00 p.m.) and thereafter he is hereby directed to take a copy of this Court Order to the Sheriff of New Hanover County and the Sheriff, or any of his Deputies, is hereby ORDERED AND DIRECTED to immediately locate and arrest plaintiff. She shall be placed in the New Hanover County Jail until this matter can be heard by the Court. In the event plaintiff is arrested under the terms of this Order, she may be released upon posting of a ..od [*sic*] and sufficient bond in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS;
>
> d. The Sheriff of New Hanover County is further directed to take custody of the minor child, LUTHA DAVID

MINTZ, III, when and if plaintiff is taken into custody and said minor child shall be turned over to his father by the Sheriff's Department . . . .

The order of 2 July 1982 which might put the mother in jail or require her to post bond mandates a procedure without complying with due process of law. The order contains no provision for notice of alleged violation or opportunity to be heard in advance of incarceration. At least an opportunity to show cause why she did not comply should have been afforded the mother. As worded, the order permits the father to become the instant judge of a willful violation of the court order by his mere oral showing to the sheriff of noncompliance. It is permissive incarceration by action of the father and no due process action by the court that destroys the validity of the order. *See Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975). Conceivably, there are many valid, justifiable reasons which might prevent the mother from turning the child over to the father, such as a sickness of the child or the occurrence of some natural disaster. Nevertheless, under the current order the father still could have had the mother placed in jail on his verbal command.

In all custody or visitation cases the child's best interest is the polestar. *In re Peal*, 305 N.C. 640, 645, 290 S.E. 2d 664, 667 (1982). Here, the order fails to contain any findings that the best interests and welfare of the child would be served by jailing the mother if the child refuses to visit with his father. *See Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967); and *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). This failing in the order also contributes to its invalidity.

As enunciated by our Supreme Court in *Tucker v. Tucker*, *supra*, at 87, 216 S.E. 2d at 5, "[P]arents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and this right may not lightly be denied or interfered with by action of the courts. This right is not absolute, however, and it may be interfered with or denied for substantial and sufficient reasons, and is subject to judicial control when the interest and welfare of the children clearly require it."

If the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or

controlling. *See Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E. 2d 129, 142 (1978); *Kearns v. Kearns*, 6 N.C. App. 319, 325, 170 S.E. 2d 132, 136 (1969); 3 R. Lee, N.C. Family Law § 224 (4th ed. 1981). As to what age is the age of discretion, we feel that the better statement of the law is that found in 42 Am. Jur. 2d *Infants* § 45 (1969):

> The nearer the child approaches the age of 14, the greater is the weight which should be given to the child's custodial preference.
>
> As to when the child is mature and intelligent enough to formulate a rational judgment concerning its welfare, it is generally agreed that in the absence of a statute to the contrary, no specific age is set by law in this regard, but the question depends on the mental capacity, or the mental development, or the intelligence of each child in question.

It remains the duty of the trial judge to determine the weight to be accorded the child's preference, to find and conclude what is in the best interest of the child, and to decide what promotes the welfare of the child.

Although improperly attempted in the present case, a trial judge has the power to make an order forcing a child to visit the noncustodial parent, but only when the circumstances are so compelling and only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child. *See generally, In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971).

Because the order of 2 July 1982 is devoid of sufficient findings of fact and has no conclusions of law to support its dispositive provisions, and because on its face the order fails to comply with the due process of law before depriving the mother of her right to liberty, the order is declared invalid. With regard to future attempts to enforce visitation, as noted in *Furr v. Furr*, 22 N.C. App. 487, 488, 206 S.E. 2d 812, 813, *cert. denied*, 285 N.C.

757, 209 S.E. 2d 281 (1974), if a parent "encounters unreasonable difficulty in exercising his visitation rights, he may apply to the trial judge, who can compel compliance with the order by making it more specific."

Reversed and remanded.

Judges BECTON and JOHNSON concur.

CLAYTON BOWEN TURNER v. THERESA HARTLEY TURNER

No. 8229DC507

(Filed 4 October 1983)

1. **Rules of Civil Procedure § 52— necessity for separate findings and conclusions**

G.S. 1A-1, Rule 52(a)(1) requires that the findings of fact and conclusions of law be stated separately.

2. **Divorce and Alimony § 21.9— equitable distribution of marital property— duties of trial court**

In making an equitable distribution of marital property under G.S. 50-20(c), the trial court must first ascertain what is marital property, then find the net value of that property, and finally make a distribution based upon the equitable goals of the statute and the various factors specified therein.

3. **Divorce and Alimony § 21.9— equitable distribution of marital property—house purchased before marriage**

If a house was purchased by plaintiff before marriage, it was error for the trial court to subject the house, as such, to equitable distribution, since the house was "separate" rather than "marital" property. If, however, an equity in the house developed during the marriage because of improvements or payments contributed to by defendant wife, that equity could be marital property and, if not marital property, would be a factor requiring consideration by the court, along with other factors specified in the statute, in determining how much of the marital property each party is entitled to receive.

4. **Divorce and Alimony § 21.9— equitable distribution of marital property—house and stock—insufficient findings**

The trial court's findings were insufficient to support an equitable distribution of the equity in a house owned by plaintiff husband and shares of stock purchased by plaintiff through his employer. In making an equitable distribution of such property upon remand of this case, the trial court must make findings as to the date plaintiff bought the house; the price of the house, the amount paid down, and the amount of the mortgage on the house;

plaintiff's equity in the house when the parties were married; the amount of the mortgage payments and cost of improvements made on the house during the marriage; the earnings of each party; defendant wife's contributions to either the equity in the house or the family expenses; the wife's contributions, if any, to the purchase of the stock; and the income, means, debts or needs of each party when the divorce occurred.

APPEAL by plaintiff from *Guice, Judge.* Judgment entered 12 February 1982 in District Court, RUTHERFORD County. Heard in the Court of Appeals 17 March 1983.

Plaintiff sued for divorce based upon one year's separation. In her answer, defendant joined in the prayer for divorce and counterclaimed for equitable distribution of marital property. The evidence of record, by no means clear or without contradiction, tends to show the following:

Plaintiff and defendant were married in September, 1976. They resided in a house encumbered by a deed of trust that plaintiff had purchased earlier. About a month before the marriage, plaintiff refinanced the loan on the house in an amount not disclosed by the record, and certain improvements were made to the house at that time. Title to the home was vested solely in plaintiff and he was the sole obligor under the note and deed of trust.

In the months following the marriage, other repairs to the house were made, the cost of which is not clear. Some of the repairs and additions were paid through a loan that both parties signed; others were paid from an insurance settlement for damages to the house, the basis for which, other than that the damage was done by a sheet rock contractor, is not shown.

During the first two years or so of the marriage, plaintiff paid all the household bills. After that until their separation, defendant paid the bills, partly from a biweekly allowance received from plaintiff for that purpose in the amount of $250 -$300, and partly from her own funds. Defendant did most of the housekeeping. During the marraige both parties were regularly employed; plaintiff's salary was substantially higher than defendant's salary; defendant also received intermittant payments from her first husband for the support of a child born of that marriage, but the full payments required of the former husband were not insisted upon by defendant.

When they separated, defendant moved out of the house, and thereafter plaintiff made payments on the deed of trust, as well as on a commercial loan signed by both parties.

Other than the house, the only asset in controversy was a number of shares of stock in plaintiff's employer, Duke Power Company. The stock was purchased by plaintiff under a plan whereby from two to six percent of his salary was deducted from his earnings each pay period and Duke increased whatever was deducted by fifty percent; but the company's contributions did not vest until a three-year waiting period had passed. During 1976, plaintiff's salary was $12,448. Defendant testified without corroboration that plaintiff purchased stock at the rate of $74 per month.

After findings and conclusions referred to in the opinion, it was adjudged that defendant is entitled to one-half the value of the house at the date of the divorce, less the outstanding mortgage balance, and to one-half of the value of the stock acquired during the term of the marriage, and the matter was left open for further evidence as to the values involved.

Arledge, Callahan & Franklin, by Hugh J. Franklin and J. Christopher Callahan, for plaintiff appellant.

George R. Morrow for defendant appellee.

PHILLIPS, Judge.

The findings and conclusions made by the trial court are as follows:

> That the parties were married September 11, 1976 and lived together until October 20, 1980.
>
> That both the plaintiff and defendant were employed during the term of the marriage and that the wife worked at public works and in the home and is entitled to equitable distribution of the property of the plaintiff which she helped acquire.
>
> That the plaintiff has acquired Duke Power stock at the rate of $74.00 per month for his contribution and the wife is entitled to one-half of said stock acquired through the term of the marriage.

That the plaintiff purchased a house one month before the marriage and the same was appraised by Citizens Federal Savings & Loan Association of Rutherfordton at that time and that the defendant has helped pay for same and also improve said house and is entitled to one-half of the equity in said house as of the date of the divorce.

That the defendant shall inquire through subpoena or otherwise as to the number of shares of Duke Power stock owned or to which plaintiff had a beneficial interest as of this date and plaintiff is enjoined from disposing of more than one-half of said stock pending the final hearing in this matter.

That the parties shall have the marital residence appraised by the Citizens Federal Savings & Loan Association of Rutherfordton as to its value as of February 4, 1982 and plaintiff is enjoined from encumbering or conveying same pending the further hearing in this matter.

That said cause shall come on for further hearing before the undersigned at which time both parties may offer additional evidence as to the value of said marital property above described to achieve an equitable distribution.

[1] These findings and conclusions are inadequate or incorrect for several reasons. For one thing, the findings of fact and conclusions of law are not stated separately, as Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires. This requirement is not a mere technicality; it serves a necessary purpose. Only by examining specific findings and conclusions can either the litigants, the trial court, or a reviewing court determine if there has been a correct application of law to fact. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). Nor do the written findings and conclusions "support the determination that the marital property has been equitably divided," as G.S. 50-20(j) directs.

[2] Under G.S. 50-20(c), equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain *what is marital property*, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein. This has not been done in this instance, as a consequence of which the findings and conclusions as to the house and stock are either inadequate or erroneous or both.

[3] If the house was purchased by plaintiff before the marriage, as the finding states, then it was error to subject the house, *as such*, to equitable distribution, since under G.S. 50-20(a)(2), property acquired by a spouse before marriage is "separate," rather than "marital," property. If, however, an equity in this property developed during the marriage because of improvements or payments contributed to by defendant, that equity (as distinguished from a mere increase in value of separate property, excluded by the statute) could be marital property, in our opinion, upon appropriate, supportable findings being made. And if not marital property, such equity, if it developed, would be a factor requiring consideration by the court, along with the other factors specified in the statute, before determining how much of the marital property each party is entitled to receive. The stock also could be marital property if appropriate, supportable findings are made. But the findings made do not support the division ordered.

[4] There are no findings as to: the date plaintiff bought the house, the price, amount paid down, the amount of the mortgage, his equity when they got married; the amount of the mortgage payments and the cost of the improvements made during the marriage; the earnings of each party; her contributions to either the equity in the house or the family expenses; her contributions, if any, to the purchase of the stock; the income, means, debts or needs of each party when the divorce occurred. In undertaking to divide the properties equally and leaving until later an ascertainment of their values, the court put the cart before the horse. Upon remand, these and other pertinent findings required by the circumstances and the statute should be made before any division is ordered. By mentioning some of the findings that this case requires, we do not imply that others are not also needed. After reconsidering the evidence already submitted, receiving such additional evidence as is deemed proper, and otherwise complying with the statutory provisions which govern this proceeding, no doubt the trial court will find it necessary and appropriate to make other findings and conclusions, as well.

Reversed and remanded for additional proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge VAUGHN and Judge BECTON concur.

CITY NATIONAL BANK v. JOE ROJAS

No. 8226DC1090

(Filed 4 October 1983)

Uniform Commercial Code § 31— summary judgment for bank as holder in due course proper

In an action by plaintiff bank to recover monies due from defendant on dishonored personal checks written by defendant on an account which he thereafter closed, the trial court properly entered summary judgment for plaintiff where plaintiff introduced an affidavit establishing good faith to which defendant failed to respond, and where there was no other dispute regarding plaintiff bank's status as a holder in due course. G.S. 21-1-201(19), G.S. 25-3-302, and G.S. 25-3-305.

APPEAL by defendant from *Lanning, Judge.* Judgment entered 26 July 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 1 September 1983.

This is an action by plaintiff bank to recover moneys due from defendant on dishonored personal checks written by defendant on an account which he thereafter closed. Sometime before June 22, 1981, defendant met with Mr. James Watters, an officer of plaintiff bank, to discuss investing in a corporation to be formed by Chuck Majors, allegedly a banking and personal friend of Mr. Watters. Majors' business, Major Industries, Inc., had an account with plaintiff bank.

On June 22, 1981, defendant delivered to Chuck Majors a check in the amount of $2,500.00 allegedly for investment purposes. The check was drawn on defendant's First Union National Bank checking account and payable to Major Industries. The check was deposited into Major Industries' checking account with plaintiff bank. Shortly thereafter, several checks drawn on the Major Industries' account were presented and paid by plaintiff bank. Payment of these checks exhausted the balance of the Major Industries' account at plaintiff bank including the $2,500.00 on

deposit from the defendant's check. Plaintiff bank presented the defendant's check for $2,500.00 payable to Major Industries to First Union for payment, but the check was returned for insufficient funds.

When defendant was notified that his $2,500.00 check had been returned, he delivered to plaintiff bank three checks drawn on his First Union account and payable to plaintiff bank in the amounts of $700.00 (dated July 8, 1981), $700.00 (dated August 10, 1981), and $1,100.00 (dated September 10, 1981). Defendant's first check for $700.00 was presented to and paid by First Union. Sometime later but before August 11, 1981, defendant closed his checking account at First Union. Upon presentment the two remaining checks were returned to plaintiff bank unpaid.

Plaintiff bank instituted this action to recover $1,800.00 for the two unpaid checks. Defendant cross-claimed to recover $700.00 for the check that was paid, alleging that Watters induced him to invest in Majors' corporation. On July 28, 1982, plaintiff's motion for summary judgment was granted and defendant's counterclaim was dismissed. From a judgment for $1,800.00 plus costs, defendant appeals.

Dorian H. Gunter, for plaintiff-appellee.

Larry Thomas Black, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in granting summary judgment on plaintiff's complaint and in dismissing defendant's counterclaim. We disagree.

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). For a moving party's motion for summary judgment to be granted, the movant must produce a forecast of evidence which is sufficient, if considered alone, to compel a verdict in his favor as a matter of law. Failure of the non-moving party to counter the effect of the movant's forecast by his own forecast of evidence will result in a

judgment against him. *Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 618, 262 S.E. 2d 651, 654 (1980).

Defendant contends that there is an issue of fact concerning plaintiff bank's "good faith," which is necessary to establish the bank's status as a holder in due course of the $2,500.00 check. To qualify as a holder in due course, plaintiff bank must have been a holder who took the check for value, in good faith, and without notice that it was overdue, had been dishonored, or of any defense against or claim to it. G.S. 25-3-302. If the plaintiff bank was a holder in due course, then it took the check free of all claims to it by any person and free of all defenses of any party to the check (except for real defenses, which do not apply here). G.S. 25-3-305. In its pleadings and affidavits, plaintiff bank presented a forecast of evidence which when considered alone, would compel a verdict in its favor as a matter of law. Defendant then was required to produce a forecast of evidence to show a genuine issue of fact concerning plaintiff bank's status as a holder in due course of the $2,500.00 check. If defendant failed to do so, plaintiff bank took the check free of all claims and defenses, and summary judgment would have been properly granted.

Regarding plaintiff bank's status as a holder in due course, defendant questions only the issue of good faith. A bank has exercised good faith if it has exercised honesty in fact in the conduct or transaction concerned. G.S. 25-1-201(19). In support of its motion for summary judgment, plaintiff bank produced the affidavit of James Watters, showing that Mr. Watters acted as a representative of the bank "for the purpose of representing to the defendant Major Industries' financial position." Mr. Watters gave defendant "the full benefit of any knowledge (he) had with respect to the financial position of Major Industries." Defendant produced no affidavits or other forecast of evidence to rebut plaintiff's forecast. Defendant relied on allegations in his answer that Mr. Watters, a bank officer, "by reason of his fiduciary relationship with the defendant persuaded and induced defendant" to invest in Majors' corporation and that Majors was a "banking and personal friend of Mr. Watters." There were no allegations of bad faith and no forecast of evidence presented by defendant that plaintiff bank failed to exercise honesty in fact in this transaction.

To rebut the movant's claim that there is no genuine issue of material fact presented, the non-moving party may not rest on

the allegations of his pleadings, but must, by affidavits or otherwise, set forth specific facts to show that there is an issue for trial. *Cockerham*, 44 N.C. App. at 618, 262 S.E. 2d at 654. Defendant failed to respond to plaintiff bank's forecast of evidence with his own forecast and instead rested on the allegations of his pleadings. Defendant failed to set forth specific facts to show that there was a genuine issue as to plaintiff bank's good faith. Since there was no genuine issue of material fact as to good faith and there were no other facts in dispute regarding plaintiff bank's status as a holder in due course, plaintiff bank took the check as a holder in due course free of all claims and defenses (except real defenses) as a matter of law. Summary judgment against defendant and dismissal of defendant's counterclaim were properly granted.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. TERRY SAUNDERS

No. 8214SC1010

(Filed 4 October 1983)

1. **Narcotics § 3.1— familiarity with defendant's residence**

In a prosecution for the sale of a controlled substance, an officer was properly permitted to testify that he was familiar with defendant's residence and that he knew defendant lived there.

2. **Narcotics § 3.1— testimony concerning investigation of defendant's residence**

An officer's testimony that he began an investigation of defendant's residence after learning from confidential, reliable sources of drug activities at such residence was not hearsay and was properly admitted to explain the officer's subsequent conduct in setting up a drug buy from defendant at the residence.

3. **Criminal Law § 122.1— questions by jury—instructions by court—no expression of opinion**

Where the jury in a prosecution for the sale of a controlled substance returned to the courtroom during deliberations and asked (1) how defendant discovered he was under arrest, (2) whether the person who made the drug buy had been accepted into the police academy prior to the buy, and (3) to

have defendant stand up and smile, the trial court did not express an opinion in instructing the jury that such questions had no bearing on the jury's task of determining the credibility of the witnesses and whether their testimony showed beyond a reasonable doubt that defendant was guilty. G.S. 15A-1232.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 3 June 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 29 August 1983.

Defendant was charged with selling or delivering a controlled substance. The State's evidence tended to show: Upon request from Officer J. T. Muse, an Investigator with the Durham Vice Narcotics Division, Ms. Beverly Council, a recruit to the Public Safety Academy, went to defendant's residence in order to purchase the drug, Phenmetrazine. Defendant sold her a pill, which proved, after analysis, to be Schedule II controlled substance, Phenmetrazine. Defendant stipulated to this fact.

From a jury verdict convicting defendant, defendant appeals.

Attorney General Edmisten, by Associate Attorney Newton G. Pritchett, Jr., for the State.

B. Frank Bullock, for the defendant appellant.

VAUGHN, Chief Judge.

[1] On direct examination, Officer Muse testified that he was familiar with defendant's residence and that he knew defendant lived there. Defendant contends this evidence was improperly admitted in that the State did not lay a proper foundation. We find no merit in defendant's contention. There is nothing in the record to indicate that the Officer's testimony was not based on personal knowledge. Defendant had an opportunity to cross-examine Officer Muse regarding such stated facts and did not do so.

In cases involving disputes over land ownership, we have held that a witness may testify as to another's possession of a tract of land so long as the witness is subject to cross-examination. *See Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3 (1937); *Bryan v. Spivey,* 109 N.C. 57, 13 S.E. 766 (1891). The same principles apply here. Furthermore, Officer Muse's testimony was properly admitted for purposes of explaining the subsequent conduct of Officer Muse and Ms. Council. *See State v. Johnson,* 176 N.C. 722, 97 S.E. 14 (1918).

[2] Officer Muse testified further on direct examination that he began an investigation of defendant's residence after learning from confidential, reliable sources of drug activities at such residence. Defendant excepts to this testimony as inadmissible hearsay. We disagree.

Hearsay is the assertion of any person, other than that of the witness himself in his present testimony, offered to prove the truth of matter asserted. If offered for any other purposes, it is not hearsay. 1 Brandis on North Carolina Evidence § 138 (1982) (and cases cited therein). Officer Muse's testimony was not offered to prove that drug activities were being conducted at defendant's residence. Rather, it was offered to explain the Officer's subsequent conduct in setting up the drug buy between defendant and Ms. Council. "The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement is made." *State v. White*, 298 N.C. 430, 437, 259 S.E. 2d 281, 286 (1979); *see also State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

[3] After trial, the judge properly instructed the jury regarding the evidence presented and law to apply. The jury deliberated and then returned to the courtroom with three questions. The jury asked: (1) how the defendant discovered he was under arrest; (2) whether Ms. Council had been accepted into the police academy prior to the incident in question; and (3) if the defendant would stand up and smile. The judge responded, we think properly, that these questions had no bearing on the jury's task of determining the credibility of the witnesses who testified and whether their testimonies showed beyond a reasonable doubt that defendant was guilty.

Defendant contends that the judge's remarks reflected a biased opinion in violation of G.S. 15A-1232. Defendant's contention is without merit.

G.S. 15A-1232 states: "In instructing the jury, the judge must declare and explain the law arising on the evidence. *He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence.* He must not express an opinion whether a fact has been proved." (Emphasis added.)

Answers to the jury's questions were unnecessary in order to apply the law to the evidence. The trial judge was impartial regarding the substantive elements in this case. In short, defendant received a fair jury trial. *See State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. McBryde*, 270 N.C. 776, 155 S.E. 2d 266 (1967). We do not find the judge's refusal to answer the jury's questions pertaining to evidence extraneous to the charges nor his remarks regarding the pertinence of such evidence to be prejudicial to defendant. *See State v. Cox*, 6 N.C. App. 18, 169 S.E. 2d 134 (1969).

A judge is "not required to instruct the jury as to evidentiary matters essentially 'subordinate,' i.e., those which do not relate to the elements of the crime charged or to defendant's criminal responsibility." *State v. Ward*, 300 N.C. 150, 155, 266 S.E. 2d 581, 585 (1980). The trial judge used proper discretion. Defendant failed to prove he was prejudiced by the use of such discretion.

In his last Assignment of Error, defendant charges that the trial court erred in denying defendant's motion to set aside the verdict as contrary to the evidence. Defendant's charge is without merit. "A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of abuse of that discretion." *State v. Boykin*, 298 N.C. 687, 702, 259 S.E. 2d 883, 892 (1979), *cert. denied*, 446 U.S. 911 (1980). Here, there was no abuse of discretion. The record indicates substantial evidence warranting submission of the case to the jury. The jury reviewed the State's evidence and returned a verdict for the State.

No error.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. BRUCE WAYNE THOMPSON

No. 823SC1298

(Filed 4 October 1983)

Criminal Law § 138— sentencing hearing—aggravating factors incorrectly considered

In a prosecution where defendant pled guilty to breaking or entering and uttering a forged check, the trial court erred in considering as an aggravating factor that the offense was committed for pecuniary gain since there was no evidence that defendant was hired to commit either the breaking or entering offense or that he was hired to utter forged checks. Nor was there any evidence that he was paid by another to commit any of these offenses. G.S. 15A-1340.4(a)(1)c; G.S. 15A-1444(a1).

APPEAL by defendant from *Tillery, Judge.* Judgment entered 19 August 1982 in Superior Court, PITT County. Heard in the Court of Appeals 21 September 1983.

Attorney General Edmisten by Associate Attorney Floyd M. Lewis for the State.

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

BRASWELL, Judge.

The defendant received one consolidated judgment with active sentence of 10 years' imprisonment upon pleas of guilty in two groups of cases. One group consisted of the first breaking or entering case, a Class H felony, consolidated with the first uttering of forged check case, a Class I felony. The second group contained one breaking or entering count and two uttering of forged checks. Under his arrangement for consolidation there was a potential maximum of twenty years' imprisonment. The presumptive sentence under the Fair Sentencing Act, G.S. 15A, Article 81A, for breaking or entering is 3 years, and for uttering a forged check is 2 years. Because the sentence imposed was in excess of the presumptive sentence of the greater of the two groups of offenses upon being consolidated for judgment, the defendant exercised his right of appeal under G.S. 15A-1444(a1).

The issue on appeal contests the sufficiency of the evidence at the sentencing stage to support the trial court's finding as ag-

gravating factors that the offenses were committed for pecuniary gain and that the defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement. Our standard of review is established by G.S. 15A-1444(a1): "whether his sentence is supported by evidence introduced at the trial and sentence hearing."

The evidence shows that in the first breaking or entering case an Akai reel-to-reel tape player valued at $500 was stolen. It was recovered in working order. In the second breaking or entering case an RCA color television set was stolen and was subsequently recovered. [The indictment (without any proof in the evidence) alleged the value of the set to be $300.] The forged checks which were uttered were for $125, $75, and $159, for a total of $359. By addition, the outside maximum money for all property for consideration as pecuniary gain to the defendant totaled $1159.

In orally announcing the basis for the sentence, the trial judge used the word "financial" instead of "pecuniary" gain. The expression was: "The Court, in passing judgment . . . takes into account the fact that these crimes were committed for financial gain." On the standard judgment form for the listing of aggravating factors the block as checked reads: "The offense was committed for hire or pecuniary gain."

What does "pecuniary gain" mean? In its filing on 9 August 1983 of *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), our Supreme Court definitively answers the question by holding that it means the defendant must have been hired or paid to commit the offense. The court's reasoning includes that G.S. 15A-1340.4(a)(1)c., as amended by 1983 N.C. Sess. Laws Ch. 70, effective 1 October 1983 which will be applied retroactively, eliminates "pecuniary gain" and inserts "[t]he defendant was hired or paid to commit the offense." In answering this question, the Supreme Court in *Abdullah* examined and accorded great weight to our court's decision in *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), which had concluded that "if the pecuniary gain at issue in a case is *inherent in the offense*, then that 'pecuniary gain' should not be considered an aggravating factor." *Id.* at 161-62, 296 S.E. 2d at 313 (emphasis added in *Abdullah*).

In looking to the evidence in the case before us we fail to find any evidence that the defendant was hired to commit either breaking or entering offense or that he was hired to utter forged checks. Also, there was no evidence that he was paid by another to commit any of these offenses. The evidence fails to support the finding of the use of the aggravating factor "pecuniary gain" to support the enhanced sentence, and its use by the trial judge constitutes an abuse of discretion in the sentencing process.

Although there were multiple offenses to which the defendant pled guilty, the judgment reflects only one consolidated grouping into one form for all aggravating factors. They were not separated as required by *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), which held "that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, *each offense, whether consolidated for hearing or not, must be treated separately*, and separately supported by findings tailored to the individual offense and applicable only to that offense." *Id.* at 598, 300 S.E. 2d at 698 (emphasis added). Also, *Ahearn* cautions, as do we, that judges should eliminate, by marking out or otherwise obliterating those portions of the AOC form judgments that are inapplicable to the particular findings of factors, either aggravating or mitigating, in each case. *Id.* at 599, 300 S.E. 2d at 698.

Since there must be a new sentencing hearing because of the erroneous use of the aggravating factor of pecuniary gain, we treat lightly the additional issue raised by defendant in his addendum to brief and supplemental argument. The claimed error was that the aggravating factor of prior conviction of more than 60 days is not supported by the record on appeal. The record is silent as to whether at the time of the conviction, or convictions, the defendant was indigent, or represented by counsel, or whether he had waived counsel. In the addendum to its brief, the State would add to the record on appeal that the defendant had convictions of unauthorized use of a motor conveyance and felonious breaking or entering, that the defendant was represented by counsel, and that the defendant's counsel for his prior convictions was the same counsel who represented him in his trial below. (We note that on appeal the defendant was given different counsel.) Perhaps this problem tends to show the wisdom of the 1983 Leg-

islature in amending G.S. 15A-1340.4(e) and in creating G.S. 15A-980, N.C. Sess. Laws Ch. 513, effective 1 October 1983. The amendment requires the defendant at the trial level to move to suppress the use of convictions he deems improper or any objection to the use of these convictions will be waived. Given the Supreme Court's legislative interpretation of and retroactive application of G.S. 15A-1340.4(a)(1)c. as amended in 1983, and as discussed in *Abdullah* we feel this issue on the use of prior convictions will not arise again in this case. This view appears to be consistent with *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

Although the defendant did not object at trial to the court's finding or use of any aggravating factor, we conceive that under G.S. 15A-1446(d)(5) a defendant may still raise on appeal the question of the sufficiency of the evidence by an appropriate question in his brief, as was done in this case. Rule 10(a), N.C. Rules App. Proc. Here, the evidence is insufficient to support the findings of fact as a matter of law. The record, however, does show substantial evidence of the elements of each offense in support of his plea of guilty.

We hold that the case must be remanded for a new sentencing hearing only.

Remanded.

Judges BECTON and JOHNSON concur.

JOHN SHERMAN CRISP, CHARLES ALLEN CRISP, ROBERT FORREST CRISP, AND CLIFFORD EUGENE CRISP v. J. E. BENFIELD AND WIFE, BERTHA BENFIELD, GERALD BENFIELD AND WIFE, NORA BENFIELD

No. 8225SC1117

(Filed 4 October 1983)

1. **Adverse Possession § 1— requirement of actual possession**

Actual possession is a required element of adverse possession.

2. **Adverse Possession § 1— meaning of adverse possession**

In order to constitute adverse possession, the possession must constitute an exercise of dominion over the land, making the ordinary use and taking the

ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment.

3. Adverse Possession § 25.2— color of title—actual possession in another

Defendant did not acquire title to land by adverse possession where the evidence showed that, although he had color of title, defendant did not actually possess the land in question but that actual possession was by defendant's son who had no color of title and was not acting as agent for defendant.

APPEAL by plaintiffs John Sherman Crisp, Charles Allen Crisp, and Robert Forrest Crisp from *Snepp, Judge.* Judgment entered 17 June 1982 in CALDWELL County Superior Court. Heard in the Court of Appeals 20 September 1983.

Plaintiffs, sons of Forrest C. Crisp and Ethel Crisp, brought suit to clear title and recover possession of land they inherited from their parents. Forrest C. Crisp died intestate on 14 September 1962; Ethel Crisp died intestate on 24 November 1965. Forrest C. Crisp had owned and possessed the land in question during his life. None of the plaintiffs lived on the land.

Defendant Gerald Benfield has lived on the land since 25 February 1964. On that date his father, defendant John Edward Benfield, purchased a deed for the property at a sheriff's sale. The deed was recorded with the Caldwell County Register of Deeds. John Edward Benfield later discovered his deed was void, and he successfully sued the sheriff for a refund of his purchase money.

Although John Edward Benfield never lived on the property, he did attempt to deed it to his son, Gerald Benfield. That attempt failed when the Benfields' attorney discovered they did not have good title. The deed from John Edward Benfield to Gerald Benfield was never recorded. Gerald Benfield continued to live on the land and did some work for his father, but he never paid monetary consideration for use of the land.

William Joseph Crisp, brother of Forrest Crisp, also lived on the land in dispute, having been there since 1953, when Forrest Crisp had given him oral permission to live there for the rest of his life.

All the plaintiffs were minors when Forrest and Ethel Crisp died, John Sherman Crisp being born on 14 September 1954;

Charles Allen Crisp on 12 May 1956; Robert Forrest Crisp on 23 May 1959; and Clifford Eugene Crisp on 7 April 1962.

At the close of plaintiffs' evidence, defendants moved for a directed verdict. The trial court held that plaintiffs' evidence established adverse possession for more than seven years under color of title by defendant John Edward Benfield. The trial court also found that Clifford Eugene Crisp, unlike his brothers, brought suit within three years of attaining his majority, so under G.S. 1-17(a)(1) defendants' adverse possession did not bar recovery on his share of the property. From judgment on the motion dismissing the action as to John Sherman Crisp, Charles Allen Crisp, and Robert Forrest Crisp, and awarding a one-quarter undivided interest in the lands to Clifford Eugene Crisp, plaintiffs John Sherman Crisp, Charles Allen Crisp, and Robert Forrest Crisp appealed.

Ted S. Douglas for plaintiffs.

Beal and Mu, P.A., by Beverly T. Beal, for defendants.

WELLS, Judge.

In ruling on a motion for a directed verdict under G.S. 1A-1, Rule 50 of the North Carolina Rules of Civil Procedure, the trial court must consider all the evidence in the light most favorable to the party opposing the motion. *Norman v. Banasik*, 304 N.C. 341, 283 S.E. 2d 489 (1981). The party claiming title by adverse possession has the burden of proof on that issue. *State v. Brooks*, 275 N.C. 175, 166 S.E. 2d 70 (1969). Therefore, defendants' motion for a directed verdict could properly be granted only if the evidence, taken in the light most favorable to the plaintiffs, proved as a matter of law that the defendants were entitled to the property by virtue of adverse possession.

Defendants argue that John Edward Benfield's color of title in combination with Gerald Benfield's actual possession in excess of seven years was adequate for adverse possession under G.S. 1-38. The trial court agreed, finding that John Edward Benfield acquired adverse possession by being in possession through his son. The trial court specifically stated that there was no evidence that the son entered the land as an agent for his father. Instead, the elder Benfield had "turned it over to his son."

Under G.S. 1-38, adverse possession rights vest "[w]hen a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years . . . ."

[1, 2] Actual possession is a required element of adverse possession. "In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others." *Mizzell v. Ewell*, 27 N.C. App. 507, 219 S.E. 2d 513 (1975); *see also Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969). Our Supreme Court has interpreted "possession" to mean " 'that the adverse claimant should either possess it in person or by his . . . servants or tenants . . . .' " *Cothran v. Akers Motor Lines, Inc.*, 257 N.C. 782, 127 S.E. 2d 578 (1962) *quoting Grant v. Winborne*, 3 N.C. (2 Hayw.) 56 (1978). The adverse possession must constitute an exercise of dominion over the land, making the ordinary use and taking the ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment. (Citations omitted.) *Mallet v. Huske*, 262 N.C. 177, 136 S.E. 2d 553 (1964).

[3] The evidence in this case, viewed in the light most favorable to plaintiffs, *see State v. Brooks, supra*, tends to show that John Edward Benfield, though having color of title, did not actually possess the land in question, and that the actual possessor, Gerald Benfield, had no color of title. For these reasons, the judgment of the trial court must be and is

Reversed.

Judges ARNOLD and EAGLES concur.

CITY OF WILMINGTON v. HARRY L. FORDEN

No. 825DC1144

(Filed 4 October 1983)

Taxation § 45— action for possession of property—tax foreclosure proceeding

The trial judge erred in granting summary judgment for plaintiff city on the issue of right to immediate possession of certain property which allegedly had been purchased at a tax foreclosure proceeding since nothing in the record, other than the unsupported allegations of plaintiff, showed that the tax foreclosure proceedings were properly conducted so as to accomplish a valid transfer of title.

APPEAL by defendant from *Rice, Judge.* Judgment entered 23 June 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 22 September 1983.

Plaintiff-city brought this action for possession of real property and to recover the fair rental value of the property with interest dating from the alleged passage of title. The evidence tends to show that defendant's ownership of the property in question was uncontroverted until 29 October 1979, at which time the plaintiff claims to have acquired an interest in the property through purchase at a tax foreclosure proceeding. On or about 6 August 1981 plaintiff learned defendant was in possession of the property, and on 22 October 1981 the plaintiff filed a complaint seeking immediate possession of the property as well as its fair rental value from and after 29 October 1979.

On 23 June 1982 the court granted summary judgment for plaintiff on the issue of right to immediate possession of the property, ordered that defendant be removed from the property, and held that plaintiff was entitled to recover from defendant $6,691.94, having found this to be the fair rental value of the property with interest, computed from 29 October 1979. Defendant appealed.

Laura E. Crumpler for the plaintiff, appellee.

Ernest B. Fullwood for the defendant, appellant.

HEDRICK, Judge.

Defendant contends that summary judgment for the plaintiff was inappropriate. He argues that plaintiff failed to make out a prima facie case for ejectment.

The general rule is that "a purchaser at an execution sale . . . is entitled to recover in ejectment against the debtor, whose estate he has bought, upon showing a judgment, execution, and sheriff's deed." 25 Am. Jur. 2d, *Ejectment* Sec. 30 (1966). In North Carolina the rule is well-settled that in an action of ejectment to try title plaintiff must prove his title:

> Plaintiffs in ejectment may not rely on the weakness of defendant's title, but must rely on the strength of their own title, and upon denial of plaintiffs' title in the answer, plaintiffs have the burden of showing title in themselves good against the world, . . . and defendant's wrongful possession.

5 N.C. Index 3d, *Ejectment* Sec. 8.1 (1977). Our Supreme Court discussed proof of title based on a tax foreclosure in *Shingleton v. Wildlife Commission*, 248 N.C. 89, 102 S.E. 2d 402 (1958): "Plaintiff . . . offers a deed to himself from a commissioner, purporting to act under authority of judgment in a tax foreclosure proceeding. But the judgment roll in such proceeding is not offered in evidence. This creates a break in plaintiff's chain of title." *Id.* at 92, 102 S.E. 2d at 404.

In support of its motion for summary judgment plaintiff offered as evidence an allegation in the complaint that it had purchased the property in question at a tax foreclosure sale. Plaintiff reiterated this allegation in an affidavit filed by the City Real Estate Officer, who stated:

> That on or about November 19, 1979, he received correspondence from Mr. Larry Powell, Tax Administrator for New Hanover County indicating the results of an Execution of Sale of Property conducted by the Sheriff's Department of New Hanover County pursuant to N.C.G.S. 105-376. Among the properties listed as having been purchased by the City of Wilmington and New Hanover County were two parcels of real property, one of which prior to the sale date of October 29, 1979 was owned by Harry L. Forden, Sr. and located at 912 North Tenth Street, and the other was owned by Harry

L. Forden, Sr. and wife, Bertha Forden and located at 816 North Fourth Street.

Finally, the City submitted as evidence two documents labeled "Sheriff's deed" that purported to convey the property to the plaintiff. In opposition to plaintiff's motion defendant filed an affidavit that was nothing more than a reiteration of the general denial contained in his answer.

Plaintiff, in order to establish its right to possession of the property, had first to establish its title. This it has failed to do. Nothing in this record, other than the unsupported allegations of plaintiff, shows that the tax foreclosure proceedings were properly conducted so as to accomplish a valid transfer of title. Therefore, plaintiff has failed to carry its burden showing no genuine issues of material fact. Faced with defendant's general denial, plaintiff had the burden of demonstrating the validity of the proceedings on which its relies for title. Because plaintiff made no such demonstration, summary judgment for plaintiff was inappropriate and must be reversed and the cause remanded for further proceedings.

Our decision that summary judgment for plaintiff was inappropriate as regards its right to possession of the property makes it unnecessary for us to discuss the question of damages; we point out, however, that the issue of damages would not, under the circumstances of this case, ordinarily be a proper subject for summary adjudication.

Reversed and remanded.

Judges WEBB and HILL concur.

JOHN WOODRUFF v. VAN MILLER, JR.

No. 8223DC975

(Filed 4 October 1983)

1. **Rules of Civil Procedure § 50.4— judgment n.o.v.—when allowed**

Judgment notwithstanding the verdict should be entered for a defendant only when the evidence in its most favorable light to the plaintiff fails to establish an essential element of the claim asserted.

2. **Trespass § 2— elements of intentional infliction of mental distress**

The elements of intentional infliction of mental distress are (1) extreme and outrageous conduct, (2) which is intended to cause severe emotional distress, and (3) which does cause severe emotional distress.

3. **Trespass § 2— intentional infliction of mental distress—sufficiency of evidence**

Plaintiff's evidence was sufficient to support the jury's verdict finding that defendant intentionally inflicted mental distress upon plaintiff where it tended to show that defendant was hostile to plaintiff school superintendent because he had lost two bitterly contested lawsuits with plaintiff involving the disputed ownership and use of land; defendant discovered that, thirty years earlier, as a result of a prank plaintiff participated in with other college boys, plaintiff pled *nolo contendere* to aiding and abetting a service station break-in; defendant obtained from the clerk of court copies of the warrant, bond, preliminary hearing order, indictment, and prayer for judgment continued in plaintiff's case; defendant posted a copy of these papers on the "wanted" board of a post office, and when the postmaster disputed his right to post the papers, defendant compared plaintiff with unapprehended criminals who were sought for stealing; defendant approached one of the county's leading citizens at a service station and had him read a copy of the papers; several other copies of the papers were shown to teachers and students at a local high school; after learning about these occurrences, plaintiff could not sleep, was anxious, embarrassed, and humiliated, and had indigestion and internal bleeding because of a pancreatic condition which is aggravated by stress; and about two weeks after posting the papers in the post office, defendant expressed delight to the postmaster that plaintiff was having trouble sleeping.

APPEAL by plaintiff from *Kilby, Judge.* Judgment entered 6 May 1982 in District Court, ALLEGHANY County. Heard in the Court of Appeals 23 August 1983.

Plaintiff sued defendant for slander and intentional infliction of mental distress.

Plaintiff's evidence indicated the following: He has been superintendent of Alleghany County schools for seventeen years

and for many years before that was a high school principal or teacher. Defendant, hostile to plaintiff because of two bitterly contested lawsuits between them which defendant lost, involving the disputed ownership and use of land, discovered that thirty years earlier, as a result of a prank participated in with some other college boys, plaintiff was indicted in Orange County for aiding and abetting a service station break in, pleaded *nolo contendere* thereto, and paid the costs. From the clerk of court defendant obtained copies of the warrant, bond, preliminary hearing order, indictment, and prayer for judgment continued, requiring plaintiff to pay the costs and periodically report his good behavior to the court; defendant posted a copy of these papers in the Laurel Springs post office, on the "Wanted" board alongside posters for unapprehended criminals, and told the Postmaster, "[T]he rogue is still stealing and I intend to put a stop to it." When the Postmaster disputed his right to post the papers, defendant stated that since "Wanted" posters were put up for the federal government for persons stealing, then a "Wanted" poster should be put up for him, too. Shortly thereafter, defendant approached one of the county's leading citizens at a service station and had him read a copy of the papers. When that man told defendant he didn't approve of that kind of thing and "We all made mistakes when we was [sic] young," defendant declared, "I've got him now." Several other copies of the papers were seen by teachers and students at different places in the building and on the grounds of Alleghany High School.

After learning about these occurrences, plaintiff could not sleep, was anxious, embarrassed, and humiliated; he had indigestion and internal bleeding because a pancreatic condition he has had for a long time is aggravated by stress. About two weeks after posting the papers on the "Wanted" board in the post office, defendant told the Postmaster, "I hear that John Woodruff does not sleep well at night because he has been into so many things." About a week after that defendant stated to the Postmaster, "If John Woodruff has lost a half million dollars sleep for all the things he says he hasn't done, it would add up to a million for the things he has done." Two other prominent Alleghany citizens, one a former member of the County Board of Education and the other a schoolteacher, participated in the same college days' misconduct that plaintiff did, but neither defendant nor anyone else had ever circulated copies of their records.

Defendant offered no evidence.

The jury found that defendant had not slandered plaintiff, but that he had intentionally inflicted mental distress upon him, and awarded plaintiff $1 in compensatory damages and $20,000 in punitive damages. Judgment notwithstanding the verdict was entered for the defendant by the court.

Dan R. Murray for plaintiff appellant.

No brief filed for defendant appellee.

PHILLIPS, Judge.

[1-3] Judgment notwithstanding the verdict should be entered for a defendant only when the evidence in its most favorable light to the plaintiff fails to establish an essential element of the claim asserted. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981). The elements of intentional infliction of mental distress are (1) extreme and outrageous conduct, (2) which is intended to cause severe emotional distress, and (3) does cause severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). The record contains plenary evidence as to each of these elements, and under our system, therefore, the plaintiff's rights and the defendant's liability were for the jury to decide, not the court. Thus, the judgment to the contrary must be and is set aside.

That defendant's conduct, as recorded, was intended to cause plaintiff severe mental distress and in fact did so is so obviously inferable, it need not be discussed; and that defendant's conduct was extreme and outrageous is equally plain.

So far as the evidence reveals: At the time defendant acted, plaintiff's record was not being considered or reviewed by any person or agency for any reason or purpose; no one but defendant was then interested in plaintiff's background, and defendant's concern was only because of animosity and spite. Defendant's consuming animus against the plaintiff, the lengths he went to in getting copies of the records, the truculent, vindictive methods used in circulating them, the outrageous comparison of a minor transgressor, who long since paid his debt to society, to dangerous criminals that have escaped apprehension, his delight in the plaintiff being unable to sleep, all indicate a calculated, persistent plan to disturb, humiliate, harass, and ruin plaintiff for no

purpose but defendant's own spiteful satisfaction. Fortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous—rather than normal and acceptable—and that our law provides an orderly way for the community to disapprove of it and compensate those victimized by it.

Reversed and remanded with instructions to enter judgment on the verdict as rendered by the jury.

Reversed and remanded.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA EX REL. JOSEPH W. GRIMSLEY, SECRETARY, NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT v. P. K. BUCHANAN, SR. AND WIFE, MARTHA I. BUCHANAN

No. 8211SC1003

(Filed 4 October 1983)

Administrative Law § 8— failure to seek administrative review—judicial review limited

In an action instituted to collect a penalty for a violation of the Sedimentation Pollution Control Act and to compel compliance with the Act, where defendants informed plaintiff by letter that they did not wish to contest the assessment in an administrative hearing, defendants waived their exclusive means by which to obtain judicial review and the determination of a violation and assessment of a penalty is final. G.S. 113A-50 through -66, G.S. 113A-64(a)(2), and G.S. 113A-54(b).

APPEAL by defendants from *Britt (Samuel E.), Judge.* Judgment entered 26 August 1982 in Superior Court, LEE County. Heard in the Court of Appeals 24 August 1983.

Defendants appeal from allowance of plaintiff's motion for summary judgment in a civil action to collect a penalty for violation of the Sedimentation Pollution Control Act and to compel compliance with the Act.

Attorney General Edmisten, by Assistant Attorney General G. Criston Windham, for the State.

Cameron & Hager, P.A., by Richard B. Hager, for defendant appellants.

WHICHARD, Judge.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *see also Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E. 2d 400, 403 (1972); *Carr v. Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E. 2d 374, 376 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981). The party moving for summary judgment has the burden of making a prima facie showing that no genuine issue of fact exists. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E. 2d 205, 209 (1980). When this occurs, the opposing party must come forward with evidence in opposition, and cannot merely rely on general denials in the pleadings. *Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E. 2d 595, 598 (1980).

Here, plaintiff's representatives inspected defendants' property for possible violations of the Sedimentation Pollution Control Act, G.S. 113A-50 to -66. Plaintiff notified defendants that they were in violation of the Act, and specified the necessary corrective measures. Defendants, in response, submitted and implemented an acceptable erosion control plan. A subsequent inspection, however, revealed that the corrective measures were no longer effective.

Plaintiff then sent defendants a second notice stating that they were in violation of the Act and specifying the necessary corrective measures. The notice also stated that if corrective measures were not begun within ten days, plaintiff would assess a civil penalty against defendants. Defendants did not take corrective measures, and plaintiff notified them of assessment of a civil penalty in the amount of $2,310.00.

The notification informed defendants that they must, within thirty days of receipt of the notice, either pay the penalty or re-

quest in writing an administrative hearing to contest the assessment. Defendants did neither. Instead, defendants' attorney informed plaintiff by letter that defendants did not wish to contest the assessments in an administrative hearing. Pursuant to G.S. 113A-64(a)(2), plaintiff referred the matter to the Attorney General for institution of a civil action to recover the penalty and compel compliance with the Act. The Attorney General then instituted this action.

Plaintiff, relying on its verified complaint and exhibits attached thereto from the administrative proceedings, filed a motion for summary judgment alleging that the failure to request an administrative hearing within the time provided by law constituted a waiver of the right to challenge the validity of the determination of a violation and assessment of a penalty. Defendants filed a response contending that the General Assembly did not provide an effective administrative remedy in the Act and did not empower the Sedimentation Pollution Control Commission to do so under the grant of rulemaking authority contained in G.S. 113A-54(b). The trial court granted the motion, and defendants appeal.

When the legislature has established an effective administrative remedy, that remedy is exclusive. *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E. 2d 12, 15 (1970); *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 262, 174 S.E. 2d 292, 294, *cert. denied*, 277 N.C. 117 (1970). The legislature has given the Sedimentation Control Commission the power to adopt rules and regulations pursuant to Article 2 of Chapter 150A, the Administrative Procedure Act. G.S. 113A-54(b) (Cum. Supp. 1981). The regulations adopted pursuant to this authority provide for an adjudicatory hearing to contest a civil penalty assessment. 15 NCAC 4C.0008. This hearing must be conducted in accordance with the Contested Case Hearing Procedures. *See* 15 NCAC 1B.0202. The party aggrieved by the final agency decision can appeal to the Superior Court of Wake County. G.S. 150A-43, -45. "When the statute under which an administrative [body] has acted provides an orderly procedure for an appeal to the superior court for review of the [body's] action, this procedure is the exclusive means for obtaining such judicial review." *Snow v. Board of Architecture*, 273 N.C. 559, 570-71, 160 S.E. 2d 719, 727 (1968).

Since there was an exclusive means by which to obtain judicial review, and defendants chose not to pursue it, the determination of a violation and assessment of a penalty is final. This civil action is for the purpose of collecting a penalty and compelling compliance with the Act. It is "not one for review of a final agency decision." *Lee v. Williams*, 55 N.C. App. 80, 83, 284 S.E. 2d 572, 575 (1981). Having elected not to pursue the exclusive means provided for judicial review of the determination of a violation and assessment of a penalty, defendants cannot now contest those matters. *Lee, supra.*

Plaintiff made a prima facie showing that it was entitled to recover the penalty and obtain compliance with the Act. Defendants presented no evidence in opposition. There thus was no genuine issue of material fact, and plaintiff was entitled as a matter of law to the relief granted.

Affirmed.

Judges JOHNSON and EAGLES concur.

BROWN McKINNEY AND WIFE, BETTY McKINNEY, ET AL. v. THE ROYAL GLOBE INSURANCE COMPANY

No. 8224SC1112

(Filed 4 October 1983)

Appeal and Error § 6.2— order granting partial summary judgment—premature appeal

In an action to recover on a fire insurance policy in which defendant pleaded four different defenses, the trial court's order granting plaintiffs' motion for summary judgment as to defendant's second defense that plaintiffs caused the fire was not immediately appealable since it was interlocutory and did not deprive defendant of any substantial right. G.S. 1-277(a); G.S. 7A-27(d)(1).

APPEAL by defendant from *Howell, Judge.* Order entered 21 July 1982 in Superior Court, MITCHELL County. Heard in the Court of Appeals 20 September 1983.

Plaintiffs instituted this action to recover damages from loss by fire of premises covered by an insurance policy issued by

defendant. Defendant admitted issuance of the policy and that same was in full force and effect at the time of the fire, but denied liability. Defendant pleaded five defenses, the second of which was alleged as follows:

SECOND DEFENSE

> The defendant is advised, informed, and believes, and, therefore, alleges, that the fire referred to in plaintiffs' Complaint and any and all damages resulting therefrom were caused by the intentional and deliberate acts and omissions of the plaintiffs in that the plaintiffs, through their own acts and omissions or through the acts of others directed by them, caused the fire to occur and the plaintiffs are unable to recover any sums of the defendant and are not entitled to any recovery under the policy referred to.

After discovery, plaintiffs filed a motion for partial summary judgment on the issue of liability and affidavits in support thereof. The court granted plaintiffs' motion for summary judgment as to defendant's second defense and denied said motion as to the other defenses. Defendant appealed.

Dennis L. Howell for plaintiff appellees.

Morris, Golding and Phillips by James N. Golding for defendant appellant.

HILL, Judge.

Defendant assigns as error the court's granting of partial summary judgment for plaintiffs. At the outset, a question arises as to whether the partial summary judgment is appealable. We conclude defendant's appeal is premature and accordingly, we dismiss it. Defendant brings its appeal pursuant to the provisions of General Statutes 1-277(a) and 7A-27(d)(1) which in effect provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E. 2d 178, 181, *reh'g denied*, 286 N.C. 547 (1974). *See also Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978).

Clearly, Judge Howell's order is not final but is interlocutory as it was entered during the pendency of the action, does not dispose of the case, and because further judicial action is required in order to settle and determine the entire controversy. *See Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). In its answer, defendant raised essentially four defenses which were: (1) that the complaint failed to state a claim upon which relief could be granted; (2) that the plaintiffs caused the fire loss; (3) that plaintiffs increased the hazard of loss; and (4) that plaintiffs filed a fraudulent proof of loss statement. With the granting of summary judgment as to the second defense only, the court did not determine the issue of defendant's liability, thus the issues of liability and damages still remain to be resolved.

An appeal at this stage in the proceedings is objectionable because the court's order will only adversely affect defendant if and when it is determined that defendant is liable to plaintiffs. The reason for the rules embodied in G.S. 1-277(a) and 7A-27(d)(1) is to "prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.' " *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978), *quoting Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E. 2d 669, 671 (1951). The present appeal is illustrative of the unnecessary, fragmentary appeals which the rules were designed to eliminate.

Furthermore, Judge Howell's order is not appealable on the theory that it affects a substantial right of defendant and will work injury to it if not corrected before an appeal from the final judgment. This case does not involve a mandatory injunction, *see English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *cert. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979), an immediate payment of damages; *see Beck v. Assurance Co.*, 36 N.C. App. 218, 243 S.E. 2d 414 (1978); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980), or other damaging measures that would affect a substantial right of defendant. As was the case in *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 344 (1978), "[d]efendant's rights here are

fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment in the case ultimately go against it." Because Judge Howell's order is interlocutory and does not deprive defendant of any substantial right, it is not appealable.

Appeal dismissed.

Judges HEDRICK and WEBB concur.

CHESTER PHILLIPS v. THE GRAND UNION COMPANY, WHINK PRODUCTS CO., AND SAVA STOP, INC.

No. 8221SC1040

(Filed 4 October 1983)

Negligence § 57.10— negligent injury to invitee of store—granting of motion to dismiss improper

In a negligence action brought to recover medical expenses and loss of services for injuries sustained by plaintiff's minor son in a grocery store, the trial court erred in granting defendant's motion to dismiss where the allegations of plaintiff's complaint indicated that the minor son was an invitee of defendant store to which the minor was owed a duty of ordinary care, that the defendant placed bottles of Whink on a low shelf that was accessible to young children, that Whink is a dangerous hydrochloric acid-based cleaner, that Whink fluid was allowed to remain on display with bottle tops removed or loosened, that warnings were not posted about Whink's dangerous properties, that the child's injuries were actually and proximately caused by defendant's actions, and that damages resulted from the injuries.

Judge JOHNSON concurring in the result.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 17 August 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 26 August 1983.

Plaintiff brought this negligence action to recover medical expenses and loss of services for injuries sustained by plaintiff's minor son in defendant's Grand Union Big Star Food Store in Winston-Salem, North Carolina. Defendant, Grand Union Company, moved to dismiss the action pursuant to Rule 12(b)(6) on the ground that the complaint failed to state a claim for which relief

could be granted. From the lower court's grant of the motion to dismiss, plaintiff appeals.

Keith & Smithwick, by Thomas J. Keith, for plaintiff-appellant.

Hutchins, Tyndall, Doughton and Moore, by Richard Tyndall, for defendant-appellee, Grand Union Company.

EAGLES, Judge.

Plaintiff's sole assignment of error is that the trial court erred in dismissing the complaint. We agree and hold that dismissal was improper. A motion to dismiss for failure to state a claim for which relief could be granted is properly granted only when "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." *Piatt v. Krispy Kreme Doughnut Corporation*, 28 N.C. App. 139, 142, 220 S.E. 2d 173, 175 (1975). The defendant's Rule 12(b)(6) motion should be granted only if it appears to a certainty, from the face of the complaint, that plaintiff's negligence claim could not be proved under any state of facts which could be proved in support of the claim. Rule 8 of the Rules of Civil Procedure requires that a complaint give "a short and plain statement of the claim sufficiently particular to give the Court and the parties notice of the transactions, occurrences, or series of transactions and occurrences, intended to be proved showing that the pleader is entitled to relief."

According to the complaint, on 12 April 1978, plaintiff and his son Benjamin went to the Big Star Food Store, which is owned by defendant Grand Union Company. While in the store, Benjamin was injured when a young child, who was and is unknown to plaintiff, playfully picked up a bottle of Whink fluid from a low shelf where it had been placed by defendant Grand Union or by another defendant with defendant Grand Union's knowledge, and sprayed it in Benjamin's right eye. Whink is a dangerous and highly acidic toilet bowl cleaner "consisting in large part of hydrochloric acid." Benjamin suffered scarring of his cornea, resulting in decreased vision and drooping of the right eye because of damage to surrounding muscles. Plaintiff alleges that defendant Grand Union was negligent, *inter alia*, in placing Whink on the lower shelves accessible to young children, in fail-

ing to separate the dangerous and highly acidic Whink fluid from other nondangerous articles, in allowing Whink fluid to remain on display with bottle tops removed or loosened, and in failing to post warnings about Whink's dangerous properties.

Plaintiff's allegations state sufficient facts which, if proved at trial, would establish defendant's negligence. A prima facie case of negligence liability is alleged when a plaintiff shows that: defendant owed him a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 95, 295 S.E. 2d 602, 603 (1982). Defendant owed a duty of ordinary care to Benjamin, for a child accompanying a parent to a business establishment has the status of an implied invitee. *Mitchell v. K.W.D.S., Inc.*, 26 N.C. App. 409, 216 S.E. 2d 408 (1975). While a defendant store is not an insurer of customers' safety, Grand Union did owe to Benjamin the duty to use ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden or latent dangers that could be ascertained by reasonable inspection and supervision. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E. 2d 559, 562 (1981); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 646, 272 S.E. 2d 357, 360 (1980). The allegations that Benjamin was an invitee to whom defendant owed a duty of ordinary care, that the defendant placed the bottles of Whink on a low shelf that was accessible to young children, that Whink is a dangerous hydrochloric acid-based cleaner, that Whink fluid was allowed to remain on display with bottle tops removed or loosened, that warnings were not posted about Whink's dangerous properties, that Benjamin's injuries were actually and proximately caused by defendant's actions, and that damages resulted from the injuries are sufficient for this action to survive a Rule 12(b)(6) motion to dismiss. If competent evidence is offered to support the allegations, a jury should be permitted to determine whether defendant failed to exercise ordinary care to keep its premises in a reasonably safe condition with regard to display of the product in question. Allowing the motion to dismiss was error. *Norwood, supra; Hunt, supra.*

Reversed and remanded.

Judge WHICHARD concurs.

Judge JOHNSON concurs in the result.

Judge JOHNSON concurring in the result.

I concur in the result only insofar as the complaint alleges that defendant was negligent in allowing Whink, an allegedly dangerous and highly acidic toilet bowl cleaner, "consisting in large part of hydrochloric acid to remain on display with bottle caps removed or loosened."

IN THE MATTER OF: OLLIE RAYNOR

No. 836DC11

(Filed 4 October 1983)

Infants § 18; Larceny § 7.1— larceny by juvenile—insufficient evidence

The State's evidence failed to show that a juvenile defendant intended permanently to deprive an owner of his watch so as to support the court's finding that defendant committed misdemeanor larceny and was thus a delinquent child where it tended to show that, while defendant was doing community service at a fire department, he put the watch on his own wrist, that when the owner told him to "pull it off" defendant handed the watch to the fire chief, and that the last time the witnesses saw the watch it was in the possession of the fire chief.

APPEAL by defendant from *Williford, Judge.* Judgment entered 20 October 1982 in District Court, HERTFORD County. Heard in the Court of Appeals 23 September 1983.

This is a criminal action in which the 15-year-old juvenile defendant, Ollie Raynor, was tried before the district court on a charge of misdemeanor larceny. The trial court found as a fact that defendant is a delinquent child as defined in G.S. 7A-517(12), in that on or about 14 July 1982 defendant "did unlawfully and willfully steal, take and carry away a watch, the personal property of Marvin Smith having the value of $32.00." The trial court entered a verdict that defendant is a delinquent child, and ordered the defendant to be committed to the Department of Human Services, Youth Service Division. From entry of that order, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Thomas L. Jones, Jr., for defendant appellant.

JOHNSON, Judge.

The sole question presented by this appeal is whether the trial court erred by denying defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence.

It is incumbent upon the State to prove the existence of each and every element of the offense with which defendant is charged. In passing on a motion to dismiss, it is the court's duty to ascertain if there is substantial evidence of each essential element of the offense charged. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). The offense of larceny is defined as the taking and carrying away from any place at any time the personal property of another without the consent of the owner and with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some person other than the owner. *State v. Booker*, 250 N.C. 272, 108 S.E. 2d 426 (1959). Felonious intent is an essential element of the crime of larceny, and if the defendant takes the property of another for his own immediate and temporary use without the intent to permanently deprive the owner of his property, then he is not guilty of larceny. *State v. McCrary*, 263 N.C. 490, 139 S.E. 2d 739 (1965). It is beyond argument that this is a case of defendant's taking the watch for his temporary and immediate use and, in a rare display of candor, the State so concedes.

The State's evidence tended to show that the defendant was doing community service for the fire department of Ahoskie on 14 July 1982. While waiting for the Fire Chief to instruct him as to what work he was to perform, defendant picked up a watch belonging to the prosecuting witness, Marvin Smith. Smith testified that the defendant put the watch on his own wrist and that Smith told the defendant to "pull it off." Smith testified that the defendant took the watch off his wrist and eventually gave it to the Fire Chief, and further, that the last time he saw the watch, it was in the possession of the Fire Chief. On cross-examination, Smith testified as follows:

Q. So the last thing you knew about the watch was when Mr. Raynor gave the watch back to the Fire Chief and so far as you knew the Fire Chief had possession of that watch, is that correct?

A. Yes sir cause I went in there and told the Chief the first time so the Chief got the watch back and put it under the glass.

Q. And that was after you had seen it on his wrist, right?

A. Yes sir.

Smith was not sure if anyone else had come into the room after that, but he did not see anybody pick up the watch again. The State did not call the Fire Chief as a witness.

The defendant testified on his own behalf. Defendant's evidence tended to show that after the defendant took the watch off his wrist, he gave the watch to the prosecuting witness, Marvin Smith. The defendant then stated that all he was doing was playing with the watch. Defendant testified further that the Fire Chief had possession of the watch after he had given the watch to Mr. Smith. The defendant then testified that the last time he saw the watch it was in the possession of the Fire Chief, and furthermore, that he did not take the watch.

Upon the foregoing evidence, it is clear that the State failed to prove beyond a reasonable doubt that the defendant had the intent to permanently deprive the owner of his property when he put the watch on his wrist. The only evidence presented by the State is uncontradicted and it shows that the defendant had at one time placed Mr. Smith's watch on his arm, and then took it off and gave it to the Fire Chief. Based on the testimony of Mr. Smith and the testimony of the defendant that he was merely playing with Mr. Smith's watch while he was waiting, the evidence shows that defendant did not intend to permanently deprive Mr. Smith of his watch. Both witnesses testified that the last time they saw the watch it was in the possession of the Fire Chief. No further evidence was presented as to the whereabouts of the watch after the Fire Chief took possession of it. Thus, there was *no* evidence whatsoever to show that the defendant intended to permanently deprive Mr. Smith of his watch when he put it on his arm. Consequently, the court erred by failing to

dismiss the charges and entering a verdict of guilty. The judgment entered upon the verdict is, therefore,

Reversed.

Judges BECTON and BRASWELL concur.

TERRY CLINTON HULL v. FLOYD S. PIKE ELECTRICAL CONTRACTOR, INC.

No. 8217SC1105

(Filed 4 October 1983)

Master and Servant § 10.2— retaliatory discharge—motion to dismiss improperly granted

The trial court erred in granting defendant's motion to dismiss plaintiff's complaint pursuant to G.S. 97-6.1 for retaliatory discharge or demotion based on plaintiff's good faith filing of a claim for workers' compensation.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 26 July 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 19 September 1983.

Plaintiff appealed an order granting defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Plaintiff, while employed by defendant, received an injury by accident on the job and began receiving disability benefits. After release by one doctor, but not by a second doctor, whom plaintiff later consulted, benefits were terminated. Plaintiff thereupon requested a hearing before the North Carolina Industrial Commission. Sometime later, plaintiff was released by the second doctor to return to work. Defendant, however, advised plaintiff that it had no work for him and would put him on temporary layoff.

Plaintiff, then, filed a complaint pursuant to G.S. 97-6.1 for retaliatory discharge or demotion based on plaintiff's good faith filing of a claim for workers' compensation. The trial court dismissed plaintiff's complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

C. Orville Light, for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr. and Jeri L. Whitfield, for defendant appellee.

VAUGHN, Chief Judge.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* The complaint should be liberally construed. *Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975). Dismissal is proper only when: (1) the complaint on its face reveals that no law supports plaintiff's claim; (2) the complaint reveals on its face that some fact essential to plaintiff's claim is missing; or (3) some fact disclosed in the complaint defeats the plaintiff's claim. *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980). Since plaintiff, here, has brought a claim under a specific statute, the question before this Court is whether plaintiff has alleged facts supporting application of the law.

To allege a cause of action under G.S. 97-6.1, plaintiff must have been demoted or discharged and such demotion or discharge must have occurred because plaintiff, in good faith, instituted or caused to be instituted a proceeding under the North Carolina Workers' Compensation Act, or testified or is about to testify in any such proceeding. Plaintiff's complaint stated that plaintiff had been advised by defendant that there was no work for him and that he would be put on temporary layoff. Had plaintiff's complaint alleged *only* these facts, dismissal would have been proper since plaintiff would not have established a prima facie case of retaliatory discharge. Plaintiff's complaint, however, contained a subsequent allegation that "plaintiff is informed and believes that he is now considered on permanent layoff and that [he] has been

demoted or discharged within the meaning of North Carolina General Statute 97-6.1." We think this allegation contains sufficient facts to withstand a motion to dismiss under Rule 12(b)(6).

The purpose of the complaint is to give the defendant notice of the wrong to which plaintiff complains. *See Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E. 2d 562 (1981); *Sutton, supra*; G.S. 1A-1, Rule 8. Defendant responded to plaintiff's complaint by stating as its second defense that plaintiff's discharge was not retaliatory, but rather was due to a lack of available work. Defendant's responsive pleading showed its understanding of the nature of the wrong alleged. Vagueness and ambiguity in plaintiff's complaint are not grounds for a motion to dismiss, but should have been attacked by defendant with a motion for a more definite statement. *Sutton, supra; Benton, supra.*

Reversed.

Judges WHICHARD and PHILLIPS concur.

IN THE MATTER OF ROGER R. SMITH v. DANIELS INTERNATIONAL AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8210SC1013

(Filed 4 October 1983)

Master and Servant § 111; Rules of Civil Procedure § 6— mailing of decision of Employment Security Commission adjudicator—time for filing appeal

G.S. 1A-1, Rule 6(e) does not apply to appeals from an Employment Security Commission adjudicator so as to give the appealing party, in addition to the 10-day period prescribed by G.S. 96-15(b)(2), three additional days within which to file an appeal when the adjudicator's decision is mailed to the parties, since G.S. 96-15(b)(2) expressly provides that the 10-day period applies "whether the conclusion be delivered manually or mailed," and G.S. 1A-1, Rule 1 thus precludes application of the 3-day grace period provided by G.S. 1A-1, Rule 6(e).

APPEAL by the Employment Security Commission from *Smith (Donald L.), Judge*. Judgment entered 11 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1983.

No brief filed for claimant appellee.

C. Coleman Billingsley, Jr., for respondent appellant Employment Security Commission.

No brief filed for respondent Daniels International.

WHICHARD, Judge.

The issue is whether G.S. 1A-1, Rule 6(e) applies to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the ten-day period prescribed by G.S. 96-15(b)(2), three additional days within which to file an appeal. We hold that it does not.

An Employment Security Commission adjudicator found claimant disqualified for benefits because discharged for misconduct in connection with his work. The determination was mailed to claimant on 29 May 1981. It informed him that his appeal rights expired on 8 June 1981.

Claimant filed a request for appeal on 10 June 1981. The appeals referee disallowed the request for untimely filing, and the Full Commission affirmed.

The superior court, on claimant's appeal, made the following finding:

> The Court, having examined the record on appeal, finds that Rule 6(e) of the North Carolina Rules of Civil Procedure when construed with N.C.G.S. 96-15(b)(2), so as not to be repugnant, applies to the Employment Security Commission and that three additional days shall be given a party to appeal when the decision of an Adjudicator is mailed.

It further found that claimant had "appealed the decision within ten days plus three additional days from the date mailed." It accordingly reversed the Commission's decision and remanded for "decision on the issue of separation."

G.S. 1A-1, Rule 1 provides: "These rules shall govern the procedure in the superior and district courts . . . except when a differing procedure is prescribed by statute." G.S. 1A-1, Rule 6(e) provides: "Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a

notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." Thus, unless "a differing procedure is prescribed by statute," defendant had thirteen days within which to file his appeal; and the appeal was timely.

G.S. 96-15(b)(2) (1981), however, as in effect at the time in question, in pertinent part provided: "Unless the claimant . . . within 10 days after notification of the conclusion of the adjudicator, *whether the conclusion be delivered manually or mailed*, files an appeal to such conclusion, the conclusion shall be final and benefits paid or denied in accordance therewith." (Emphasis supplied.) (This statute was amended by Act of April 1, 1981, ch. 160, § 27, 1981 N.C. Sess. Laws 131, 135, effective 1 July 1981.) The provision that the ten-day limit applies "whether the conclusion [is] delivered manually or mailed" clearly indicates legislative intent to establish "a differing procedure" from that prescribed by G.S. 1A-1, Rule 6(e). G.S. 1A-1, Rule 1 thus precludes application of the three-day grace period provided by G.S. 1A-1, Rule 6(e) and dictates that the express ten-day limit of G.S. 96-15(b)(2) controls.

Because the record conclusively discloses that claimant did not comply with the time limitation imposed by G.S. 96-15(b)(2) in giving his notice of appeal, and because that limitation controls and excludes the grace period provided by G.S. 1A-1, Rule 6(e), the superior court had no authority to entertain the appeal and reverse the decision of the Commission. *In re Browning*, 51 N.C. App. 161, 163, 275 S.E. 2d 520, 521-22 (1981). Accordingly, its judgment is vacated, and the cause is remanded for entry of an order dismissing the appeal.

Vacated and remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. NORRIS COLEMAN

No. 8227SC1077

(Filed 4 October 1983)

1. **Criminal Law § 143.5— revocation of probation—sufficiency of evidence**

In a probation revocation hearing where one of the conditions of probation was that defendant support his family, and where a North Carolina probation officer testified that defendant told her he had been incarcerated for nonsupport, this was competent evidence that defendant had violated a condition of his probation.

2. **Criminal Law § 143.3— probation revocation—supervision of defendant in Maryland—revocation hearing in North Carolina**

Although defendant was under the supervision of the State of Maryland, it was proper for his revocation hearing to have been held in North Carolina pursuant to G.S. 148-65.1A(d) and G.S. 148-65.1(3).

APPEAL by defendant from *Owens, Judge.* Judgment entered 7 June 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 29 August 1983.

Defendant pled guilty to breaking or entering and larceny, and was placed on probation. He subsequently moved to Maryland, and his probation was transferred to that state. He now appeals from an order and judgment and commitment finding a violation of the terms and conditions of his probation, revoking the suspension of his sentence, and ordering his imprisonment.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Rebecca K. Killian, Assistant Public Defender, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends that because the North Carolina probation officer testified entirely on the basis of a report prepared by a Maryland probation officer, he was denied his Sixth Amendment right to cross-examine a witness against him. He also contends the Maryland report was inadmissible hearsay.

In a probation revocation hearing the court is not bound by strict rules of evidence. *State v. Duncan,* 270 N.C. 241, 245, 154

S.E. 2d 53, 57 (1967); *State v. Baines*, 40 N.C. App. 545, 548, 253 S.E. 2d 300, 302 (1979); *State v. Green*, 29 N.C. App. 574, 576, 225 S.E. 2d 170, 172, *disc. review denied*, 290 N.C. 665, 228 S.E. 2d 455 (1976). If both competent and incompetent evidence is admitted, "it is presumed that the trial court ignores the incompetent evidence and considers only that which is competent [,] and that the findings of fact of the court are in no way influenced by hearing the incompetent evidence." *State v. Baines*, 40 N.C. App. 545, 548, 253 S.E. 2d 300, 302 (1979). Thus, if competent evidence was before the court "which was reasonably sufficient to satisfy it in the exercise of sound judicial discretion that the defendant had, without lawful excuse, wilfully violated one of the valid conditions of his probation," the order and judgment must be affirmed. *Baines, supra*, 40 N.C. App. at 548-49, 253 S.E. 2d at 302.

One of the conditions of probation was that defendant support his family. The North Carolina probation officer testified that defendant told her he had been incarcerated for nonsupport. This was competent evidence that defendant had violated a condition of his probation. Unless other error appears, then, the order and judgment must be affirmed.

[2] Defendant further contends that because he was under the supervision of the State of Maryland, his revocation hearing should have been held in that state; and that failure to hold the hearing there violated the interstate compact agreement. While the governing statute authorizes the receiving state to hold a revocation hearing which has the "same standing and effect" as if held in this state, G.S. 148-65.1A(d), it does not mandate a hearing in that state. Further, it provides that the sending state "may *at all times* enter a receiving state and . . . retake any person on probation." G.S. 148-65.1(3) (emphasis supplied). The phrase "at all times" clearly implies a right of the sending state to retake the probationer prior to a revocation hearing in the receiving state, and to hold the hearing in the sending state. This contention is thus without merit.

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

JUDITH L. ABERNETHY v. C. FRED ABERNETHY

No. 8215DC1147

(Filed 4 October 1983)

Contempt of Court § 6.2; Divorce and Alimony § 21.5— failure to make alimony and child support payments—contempt of court—present ability to pay

Where defendant was ordered jailed for contempt for failure to make alimony and child support arrearage and current payments as ordered by the court but was permitted to purge himself of contempt by paying arrearages and plaintiff's legal fees, the issue of defendant's present ability to pay the sum ordered was fully adjudicated in the original contempt hearing, and defendant failed to appeal the contempt order, the court's findings as to defendant's ability to pay were *res judicata* on that issue in a subsequent hearing at which plaintiff demonstrated that defendant failed to make the payments necessary to purge himself of contempt and the court ordered that the commitment for contempt be activated.

APPEAL by defendant from *Paschal, Judge*. Order entered 8 June 1982 in ORANGE County District Court. Heard in the Court of Appeals 22 September 1983.

Defendant has appealed from the order activating commitment which provided that he spend thirty days in jail for civil contempt of court. The contempt proceedings arose from defendant's failure to pay alimony and child support as the court had previously ordered.

The parties executed a separation agreement on 15 October 1980. On 5 November 1980 plaintiff instituted an action to enforce the separation agreement. In February and August of 1981 the court ordered defendant to pay arrearages and comply with his agreement to support plaintiff and her children. Defendant consented to the February, 1981, order and did not appeal either order. On 14 December 1981 judgment was entered for plaintiff in her uncontested action for absolute divorce, and the divorce action was consolidated with the action for enforcement of the separation agreement. On 2 February 1982 plaintiff filed a motion in the cause asking that defendant be found in willful contempt of the prior court orders. After a hearing, the court made findings of fact, conclusions of law, and ordered defendant confined to jail for thirty days for contempt. However, the order provided that defendant could purge himself of contempt by paying arrearages

and plaintiff's legal fees in installments to be completed by 9 June 1982. Defendant did not appeal from this order, which was entered 11 March 1982. On 7 June 1982 another hearing was held at which plaintiff demonstrated that defendant failed to make the payments necessary to purge himself of contempt. From the 8 June 1982 order activating commitment, defendant appealed.

Powe, Porter & Alphin, P.A., by N.A. Ciompi and William E. Freeman, for plaintiff.

Spears, Barnes, Baker & Hoof, by John C. Wainio, for defendant.

WELLS, Judge.

Defendant contends the trial court erred in ordering him jailed for contempt when there was no evidence and no finding at the 7 June 1982 hearing that he had a present ability to comply with the previous orders. The civil contempt statute, G.S. 5A-21, does require that "[t]he person to whom the order is directed [be] able to comply with the order or [be] able to take reasonable measures that would enable him to comply with the order." Our Supreme Court has insisted that the trial court must find "that the defendant presently possesses *the means* to comply." (Emphasis in original.) *Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983); *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966). *See also Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980).

In the order of 11 March 1982, the trial court made the following finding of fact:

> 15. Since August of 1981 through the present time, the Defendant had access to monies in excess of $17,000 and has had monies paid to him or has had access to money which would have given him ample opportunity to comply with the Orders of this Court, but the Defendant chose not to comply with the Orders of this Court.

The trial court also made findings on the specific types of income and expenses the defendant had. Thus, the 11 March 1982 order clearly contained a finding as to defendant's then present ability to pay.

The issue of defendant's present ability to pay the sum ordered was fully litigated in the hearing which culminated in the trial court's order of 11 March 1982. Defendant not having appealed from that judgment, the findings as to his ability to pay, as set forth in that order, are *res judicata* on that issue and defendant was estopped from having that issue retried at the 8 June 1982 hearing. At that hearing, the only issue properly before the court was whether defendant had complied with the court's earlier order. *See Real Estate Trust v. Debnam*, 299 N.C. 510, 263 S.E. 2d 595 (1980); *Bowen v. Iowa National Mutual Insurance Co.*, 270 N.C. 486, 155 S.E. 2d 238 (1967).

For the reasons stated, the order of the trial court is

Affirmed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. JACKIE ALLEN BARTLETT

No. 8225SC1274

(Filed 4 October 1983)

Criminal Law § 154.2— failure to file record on appeal within 150 days of giving notice—dismissal of appeal

Pursuant to App. R. 12(a) defendant's appeal was dismissed for his failure to file the record on appeal within 150 days of giving notice of appeal.

ON writ of certiorari to review judgment entered by *Lane, Judge*. Judgment entered 17 June 1981 in BURKE County Superior Court. Heard in the Court of Appeals 20 September 1983.

Defendant was found guilty of felonious breaking or entering and felonious larceny. The trial court sentenced him to a five year minimum and five year maximum sentence in prison on the breaking or entering verdict, and arrested judgment on the larceny verdict. Unusual circumstances deprived defendant of a fair chance to give timely notice of appeal, but this court granted a writ of certiorari to review the case.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Simpson, Aycock, Beyer & Simpson, P.A., by Richard W. Beyer, for defendant.

WELLS, Judge.

Defendant's petition for writ of certiorari was allowed on 17 May 1982. The order allowing the petition specified that date as the time from which appeal was considered to be taken. The record in this appeal was filed in the Court of Appeals 200 days later, on 3 December 1982.

On 24 August 1982 defendant filed a motion in this Court entitled "Request for an Extension of Time." The motion was dismissed without prejudice to file a new motion "setting forth the status of the appeal in greater detail." Defendant filed no further motion for an extension of time.

Appellate Rule 12(a) requires the record on appeal to be filed within 150 days of giving notice of appeal, which defendant has failed to do in the present case. Defendant's failure to perfect his appeal within the time allowed by the Rules of Appellate Procedure requires a dismissal of his appeal. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979). We have reviewed the record and briefs and we are convinced that defendant's appeal lacks merit and that there is no basis under Appellate Rule 2 upon which we should waive defendant's violation of Appellate Rule 12.

Appeal dismissed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. HAROLD DEAN MILLER

No. 8224SC1256

(Filed 4 October 1983)

Constitutional Law § 48— effective representation by counsel—failure to object to references to lie detector tests

Defendant was not denied the effective assistance of counsel by failure of his counsel to object to testimony by an alleged accomplice who was a witness for the State in which the accomplice repeatedly referred to the fact that he had taken a lie detector test.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 11 August 1982 in Superior Court, YANCEY County. Heard in the Court of Appeals 20 September 1983.

Defendant was tried for armed robbery in violation of G.S. 14-87. He was found guilty and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Swain and Stevenson, by Joel B. Stevenson, for defendant appellant.

WEBB, Judge.

The defendant assigns ineffective assistance of counsel as error. Specifically he contends that his attorney, who was trying his first felony case in the Superior Court of Yancey County, should have objected to several references in the testimony of Ben Warren King to taking a lie detector test. Mr. King testified he was with defendant at the time of the alleged robbery. The results of the lie detector test were not offered into evidence but the witness made repeated references to having taken the test. The appellant argues that the State was allowed to bolster improperly the testimony of its principal witness who was allegedly an accomplice. The appellant also argues that his attorney's failure to request the judge to charge as to how the jury should consider circumstantial evidence shows that his counsel was ineffective.

The defendant was entitled to have counsel whose range of performance was "within the range of competence demanded of

attorneys in criminal cases." *See State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). In this case the transcript of the evidence covers 126 pages. The defendant's counsel cross-examined some of the State's witnesses and examined witnesses for the defendant. We believe from reading the transcript that he was vigorous and effective in his defense. We do not believe that his failure to object to one part of the testimony requires us to hold that his representation of the defendant was not within the range of competence required of attorneys in criminal cases. *See State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978) and *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974).

As to the appellant's contention that his attorney was ineffective because he did not request the court to charge on circumstantial evidence, we note that the court charged on circumstantial evidence. We do not believe there is any showing of ineffectiveness because the defendant's attorney did not request such a charge.

No error.

Judges HEDRICK and HILL concur.

AFRICAN METHODIST EPISCOPAL ZION CHURCH, AND THE CHURCH EXTENSION OF THE AFRICAN METHODIST EPISCOPAL ZION CHURCH v. UNION CHAPEL A.M.E. ZION CHURCH, JAMES M. GRIFFIN, MARGARET P. SMITH, GLORIA W. CROSS, GEORGE W. SMITH, LEROY SMITH, CECIL DALTON, PAUL GRIFFIN, REGGIE HARGROVE, AND CHARLIE GRIFFIN, INDIVIDUALLY AND AS TRUSTEES, AND REV. SAMUEL PURYEAR, INDIVIDUALLY AND AS MINISTER

No. 8222SC597

(Filed 18 October 1983)

1. Rules of Civil Procedure § 59— failure to amend judgment—order of court not consistent with judge's intent

Where the proper factors to have considered in the resolution of a dispute between the parties were those concerning the nature of the relationship between the plaintiff general church and the defendant local church rather than whether the evidence was sufficient to establish record title in plaintiff general church, the trial court heard the evidence and found the facts against

plaintiff under a misapprehension of the controlling law, and therefore, the factual findings may be set aside on the theory that the evidence should be considered in its true legal light.

2. **Religious Societies and Corporations § 3.1— right of parent body of hierarchical church to control property of local affiliated church**

Where plaintiff, parent body of a hierarchical church, sought the right to control the property of defendant church, as a local affiliated church, and where defendant church asserted it had never been affiliated with the plaintiff church, the central question to be answered on remand is whether defendant local church was in fact in a hierarchical relationship with the plaintiff parent body with respect to property matters.

APPEAL by plaintiffs from *Washington, Judge.* Order entered 7 April 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 20 April 1983.

On 31 July 1980, plaintiffs, African Methodist Episcopal Zion Church and the Church Extension of the African Methodist Episcopal Zion Church, filed a complaint against defendants, Union Chapel A.M.E. Zion Church, certain named trustees individually and as trustees, and Rev. Samuel Puryear, individually and as minister of defendant Church. Eventually the case was tried without a jury before Judge Washington. The court allowed defendants' motion to dismiss the complaint under Rule 41(b) of the Rules of Civil Procedure at the close of all the evidence. A written judgment was entered on 15 February 1982. Plaintiffs filed a motion under Rule 59 of the Rules of Civil Procedure seeking to set aside the judgment and grant a new trial, or, in the alternative, enter a new judgment. The motion was heard by the court on 1 April 1982. The motion was denied and plaintiffs appeal.

Burke & Donaldson, by Arthur J. Donaldson, for plaintiff appellants.

Smith, Michael & Penry, by Robert B. Smith, Jr. and Phyllis S. Penry, for defendant appellees.

JOHNSON, Judge.

The central question presented by this appeal concerns the nature of the issues decided by the 15 February 1982 judgment entered upon defendants' Rule 41(b) motion to dismiss the complaint. A summary of the facts and events leading up to entry of

the court's judgment is necessary for an understanding of the issues presented by this appeal.

I

Plaintiff, African Methodist Episcopal Zion Church (hereafter A.M.E. Zion Church), is an unincorporated religious association with an office in Charlotte, North Carolina. The Church Extension of the A.M.E. Zion Church is a North Carolina corporation, incorporated on 17 November 1969, whose purpose is the promotion of the temporal welfare of the A.M.E. Zion Church. The defendant congregation, Union Chapel A.M.E. Zion Church (hereafter Union Chapel), is alleged by plaintiffs to be a class of people who seek to break Union Chapel's affiliation with, and commitment to, the A.M.E. Zion Church. The defendant, Rev. Samuel Puryear, is the minister of Union Chapel. Rev. Puryear was ordained by an A.M.E. Zion Bishop and sent to Union Chapel at a time when the old church building was in existence in late 1973 or early 1974. Rev. Puryear was accepted by the congregation at Union Chapel, and during his tenure a new church building was constructed. The other named defendants are the trustees of Union Chapel A.M.E. Zion Church.

The A.M.E. Zion Church has been in existence since 1796. The rules, regulations and doctrines governing and controlling the operation of the church are found in "The Doctrine and Discipline of the African Methodist Episcopal Zion Church," revised in May, 1976 and hereafter referred to as "the Discipline." The A.M.E. Zion Church is a hierarchical church composed of local pastors, deacons, elders, presiding elders, and bishops, whose duties are specified in the Discipline. Periodic meetings are held, known as the General Conference, Annual Conference, District Conference and Quarterly Conference. The Church has a home mission department, makes grants and loans to local churches and has a publishing house in Charlotte, North Carolina. It operates Livingstone College in Salisbury, North Carolina and conducts Hood Seminary, a part of Livingstone College, to train its pastors. The A.M.E. Zion Church is financed by assessments called "general claims," which are paid by the members of the local churches to the "Connection," meaning the central or general church.

A brief history of the origin of the A.M.E. Zion Church is contained in the Discipline.

> The John Street Church was the first Methodist Church erected in [New York City]. There were several colored Members in this Church from its first organization. Between the years 1765 and 1796 the number of colored members largely increased, so much that caste prejudice forbade their taking the sacrament until the white families were all served. This, and the desire for other Church privileges denied them, induced them to organize themselves, which they did in the year 1796. This was the first African Episcopal Church of which we have any account. In the year 1800 they built a church and called it Zion. This Church, unlike the other colored Methodist Churches formed about the same period, was, as regards its temporal economy, separate from the Methodist Episcopal Church, from its first organization . . . As we have shown, the Connection is generally called Zion out of respect to that first Church. But the style and title of the Church, as the founders tell us, is the African Methodist Episcopal Church.

The present controversy arose out of events occurring in 1976 and early 1977. The record discloses that the defendants sought to disaffiliate from the A.M.E. Zion Church, apparently as a result of an increase in assessments levied by the 1976 General Conference. According to the Presiding Elder of the Winston-Salem District of the Western North Carolina Conference of the A.M.E. Zion Church, Richard J. Harris, II, the increase was needed so that the general church could provide insurance for the local ministers. Defendants were also apparently concerned that an A.M.E. Zion Bishop did not attend the dedication of the new Union Chapel Church building because the church could not afford to pay him a $300.00 honorarium.

By a letter dated 18 May 1977, the defendant trustees of Union Chapel notified Elder Harris of their decision to withdraw Union Chapel's membership from the African Methodist Episcopal Zion Church Conference. The letterhead reads:

> UNION CHAPEL A.M.E. ZION CHURCH
> ROUTE L
> LINWOOD, NORTH CAROLINA

The text contains references to the fact that increased financial obligations faced by Union Chapel due to the new Church

building, together with the increased A.M.E. Zion assessments posed an "overload" situation for Union Chapel's membership, and indicated that the Trustee Board proposed the withdrawal. The letter states:

> A business meeting was held in the fellowship hall of our church on March 5, 1977. At that time, a recommendation was made by the Trustee Board and a motion made and carried as stated below:
>
> That the Union Chapel A.M.E. Zion Church withdraw its membership from the African Methodist Episcopal Zion Church Conference (Western North Carolina Conference). The effective date of the withdrawal to be at the closing of the 1976-77 conference year—August, 1977.

The letter was signed by each of the named defendant trustees under the heading, "The Trustee Board—Union Chapel A.M.E. Zion Church." Elder Harris responded by separate letters to Rev. Puryear and to the Board of Trustees, each dated 20 June 1977, informing them, *inter alia*, that under both civil law and the rules governing church property contained in the Discipline, the membership of Union Chapel could withdraw from the Connection as individuals, but that the church property must remain within the Connection. Since 1977, Union Chapel has not participated in any meetings of the Western North Carolina Conference, nor paid its general assessments.

Two tracts of land are the subject matter of the present controversy. They are described for purposes of this appeal as follows:

> FIRST TRACT:
>
> By deed dated 27 January 1873, Hezekiah Lomax and Burgep Cox of Davidson County conveyed to Arab Banks, Cliff Roberts and Perry Hall, trustees for "a Methodist Epeskopal [sic] Church of the County of Davidson" certain real property containing 1.001 acres, which deed was recorded 3 July 1946 in the office of the Register of Deeds for Davidson County in Deed Book 166, page 101.

SECOND TRACT:

By deed dated 6 December 1975, Josephine G. Mobley and husband, Isaiah Mobley conveyed to the defendants as trustees of the "Union Chapel A.M.E. Zion Church, Churchland," 1½ acres of land, which deed was recorded 10 December 1976 in the office of the Register of Deeds for Davidson County in Deed Book 543, page 443.

On 31 March 1977, the trustees of Union Chapel A.M.E. Zion Church executed a deed to Sam H. Puryear and wife, Beverly H. Puryear for .502 acres, a portion of the property described above as the Second Tract. That deed was recorded in Deed Book 548, page 533 in the office of the Register of Deeds, Davidson County. On 2 August 1979, by deed recorded in Deed Book 574, page 165 in the above office, James Griffin, *et al.*, "Trustees of the Union Chapel A.M.E. Zion Church, Churchland," executed a deed to James Griffin, *et al.*, "Trustees of Union Chapel Methodist Church," for that property described in Deed Book 166, page 101 (FIRST TRACT) and that property described in Deed Book 543, page 443 (SECOND TRACT) [.502 acres of which had previously been deeded to the Puryears].

Since at least 1940, the A.M.E. Zion Church Discipline has required that a trust clause be incorporated in all conveyances to the A.M.E Zion Church by which premises are held or acquired for worship or other church activities. However, beginning with the 1968 Discipline at Paragraph 434, Section 2, it is specifically provided that the absence of the "trust clause" in deeds and conveyances previously executed does not relieve a local church from connectional responsibilities.[1] Neither the 1873 deed for the First

1. Paragraph 432, Sec. 2 of the 1976 Revised Discipline is essentially identical and it provides:

> However, the absence of trust clause stipulated in paragraph 431 and paragraph 432, Section 1, in deeds and conveyances previously executed, shall in no way exclude a local church from, or relieve it of, its African Methodist Episcopal Zion Church Connectional responsibilities. Nor shall it absolve a local congregation or board of trustees of its responsibility to the African Methodist Episcopal Zion Church, provided that the intent and desire of the founders and/or the later congregations and boards of Trustees is shown by any or all of the following indications: (a) the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors; (b) the use of the name, customs, and policy of the African

Tract nor the 1976 deed for the Second Tract contained the trust language required by the 1940 and subsequent Disciplines.

Plaintiffs instituted this action by filing a complaint on 31 July 1980. The complaint alleged, in essence, that A.M.E. Zion Church is a connectional church and its governing rules and regulations are as set forth in its Discipline; that Union Chapel A.M.E. Zion Church is a member of plaintiff general church, in particular is a member of the Western North Carolina Conference, and that, as a member of the A.M.E. Zion Church Connection, Union Chapel is subject to the rules and regulations of the A.M.E. Zion Church Discipline and also subject to those rules promulgated by the General Conference. Further, that Union Chapel has been under A.M.E. Zion Church supervision, direction and control since its establishment and that Union Chapel, its ministers, trustees and members have in the past recognized and adhered to the authority, rulings, teachings and power of the A.M.E. Zion Church Connection, Discipline and District Conference until a division occurred on or about August, 1977, resulting from the decision of Union Chapel's membership to withdraw from the A.M.E. Zion Church Connection.

The complaint alleges further that demand has been made on the Union Chapel Church to meet its connectional obligations, but that such requests have been refused; that Union Chapel's continued use of the church property [First and Second Tracts] is without the consent of the A.M.E. Zion Church; and that "the defendants are now in the wrongful and unlawful possession of the above named premises and that said defendants are continuing to use the above described premises for purposes other than which they were originally conveyed." Plaintiffs alleged that they "have no adequate remedy at law," and prayed for the following relief:

> 1. That pursuant to N.C.G.S. 1A-1, Rule 56 and N.C.G.S. 1-485, et seq. the Court issued a permanent injunction restraining the defendants from continuing to unlawfully use

Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination; (c) the acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church, or employed by the presiding elder of the district in which it is located.

the premises described in paragraph VI, for their own purposes except with the express consent of the A.M.E. Zion Church or one of its subdivisions with the power to give such consent.

2. That the A.M.E. Zion Church be adjudged the owner in fee of the property described in paragraph VI. [First and Second Tracts]

3. That the defendants be ordered to give an accounting of all the moneys collected while they were in wrongful possession of the A.M.E Zion Church property, and that upon such accounting being given, the plaintiffs have a judgment against the defendants in the amount of said accounting.

4. That plaintiffs have and recover of the said defendants the amount of $20,000 individually for the intentional wrongful use of the said property.

In response, defendants moved to dismiss the complaint pursuant to Rule 12(b) of the Rules of Civil Procedure and on the grounds of lack of capacity to sue. With leave, plaintiffs amended their complaint regarding capacity and set out in more detail the allegations against the defendants. Specifically, the amended complaint alleges that Rev. Puryear was assigned by the A.M.E. Zion Church to be the minister at Union Chapel and that since August, 1977, he and the defendant trustees have seized the church property and converted it to their own personal use, contrary to the wishes and demands of plaintiffs. The amended complaint alleges further that plaintiffs are the fee simple owners of the disputed tracts; that defendants claim an estate or interest in the land adverse to the plaintiffs, which constitutes a cloud upon plaintiffs' title; that defendants are continuing to use the premises for purposes other than which they were originally conveyed; and that defendants' claim to the property is invalid because the A.M.E. Zion Church is "connectional in nature and all property held in the name of its local and affiliated churches or the trustees thereof is held in trust for the plaintiff, the African Methodist Episcopal Zion Church." The amended complaint also alleges that plaintiffs will be irreparably harmed unless defendants are ordered to surrender possession of the church premises and enjoined from making unauthorized dispositions of church funds until an adjudication of the matter on the merits may be had.

The amended prayer for relief, in pertinent part, is as follows:

> 1. That this Complaint be treated as an affidavit by the Court and as an Order directed to the defendants ordering them to show cause why a Preliminary Injunction should not be issued enjoining the defendants . . . from refusing to surrender possession of the premises at Union Chapel A.M.E. Zion Church to the plaintiffs, from interfering with the plaintiffs in the operation of the Church, and from making any expenditures of church funds until a hearing on the merits can be held in this cause;
>
> 2. That this Court declare the cloud created by the adverse claim of the defendants removed from said title and that the plaintiff, the African Methodist Episcopal Zion Church, be declared the owner in fee simple of said property free from the claim of defendants, and that defendants be required to vacate said property immediately;

On 29 October 1980, the defendants answered, denying the material allegations of the complaint, and alleging as a defense that Rev. Puryear is the minister of the "Union Chapel Methodist Church," and that the defendants individually and as trustees of the "Union Chapel Methodist Church" do claim an interest in the land which is adverse to plaintiffs. Defendants prayed that the complaint be dismissed pursuant to Rule 12(b)(6) and Rule 9(a) of the Rules of Civil Procedure, and further, that the court declare that the individual defendants as trustees hold title to the property for the use and benefit of the members of the "Union Chapel Methodist Church" and, *inter alia*, that said Church be declared owner in fee simple of the church premises. The defendants also prayed that the complaint not be treated as an affidavit on which to base the entry of a show cause order "because the same is not verified; and that an order to show cause not be issued until proper motion and affidavits are presented."

The record does not contain any further motions or affidavits requesting that an order to show cause be issued against defendants regarding the preliminary injunctive relief prayed for by plaintiffs in their amended complaint. On 7 July 1981, the defendants moved for summary judgment with a supporting affidavit of Rev. Puryear pursuant to Rule 56 of the Rules of Civil Procedure.

The defendants' motion states that "this is an action to determine title to the real property on which the church building is located." In brief, the motion alleges that the 1873 deed does not contain the trust language required by the A.M.E. Zion Church Discipline and that the property has never been conveyed to either of the plaintiffs. In the accompanying affidavit, Rev. Puryear alleged that the organization now known as "Union Chapel Methodist Church" has been in continued existence since prior to 7 January 1873; that its trustees have never deeded the property to plaintiffs; and that at no time has defendant local church entered into an agreement with plaintiffs to hold in trust any of the real property deeded to them on 7 January 1873.

Plaintiffs responded with an affidavit by Rev. Richard Harris, II, Presiding Elder of the Winston-Salem District of the A.M.E. Zion Church. The affidavit contains allegations similar to those stated in plaintiffs' complaint—that Union Chapel A.M.E. Zion Church and the named defendants have been affiliated with plaintiffs since the early 1900's and have in the past recognized and adhered to the authority and rules of the A.M.E. Zion Church. Elder Harris pointed to the warranty deed dated 2 August 1979, which states that the conveyance was from the named defendants as "Trustees of the Union Chapel A.M.E. Zion Church, Churchland, acting pursuant to the unanimous consent of the members in full connection of said church: to the Trustees of Union Chapel Methodist Church," as evidence of defendants' self-acknowledged affiliation with plaintiffs. Elder Harris also alleged that the defendants' purported withdrawal from the A.M.E. Zion Connection, as evidenced by the 18 May 1977 letter from the defendant trustees to Elder Harris, was not done in accordance with the church Discipline, and is therefore of no effect.

On 9 September 1981, defendants' motion for summary judgment was denied. Plaintiffs, on 9 October 1981, filed a motion for summary judgment, incorporating by reference Elder Harris' earlier affidavit. Plaintiffs' motion alleges that "this is an action to recover land as church property wrongfully withheld by defendants." The motion contains the following pertinent, abbreviated allegations:

> 1. The real property on which the church building is located was deeded in 1873 to certain named trustees for a "Methodist Episcopal" Church, said deed was recorded in 1946.

2. That the A.M.E. Zion Church is the black church which grew from the Methodist Episcopal Church to which the property was originally deeded.

3. That the property was deeded to be used for Methodist Episcopal religious services for black people, which church would be a connectional church. G.S. 61-3 provides that property shall forever be used for the purposes for which it was granted and shall be vested in the said denomination.

4. That defendants seek to alter the use for which the property was conveyed, and seek to use the same as a congregational church.

5. That various actions demonstrate that Union Chapel A.M.E. Zion Church is affiliated with the A.M.E. Zion Church Connection.

6. That the Discipline provides that local church property enures to the benefit of the A.M.E Zion Church Connection.

Plaintiff's motion for summary judgment was denied on 12 October 1981. An order on the final pretrial conference was filed that same day. In the order, plaintiffs contended that the contested factual issues to be tried were as follows:

1. Whether the defendant church is congregational or connectional in nature?

2. Who constitutes the governing body of Union Chapel A.M.E. Zion Church?

3. Who has that governing body determined to be entitled to the property?

Defendants, to the contrary, contended that the contested issues were as follows:

1. Is the title to the real property described in the amended complaint vested in the plaintiffs?

2. Is the property described in the complaint vested in the defendants as Trustees for the Union Chapel Methodist Church?

The parties stipulated that all issues were to be tried by the court. Certain facts were also stipulated to regarding the conveyances of the disputed property, including a stipulation that Union Chapel had borrowed funds to construct a church on the property described in Deed Book 166, Page 101 (First Tract) and that no A.M.E. Zion Church or Church Extension funds were used for its construction. The other stipulation relevant to this fact states:

> On March 31, 1977, the trustees of the Union Chapel A.M.E. Zion Church executed to P. V. Critcher, Trustee, a Deed of Trust in favor of Mutual Savings & Loan Association, in face amount of Twenty-seven Thousand ($27,000.00) Dollars . . .

The record also contains the parties' answers to interrogatories and requests for admissions.

The action was heard before Judge Washington sitting without a jury. Plaintiffs presented considerable testimonial and documentary evidence regarding the structure of the A.M.E. Zion Church, its history in North Carolina, and the nature of defendant Union Chapel's relation to the general church. Various persons gave uncontradicted testimony that they were members of the Union Chapel A.M.E. Zion Church and that, to the extent of their personal knowledge, Union Chapel was always known as "Union Chapel A.M.E. Zion Church" and was a part of the general A.M.E. Zion Church. Some of the witnesses were questioned about the cornerstone on the original Union Chapel Church building, and recalled that on the cornerstone was written "Union Chapel A.M.E. Zion Church." Elder Harris recalled that the founding date on the cornerstone was 1906 or the later part of the 1800's. Taken together, nearly all the testimony tended to show the connectional nature of the A.M.E. Zion Church; that Union Chapel had long paid the regular annual assessments and dues of the A.M.E. Zion Church Conference; had participated in quarterly, annual and four year conferences of the general church; had accepted pastoral appointments made by the general church and had adhered to its rules, regulations, customs and policies, and utilized the A.M.E. Zion Church Discipline, order of worship, and hymnals in conducting church services. In addition, Bishop Smith testified that he ordained the defendant Rev. Sam Puryear as an A.M.E. Zion minister and appointed him to Union Chapel

A.M.E. Zion Church. Furthermore, Union Chapel had long used the name "Union Chapel A.M.E. Zion Church."

Plaintiffs' documentary evidence supported the testimony presented concerning Union Chapel's participation in the A.M.E. Zion Connection. In addition, repeated evidence of the defendants' having referred to themselves as "Union Chapel A.M.E. Zion Church" and "Trustees for Union Chapel A.M.E. Zion Church" was introduced in the form of defendants' "withdrawal" letter of 18 May 1977, and the conveyances and deeds of trust the defendant trustees executed under the title, "Trustees of the Union Chapel A.M.E. Zion Church." In addition, they accepted from Josephine Mobley and Isaiah Mobley, as "Trustees of the Union Chapel A.M.E. Zion Church," the conveyance of the Second Tract of property.

Furthermore, plaintiffs introduced evidence tending to show that the attempted conveyances out by the defendants, both by deed and mortgage, did not comply with any of the Discipline requirements. The 1976 Discipline at Paragraph 435, Section 1 requires written consent of the Bishop of the District or the Annual Conference to sell or otherwise dispose of any church property. Such consent was not obtained prior to the purported sales and mortgage of either tract.

With regard to the identity of the grantee church organization named in the 1873 deed to the First Tract, plaintiff's evidence was less complete. The description of the church organization is only that of *a* Methodist Episcopal Church of Davidson County. Plaintiffs' evidence, both documentary and testimonial, tended to show that the deed description could apply to at least three organizations: (1) either a white or black Methodist Episcopal Church, out of which the plaintiff A.M.E. Zion Church grew; (2) a black A.M.E. Zion Church, of which plaintiffs are successors-in-interest; and (3) a black Methodist Episcopal Church which was unaffiliated with the A.M.E. Zion Church. No evidence was presented as to the identity or race of the three trustees named in the 1873 deed. No evidence was presented as to the identity of the church organization occupying the First Tract premises from 1873 to about 1916. However, extensive uncontradicted evidence was presented to show that the only church that occupied the property was an A.M.E. Zion Church called Union Chapel from about 1916 to present.

Furthermore, ample evidence was presented to show that plaintiff A.M.E. Zion Church is *a* Methodist Episcopal Church. Plaintiffs' witness William Milton White, who was qualified as an expert witness on Methodism and the A.M.E. Zion Church, testified that the A.M.E. Zion Church had existed in the western areas of North Carolina since the post-civil war period of reconstruction, was in existence in the Davidson County area in 1873, and has been continually in existence there since 1873 to the present. White also testified that "Methodist" is a term describing a form of religious belief, and "Episcopal" describes the hierarchy of the church, its form of government by a Bishop, a general conference and other lawmaking bodies of the general church which control the local churches. None of the evidence that plaintiffs presented would tend to show that from 1916 to August, 1977 Union Chapel was a self-governing church congregation or that it was a Methodist Episcopal Church unaffiliated with the A.M.E. Zion Connection. Although *no* evidence of record was presented as to who was in possession of the 1873 deed at any time relevant to this action, the deed was recorded in 1946, a time when the property was occupied by the "Union Chapel A.M.E. Zion Church."

At the close of plaintiffs' evidence, defendants' moved pursuant to Rule 41(b) of the Rules of Civil Procedure to dismiss on the grounds "that there is not sufficient evidence in the record to justify the claim for relief which is sought in the complaint." The court indicated that it would reserve its ruling. The defendants stated that they would not offer any evidence and renewed the motion to dismiss the complaint. A colloquy between counsel and the court followed, during which the court indicated its concern that the description of the cestui que trust in the 1873 deed did not appear to be sufficiently definite to vest title in plaintiffs. Counsel for the plaintiffs argued to the effect that notwithstanding the gap in the chain of title from the "Methodist Episcopal Church" named in the 1873 deed to the A.M.E. Zion Church, the evidence presented was sufficient to give plaintiffs an ownership interest in both of the disputed properties under the tests established in Paragraph 432, Section 2 of the A.M.E. Zion Church Discipline. The court then stated:

> At the close of all the evidence I'm going to dismiss the claim and the basic reason is that I do not believe that the evi-

dence supports the prayer for relief by the greater weight of the evidence.

The court entered a judgment on 15 February 1982, containing findings of fact and conclusions of law touching, albeit indirectly, on all the issues raised by the pleadings. Findings of Fact Nos. 1 and 8(g) state that, "this is an action to determine title to real property." Without repeating each finding, the findings of fact taken as a whole are to the effect that plaintiffs had not proved that they were successors in interest to the cestui que trust of the 1873 deed, the Methodist Episcopal Church of Davidson County; that the 1873 deed did not contain the trust language required by the Discipline to vest ownership in the A.M.E. Church; and that no other deed conveying property to plaintiff church had been produced. Similarly, the court found that the 1976 deed from the Mobleys for the Second Tract also failed to contain the trust clause. Various other findings of fact were made regarding the issues of record title and constructive or implied trust. However, no direct findings or conclusions were made with regard to the specific issues plaintiffs listed in the pretrial order. Based upon its findings of fact, the court made the following conclusions of law:

1. There was no improper or unlawful conduct as to the individual defendants and as to those defendants sued in their individual capacity, this action should be dismissed.

2. There was no evidence presented that a Methodist Episcopal Church is, nor was ever one and the same as the African Methodist Episcopal Zion Church, but rather was a separate religious organization and is a separate legal entity.

3. The language contained in the Discipline which attempts to impose a trust upon the property based upon usage and practice of the local church is not sufficient to impose such a trust.

4. No trust in favor of the African Methodist Episcopal Zion Church in America was created as concerns the property recorded in Deed Book 166, Page 101, and on which the church building is located nor on the property conveyed in Deed Book 543, Page 443, which is vacant land.

5. *This is an action to determine legal title to real property* and such question of laws must be decided in conformity with the laws of the State of North Carolina and the plaintiffs have not presented evidence sufficient to sustain the plaintiffs' allegations that they are fee simple owners of the two tracts or that a trust was specifically created, or that a constructive or implied trust should be imposed.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, it is hereby ORDERED, ADJUDGED AND DECREED that the plaintiffs' complaint be dismissed and that the cost of this action be taxed against the plaintiffs. (Emphasis added.)

On 23 February 1982, plaintiffs filed a motion pursuant to Rule 59 of the Rules of Civil Procedure for a new trial or the entry of a new judgment on all of the issues on the grounds, *inter alia*, that the order is contrary to law. A colloquy was held between counsel and the court at the hearing on plaintiffs' Rule 59 motion. Plaintiffs' counsel pointed out that the complaint and pretrial order indicated that, from the plaintiffs' perspective, this was *not* primarily an action to try title. Rather, they had primarily sought an injunction to prohibit interference by the defendant Trustees and Reverend in the conduct of Union Chapel as a part of the A.M.E. Zion Church and a declaration of the plaintiffs' right to control the church property. The court then stated:

I have not treated it as a title case, and frankly, I can understand why if it was a title case then someone—, there has to be a judgment saying who had title, whose title it was in. *The judgment does not say to whom this property belongs; all it does is dismiss the plaintiff's complaint . . .*

COURT: Let me ask you this—*how can the Court consider relief unless it has the title question decided.*

MR. DONALDSON: I understand but the defendants brought it up . . .

COURT: Plaintiffs allege they are the owners of the property, that it's the owner of the property.

MR. DONALDSON: That it has the right to the possession of the property, that's right.

COURT: You are saying that the defendant in such case does not have the right to raise *the question as to title, which is required before the plaintiff could obtain injunctive relief* . . .

* * *

COURT: . . . *I felt that an integral part of the Court's decision to grant injunctive relief had to be a determination—that plaintiff had sufficient evidence of title in the plaintiff* to obtain injunctive relief. When I say I dismissed it, I dismissed it on the basis I didn't feel that I had enough evidence to say plaintiff or defendant in this case had title to the property. *Now, whether there would be any bar—I don't think there would—to a later action to have trust or constructive trust or implied trust,* something of that nature; whether there could be evidence to establish prescriptive title—*I didn't feel I could rule on that; I didn't feel I could close the door on either party. I frankly anticipated there would have to be further litigation to resolve the question.* (Emphasis added.)

The court inquired of counsel if there was anything in the "judgment" which would preclude or bar plaintiffs from again proceeding.

COURT: My feeling was this was not a case I ought to enter a simple order dismissing the case—maybe I'm wrong; but I felt I ought to have something in that to indicate what some of the evidence was that was presented to the Court, and I had a great deal of difficulty with it, I don't mind admitting that; they submitted to me a draft; I went over it and perhaps the pressure of time in that I was late getting that done. *I made minor revisions but basically signed what they [defendants] submitted. You tell me—do you see anything in this quote "judgment", or what the term is—an order, which precludes or bars the plaintiff from again proceeding?*

MR. DONALDSON: Yes.

COURT: What?

MR. DONALDSON: You say it was an action to try title to land and you dismissed the action; that is your first thing; that puts us out as far as title—you say it's an action to try title to land—

Counsel for plaintiffs then requested that the Court amend the judgment under Rule 41(b) to an involuntary dismissal without prejudice, consistent with the court's intention that further litigation on the merits be had. The trial judge again repeated that "I did not feel I had evidence before me to make a decision of this matter or the merits as to who had record title to the property." The court then inquired whether a sixth conclusion to the effect that "this Court does not consider the evidence sufficient nor the judgment sufficiently definite and certain to constitute or present judicial estoppel of either parties later assertion of title upon proper pleadings . . ." would solve the problem. Further exchanges occurred between counsel and the court. Ultimately, the court noted that plaintiffs' Rule 59 motion was not a motion to modify or amend the judgment and the court refused to amend the judgment to state that the dismissal was "without prejudice" or to include the court's proposed "sixth" conclusion of law. The court also denied plaintiffs' motion for a new judgment or a new trial.

II

[1] From the foregoing facts, one conclusion is certain—the judgment entered in this case must be vacated. Despite the lack of (1) a proper motion for an order to show cause why a preliminary injunction should not be entered; (2) any further mention of injunctive relief in the pretrial order; and (3) any findings of fact or conclusions of law relating to the standards for obtaining injunctive relief in the judgment itself, it is clear that the trial judge, by reading the prayer for relief in plaintiffs' original and amended complaint, was under the impression that the *only* issue to be decided was whether plaintiffs had presented sufficient evidence to entitle them to injunctive relief, and, more importantly, that proof of record title in plaintiffs was the *exclusive* basis upon which plaintiffs would be entitled to such relief. Although proof of record title in plaintiffs would indeed be *a* valid basis for injunctive relief, the court was clearly in error as to the nature of the proceeding and the issues before it at the time of the trial itself. In addition, the judgment entered does not specify whether the injunctive relief to which plaintiffs were not entitled was the *permanent injunction* requested in the original complaint, or the *preliminary injunction* requested in the amended complaint. However, the court's remarks make it likely that the court

thought that it was ruling on the request for a preliminary injunction, with trial on the merits to follow. Furthermore, the record of the colloquy on the Rule 59 motion indicates that the court was apparently unaware both of the effect the judgment of involuntary dismissal *with prejudice* at the close of all the evidence would have with regard to future litigation of the issues covered therein, and of the fact that entry of the requested dismissal *without prejudice* would have had precisely the effect the court sought through its proposed "sixth" conclusion of law.

Rule 41(b) states, in pertinent part, that at the close of the plaintiff's evidence the defendant may move "for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Under the rule, the judge is not required to rule on the motion at the close of the plaintiff's evidence and may decline to render any judgment until the close of all the evidence. Rule 41(b) does not specifically provide for involuntary dismissal at the close of all the evidence. However, where such a motion is made and ruled upon and the court has made findings as required by G.S. 1A-1, Rule 52, the judgment entered will be treated as a judgment on the merits. *See Land Co., Inc. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979); *Reid v. Midgett*, 25 N.C. App. 456, 213 S.E. 2d 379 (1975). In ruling on a motion to dismiss under Rule 41(b), the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and if so, must pass upon the weight and credibility of the evidence upon which plaintiff must rely in order to recover. *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 180 S.E. 2d 611 (1971). If the motion to dismiss is allowed, the trial judge must determine the facts and render judgment against the plaintiff. Rule 41(b) provides that unless the court in its order for dismissal otherwise specifies, [through the language "without prejudice"], dismissal under that section operates as an adjudication upon the merits.

In this case, the judgment appears to find the facts adversely to plaintiffs and would in fact operate to preclude relitigation of the issues it purports to adjudicate, including the issues of title and express, implied, or constructive trust. It would operate, in effect, as a complete adjudication upon the merits. The record plainly discloses that this is precisely the opposite result from that intended by the trial judge when he indicated that the evidence was *merely insufficient to establish record title in plain-*

tiffs and therefore insufficient to entitle them to the injunctive relief originally requested. While an appellate court will not ordinarily look behind a judgment to divine the "intent" of the trial court, the record in this case unmistakably discloses the fact that the judgment of involuntary dismissal with prejudice did not express the intention of the court. It is clear that despite the court's refusal to "amend" the judgment pursuant to plaintiffs' Rule 59 motion, the court did not intend that the complaint be dismissed with prejudice so as to preclude future litigation "on the merits" of plaintiffs' claim.

Plaintiffs have assigned as error (1) various findings of fact in the judgment as unsupported by the evidence, and contrary to the evidence; (2) all of the conclusions of law, with the exception of Conclusion No. 1; (3) entry of the judgment as inappropriately granted and as being against the greater weight of the evidence; and (4) the denial of the Rule 59 motion on the grounds that the judgment was contrary to the court's intent and as being against the greater weight of the evidence. However, these contentions do not adequately address the fundamental error in the case.

The trial court was apparently entirely unaware of the underlying nature of the claim being adjudicated and of the relevant body of law controlling disposition of the issues plaintiffs listed in the pretrial order. It was the plaintiffs' contention at trial, and on appeal, that the underlying legal question before the court is whether Union Chapel A.M.E. Zion Church is a connectional or a congregational church. Plaintiffs contend that their evidence established that the A.M.E. Zion Church is a connectional church, whose internal church government is hierarchical. Plaintiffs also contend that Union Chapel was regarded in the community and by its own congregation as being an A.M.E. Zion Church. They point to A.M.E. Zion Church records listing Union Chapel as a member of the Winston-Salem District of the Western North Carolina Conference, to the acceptance of an A.M.E. Zion minister, Rev. Puryear, by the Union Chapel congregation, and to the acts of the defendant trustees in accepting, conveying and mortgaging church property as "Trustees of the Union Chapel A.M.E. Zion Church" in support of their contention that Union Chapel is and has always been affiliated with the A.M.E. Zion Church Connection. Therefore, its ministers, trustees, congregation and property are governed by the general church. Further-

more, plaintiffs contend that the letter of 18 May 1977, by which the defendant trustees attempted to "*withdraw* Union Chapel's *membership* from the African Methodist Episcopal Zion Church Conference (Western North Carolina Conference)," is indisputable evidence that defendants considered themselves an A.M.E. Zion Church. Thus, plaintiffs contend, Union Chapel is a local A.M.E. Zion Church, subject to the authority of the general A.M.E. Zion Church and pursuant to the policies and Discipline of the general church, and in particular Paragraph 432, Sec. 2 of the 1976 Revised Discipline, the continued usage of the First Tract from at least 1916 to August, 1977 by a local A.M.E. Zion Church was sufficient to vest title to the property in plaintiffs as cestui que trust, or, at the very least, to give them a proprietary interest in the possession, use and control of that property. As to the Second Tract, plaintiffs contend that the 1976 deed itself creates an express trust for the benefit of the A.M.E. Zion Church, because the property was conveyed to the defendant trustees as "Trustees" of "Union Chapel, *A.M.E. Zion Church*," notwithstanding the lack of the specific trust clause.

It is evident that under the plaintiffs' theory of the case, the lack of conclusive evidence as to whether plaintiff A.M.E. Zion Church is a successor to *the* Methodist Episcopal Church named in the 1873 deed, and their failure to establish an unbroken chain of record title is not fatal to their claim of a proprietary interest in the church property, for even if it were to be established that Union Chapel was the successor to the named grantee, as a member of the A.M.E. Zion Church Connection, all property theretofore held by the local church would enure to the benefit, and be subject to the control of, the plaintiff general church. The key issue then becomes whether Union Chapel is a member of the A.M.E. Zion Church Connection.

We agree with the plaintiffs that the proper factors to consider in resolution of the dispute between the parties are those concerning the nature of the relationship between the plaintiff general church and the defendant local church. The trial court clearly heard the evidence and found the facts against plaintiffs under a misapprehension of the controlling law. Therefore, the factual findings may be set aside on the theory that the evidence should be considered in its true legal light. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973); *McGill v. Lumberton*, 215 N.C. 752,

3 S.E. 2d 324 (1939). Although this cause must be remanded to the Superior Court for a new trial, we will endeavor to clarify the issues raised by this case and the law governing their resolution.

III

[2] The central issue plaintiffs sought to have adjudicated was not record title, but rather, whether the parent body of a hierarchical church has the right to control the property of a local affiliated church, and whether the rules and decisions of the parent body on questions of church property will be enforced by the civil courts of our state. It is well established that the civil courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state. N.C. Const. Art. 1, § 13; U.S. Const. amend. I; *Reid v. Johnston*, 241 N.C. 201, 85 S.E. 2d 114 (1954). However, the courts do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy. *Id.*

In *Conference v. Allen*, 156 N.C. 524, 526, 72 S.E. 617, 618 (1911), the court explained the difference between the structures of a hierarchical or connectional church, and a congregational church.

> In *SIMMONS v. ALLISON*, 118 N.C. [763] 770, [24 S.E. 716 (1896)], we had occasion to call attention to the distinction between those churches whose organization is connectional such as the Protestant Episcopal, the various Methodist churches, the Presbyterian, the Roman Catholic, and others which are governed by large bodies, such as dioceses, conferences, and synods, and the like, in which the individual congregations bear the same relation to the governing body as counties bear to the State, and, on the other hand, the congregational system which is in use among the Baptists, the Congregational, and the Christian and other denominations. In these latter, the individual congregation is each an independent republic, governed by the majority of its members and subject to control or supervision by no higher authority. . . . The churches of the congregational system often combine into associations, conferences, and general conventions. But, unlike such organizations under the connectional system,

> these bodies under the congregational system are purely voluntary associations for the purpose of joining their efforts for missions and similar work, but having no supervision, control, or governmental authority of any kind whatsoever over the individual congregations, which are absolutely independent of each other.

Simmons v. Allison, supra, itself involved a dispute between two contending boards of trustees of a local A.M.E. Zion Church known as Clinton Chapel. Both parties contended that they represented the identical congregation, and each sought a restraining order against the other to prevent interference in their respective discharge of their official duties. The Supreme Court stated that the controlling issue was whether the local congregation "was an integral part of the large connectional system known as the African Methodist Episcopal Zion Church and subject to its discipline, or had been all along an independent body, recognized and known as such, but voluntarily and temporarily acting with the larger body, with a reserved right to withdraw at any time." 118 N.C. at 770, 24 S.E. at 718. The court stated that the connectional system is recognized by the law, and determined that the controversy between the respective trustees would be resolved according to the Discipline of the A.M.E. Zion Church. In *Simmons* the dispute tangentially involved a latent ambiguity in the 1866 deed for the property on which Clinton Chapel was located, which deeded the land to the trustees of the "African Methodist Church." The court made this pertinent observation about the vagaries of early church deeds:

> In probably a majority of the cases church deeds are taken by humble and illiterate men when the church is first beginning, and these deeds are often technically defective (as in the present case) or are never recorded.

118 N.C. at 771, 24 S.E. 719. In *Simmons*, the A.M.E. Zion Church was allowed to prove that no church by the name of "African Methodist" actually existed and that the named trustees were in fact members of the A.M.E. Zion Church.

Thus, our courts have long recognized that the African Methodist Episcopal Zion Church is a connectional church polity, and that civil courts may settle certain types of disputes arising from a church controversy by applying or following the rules of

the A.M.E. Zion Church Discipline. In addition, our Supreme Court has recognized that although the A.M.E. Zion Church is connectional, it is possible that a local church could have retained sufficient independence from the general church so that it reserved its right to withdraw at any time, and, presumably, take along with it whatever property it independently owned prior to, and retained during, its limited affiliation with the general church.

The foregoing principles are consistent with the general rule that the parent body of a hierarchical church has the right to control the property of local affiliated churches, and, as a corollary, that the decision of superior tribunals in hierarchical churches will be enforced in civil courts. Anno., 52 A.L.R. 3d 324, § 2(a) and (b) (1973). The annotation points out at p. 332 that, "[although] the rule has stood for a hundred years that in a hierarchical church organization or denomination the parent or superior ecclesiastical authority—and not the local congregation—has the right to control church property, in 1969 the United States Supreme Court substantially tightened the constitutional requirements for applying this rule."

The case referred to is *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 21 L.Ed. 2d 658, 89 S.Ct. 601 (1969). In that case, the United States Supreme Court in effect reaffirmed and strengthened the right of a parent body in a hierarchically organized church to control the property of local member churches by cutting off a major loophole. Previously, local churches were allowed to withdraw from the parent body without surrendering possession of local church property, ordinarily considered to be held under an implied trust for the parent church, when it was shown that the parent body had departed from fundamental tenants of the faith (the departure-from-doctrine exception). This exception necessarily required courts to interpret religious doctrine. The Supreme Court ruled that civil courts must decide church property disputes without resolving underlying controversies over religious doctrine, and, therefore, must endeavor to use "neutral principles of law" to settle church property disputes, without reference to ecclesiastical law.

Following *Hull Memorial Presbyterian Church*, the Appellate Court of Indiana determined that the "discipline" of a hierarchical

Methodist Church, as it pertains to property of local churches, may be considered a "neutral principle of law" in the resolution of church property disputes between an affiliated local church and its parent body. *United Methodist Church v. St. Louis Crossing*, 150 Ind. App. 574, 276 N.E. 2d 916, 52 A.L.R. 3d 311 (1971). Similarly, in *Green v. Lewis*, 221 Va. 547, 272 S.E. 2d 181 (1980), the Supreme Court of Virginia utilized, *inter alia*, the Discipline of the A.M.E. Zion Church (1972 Revised Edition) to resolve a property dispute between a local A.M.E. Zion Church and the parent body. On facts strikingly similar to those of the case under discussion, the court held as follows:

> We find from the language of the deed involved, the Discipline of the A.M.E. Zion Church, and the relationship which has existed between the central church and the congregation over a long period of years, that the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel, and that its interest in the church property cannot be eliminated by the unilateral action of the [local church] congregation.

272 S.E. 2d at 186. *See also* 52 A.L.R. 3d 324, § 23(b) (general rule is that in doctrine and general church organization, African Methodist Episcopal Church does not differ from the Methodist Church, which is clearly hierarchical in polity, and therefore local congregations affiliated with the African Methodist Episcopal Church have been held not to be independent and self-governing with respect to property matters, but subject to the control of superior church authority).

The defendant appellees asserted, in their answers to plaintiffs' interrogatories, that the Union Chapel A.M.E. Zion Church, or the "Union Chapel Methodist Church" as its name appears in the 1979 deed, was never affiliated with the A.M.E. Zion Church. Further, that they never made any reports or accountings to the plaintiffs. The defendants apparently took the position that they had always been an independent body, recognized and known as such, with a reserved right to unilaterally withdraw from the A.M.E. Zion Church. In response to plaintiffs' request to admit, defendants averred that the congregation of the "Union Chapel Methodist Church" has been in continued existence since prior to 27 January 1873.

Therefore, upon remand, the major question to be answered, although now following the *Hull Memorial Presbyterian Church* guidelines, *is whether the defendant local church was in fact in a hierarchical relationship with the plaintiff parent body with respect to property matters.*

We address one further point with regard to the defendants' purported withdrawal from the parent African Methodist Episcopal Zion Church, and their new title as "Union Chapel Methodist Church." It appears that the defendants rested their case largely upon the 1873 deed which describes "a Methodist Epeskopal (sic) Church" in Davidson County. They averred in their pleadings and in the issues set out in the pretrial order that the "Union Chapel Methodist Church" was the owner of the above-mentioned property, and of the Second Tract. Pursuant to G.S. 61-3, all lands given or granted to any church, religious denomination, or congregation for their respective use "shall be and remain forever to the use and occupancy of that church, or denomination, society or congregation" for which the lands were given or granted, and "the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use according to the intent expressed in the conveyance." Plaintiffs contend that defendants, as the congregation of Union Chapel *Methodist Church*, would no longer constitute a *Methodist Episcopal Church*, and therefore would be precluded from use and control of the property as against the latter denomination named in the 1873 deed. They cite G.S. 61-3, and *Western North Carolina Conference v. Tally*, 229 N.C. 1, 47 S.E. 2d 467 (1948) (members of congregation who withdraw affiliation from the denomination taking under the deed are not entitled to the control and use of the property as against the grantee denomination). Upon retrial, a determination must be made as to whether "Union Chapel Methodist Church" would be entitled to fee simple ownership of lands deeded to a Methodist Episcopal Church in the 1873 deed and to an A.M.E. Zion Church in the 1976 deed.

In conclusion, we hold that the judgment entered on 15 February 1982 must be vacated because it did not conform to the trial court's stated intention and was entered under a misapprehension as to the nature of the claim being litigated and the

law applicable to that claim. The cause is remanded to the Superior Court for a trial *de novo*.

Vacated and remanded.

Judges HILL and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 OCTOBER 1983

BAUGH v. BAUGH No. 8218SC1157	Guilford (80CVD1950)	Affirmed in Part, Vacated and Remanded in Part
OSBORNE v. HATCHER PICKUP No. 8218SC1091	Guilford (78CVS3465)	No Error
STATE v. BURRUS No. 832SC39	Hyde (81CRS60) (81CRS73)	No Error
STATE v. STARKEY No. 823SC1351	Pitt (82CRS3715)	No Error
STATE v. THOMPSON No. 8215SC1293	Orange (82CRS4726)	New Trial

MARVIN L. SPECK AND STANLEY E. GILLILAND v. NORTH CAROLINA DAIRY FOUNDATION, INC., THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY, A CONSTITUENT INSTITUTION AND THE ACTING CHANCELLOR OF NORTH CAROLINA STATE UNIVERSITY

No. 8210SC920

(Filed 18 October 1983)

Fiduciaries § 2; Limitation of Actions § 7 — breach of fiduciary duty — constructive trust — sufficiency of evidence — statute of limitations

In an action to recover a share of the royalties defendants received from the marketing of Sweet Acidophilus milk, the secret process for which had been developed by plaintiffs, plaintiffs' evidence raised a genuine issue of material fact as to whether defendants N.C. State University and N.C. Dairy Foundation had a fiduciary duty to plaintiffs which they breached so as to give rise to a constructive trust where it tended to show that plaintiffs were employees of defendant University; pursuant to University policy, plaintiffs entrusted their secret process for Sweet Acidophilus to the University, and the University exercised authority and control over the commercial development of the process; the University traditionally awarded 15% of the royalties it received from a product to its faculty inventor; the University, plaintiffs and the Dairy Foundation worked together to obtain a trademark for Sweet Acidophilus milk through the Dairy Foundation; the Sweet Acidophilus was marketed through the Dairy Foundation, which was an agent of the University for that purpose; and the University has denied plaintiffs' request for a share of the royalties. Therefore, the ten-year statute of limitations of G.S. 1-56 may apply to plaintiffs' case.

Judge HEDRICK dissenting.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 2 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1983.

The plaintiffs brought suit to recover a share of the royalties defendants had received in connection with plaintiffs' research on acidophilus milk. Plaintiffs based their claim on the following events:

Plaintiff Speck spent several years during his tenure as a professor at North Carolina State University (hereinafter, "the University") studying how to make a good-tasting milk product containing lactobacillus acidophilus bacteria. Plaintiff Gilliland assisted him. They developed a technique for producing concen-

trated acidophilus which maintained its resistance to bile without adding sour flavor to milk. The plaintiffs' research is significant because acidophilus apparently inhibits the growth of unhealthy micro-organisms in human intestines while facilitating good digestion. Prior to plaintiffs' research, acidophilus could not be easily introduced to milk without ruining the taste of the milk.

On 15 September 1972 plaintiff Speck informed the head of his department, Dr. Roberts, of his acidophilus research. Roberts suggested that he submit a proposal to the University Patent Committee for obtaining a trademark and marketing "Sweet Acidophilus" milk. The minutes of the Patent Committee meeting on 19 October 1972 reveal that,

> [Dr. Speck and Dr. Roberts] proposed to work through the North Carolina Dairy Foundation and employ a patent attorney to advise on the desirability of obtaining either a trademark or a copyright. Cost of the venture would be borne by the Dairy Foundation and a licensing of any trademark obtained would be handled through that organization. After a brief discussion by the Committee, which brought out that a patent application was not feasible, Mr. Conner moved that the request be approved and the motion was seconded by Dr. Bennett. Motion carried unanimously.

The University's Dean of the School of Agriculture and Life Sciences subsequently told the Dairy Foundation that, "the Patent Committee was applying for a patent on [sic] a trademark for the product through the Dairy Foundation."

Plaintiffs never executed an assignment of their ownership rights in the acidophilus process to the Dairy Foundation, the University, or anyone else. However, the University's Patent Policy clearly asserted University ownership of patentable inventions made by faculty members. The Patent Policy further stated, "The University will establish equitable arrangements with the inventor(s) for an appropriate share of the proceeds of any royalties realized from a patent so as to provide a reasonable encouragement to the inventor." The University traditionally awarded 15% of the royalties it received to the inventor.

Although plaintiffs' secret process for acidophilus milk was not patentable, all parties involved assumed the Patent Policy ap-

plied by analogy. Indeed, the Patent Committee revised the policy in 1976 to expressly cover trademarks and trade secret agreements. Plaintiff Speck and the defendants all initially assumed that ownership rights to the techniques plaintiffs developed were in the Dairy Foundation.

The University, Dr. Speck, and the Dairy Foundation worked together to obtain a trademark and market Sweet Acidophilus milk. The Dairy Foundation is a nonprofit organization that promotes University research on dairy products. It has its office on the University campus and one of its officers is a dean at the University. Dr. Speck and University officials helped the Dairy Foundation negotiate a contract for commercial production of acidophilus. The Dairy Foundation's Acidophilus Committee minutes of 9 January 1973 stated that University officials "would be kept informed of all pending actions and would be given the opportunity to review all agreements and contracts prior to execution." The Patent Committee and ranking University officials consistently maintained their desire to "work through" the Dairy Foundation to make Sweet Acidophilus milk a commercially viable product. With University support, Dr. Speck worked closely with the Dairy Foundation in marketing Sweet Acidophilus milk. Their marketing scheme proved successful and royalties began to accrue to the Dairy Foundation, as agreed by the University.

On 3 November 1975 Dr. Speck wrote to the head of his department to inquire about royalties. He felt the Dairy Foundation was the proper vehicle for marketing Sweet Acidophilus milk and also a proper agent of the University for receiving the royalties. However, Dr. Speck noted, participation by the inventor in the royalties had been overlooked.

Dr. Roberts passed Dr. Speck's request for royalties on to another University official, who, on 1 December 1975, replied that there was no basis for plaintiffs to share in the income from Sweet Acidophilus.

In a 8 October 1976 memorandum, Dr. Speck argued that he had not surrendered his rights as inventor, and that the University should make royalty payments to him in accord with the Patent Policy. The University's Legal Advisor stated a month later that since the plaintiffs' method of making Sweet Acidophilus milk was not patentable, all ownership rights were automatically

returned to the plaintiffs. This position was based on the following provisions of the Patent Policy:

> [The Patent Committee] may at its discretion, cause the University's ownership rights to subsequent patents, if any, to be waived to the inventor if the Faculty Patent Committee is convinced that . . . (b) the invention is clearly one which is nonpatentable and which does not warrant referral to a patent management agency for evaluation.

The Legal Advisor further made the "assumption" that Dr. Speck had given his discovery to the Dairy Foundation since, despite the lack of any assignment of rights, Dr. Speck had not denied the rights belonged to the Dairy Foundation and had even recognized in a 1973 letter that the Dairy Foundation owned the rights.

On 23 January 1978 the Chairman of the University Patent Committee recommended to the Chancellor that a one-time payment of 15% of the royalty funds from Sweet Acidophilus be paid to Dr. Speck. The Chairman observed that such payments were an established procedure for faculty inventions, and that another professor in the Food Science Department had recently received such a payment. The Chairman also mentioned that it would be prudent to get Dr. Speck to formally execute an assignment of his rights to Sweet Acidophilus upon receipt of a one-time payment. In a similar vein, Dr. Roberts recommended on 6 December 1979 that the Dairy Foundation "establish as soon as possible its rights with N. C. State University and the claims of the inventors" so it would be able to negotiate with commercial manufacturers.

The plaintiffs filed a complaint on 11 December 1981 asking for an equitable distribution of the royalties and a constructive trust to remedy the unjust enrichment of the defendants. The defendant Dairy Foundation moved for summary judgment on the ground that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. The other defendants moved for summary judgment on the ground that the three-year statute of limitations period had expired before suit was filed. The trial court granted defendants' motions for summary judgment. Plaintiffs appealed.

Boyce, Mitchell, Burns & Smith, by Lacy M. Presnell, III and Susan K. Burkhart, for plaintiff appellants.

Poyner, Geraghty, Hartsfield & Townsend, by Thomas L. Norris, Jr., Cecil W. Harrison, Jr., and David W. Long, for defendant appellee North Carolina Dairy Foundation, Inc.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr. and Associate Attorney Thomas J. Ziko, for defendant appellees The Board of Governors of the University of North Carolina, The Board of Trustees of North Carolina State University, and The Acting Chancellor of North Carolina State University.

PHILLIPS, Judge.

The central issue on appeal is whether plaintiffs' cause of action is barred by the three-year limitations period of G.S. 1-52. Because the record contains evidence supporting plaintiffs' allegations of a breach of fiduciary duty, we hold that their claim may fall under the ten-year limitations period of G.S. 1-56 and therefore summary judgment was not proper.

Summary judgment for the defendants is proper only if the evidence in the light most favorable to the plaintiffs shows no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law. If the plaintiffs had merely made out a claim in contract, express or implied, or in fraud, then the defendants would be entitled to judgment based on the three-year statute of limitations in G.S. 1-52. However, plaintiffs' evidence raises a genuine issue of material fact as to whether the defendants had a fiduciary duty to the plaintiffs that they breached.

A confidential or fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Whether such a relationship exists in any instance is determined by the specific circumstances of the case. When, as here, the circumstances governing the alleged relationship are in dispute, the issue is one of fact for the jury, rather than one of law for the court. *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971); *Crew v. Crew*, 236 N.C. 528, 73 S.E. 2d 309 (1952).

Taken in the light most favorable to the plaintiffs, the evidence in the present case indicates Dr. Speck reposed a special confidence in the University and the Dairy Foundation to protect his interest in the secret process for making Sweet Acidophilus milk. Acting pursuant to the University's Patent Policy, Dr. Speck presented his secret process to the Patent Committee. He reasonably assumed that the University had ownership rights to his invention but that he would be equitably compensated as specified in the Patent Policy. The University did not inform him that the ownership rights were his. Instead, the Patent Committee approved his idea of marketing the invention through the Dairy Foundation. Plaintiffs understood the University to be turning its ownership rights over to the Dairy Foundation. The University, as their employer, was in a superior position to plaintiffs, who were in no position to question the course that the University chose to follow.

University officials claimed credit for the scientific and commercial success of Sweet Acidophilus, noting that the new milk product had been marketed through the Dairy Foundation. The University encouraged Dr. Speck to assist the Dairy Foundation in developing Sweet Acidophilus, and University officials worked directly with the Dairy Foundation on this project. Evidence for the plaintiffs shows that the University exercised authority and control over the commercial development of plaintiffs' secret process, and that the plaintiffs entrusted their invention or discovery to the University for development.

The circumstances indicate the relationship was more than contractual. Plaintiffs turned their secret process over to their employer without asking for anything. Their primary concern was for the University to make the best use of acidophilus; they relied on the superior business and legal skills of the defendants for marketing acidophilus milk. Yet they understood from the Patent Policy that surrendering their legal ownership rights did not deprive them of an equitable or beneficial interest in their invention. By working with the defendants to develop Sweet Acidophilus long after they had acknowledged the legal ownership was in the defendants, they demonstrated their continued interest in their invention. Plaintiffs reposed a special confidence in the defendants by confidentially revealing a secret and valuable process to them, and the defendants' actions indicate they accepted

this trust. The minutes of the 28 October 1972 Dairy Foundation meeting show a University official stated that the Patent Committee was applying for the trademark through the Dairy Foundation. Thus, there is evidence that all the defendants assumed responsibility for the secret process despite the absence of any assignment of rights to them or contractual agreement. Plaintiffs' evidence supports their claim that they entrusted the defendants with their new techniques, and that there was neither any intent by plaintiffs to divest themselves of any equitable interest that they might have therein nor any bargaining with respect thereto.

The trust placed by the plaintiffs in the University also encompasses the Dairy Foundation. The Dairy Foundation essentially acted as an agent of the University for developing Sweet Acidophilus milk. These two organizations had an identity of interests since part of the Dairy Foundation's royalties from Sweet Acidophilus went to support further University research on this milk product. Moreover, the University and the Dairy Foundation shared the goal of using the royalties to promote dairy products and general research in the public interest. The two organizations had overlapping officers and office locations. They worked closely together in developing Sweet Acidophilus. The Dairy Foundation, nominal owner of the rights to Sweet Acidophilus, opened all its contracts and actions pertaining to the milk product to review by the University. University officials consistently stated they were developing Sweet Acidophilus for consumer markets by working through the Dairy Foundation, thereby implying an agency relationship. The interests and responsibilities of the University and Dairy Foundation were so tightly interwoven in developing Sweet Acidophilus that the actions of one may be fairly attributed to the other.

Plaintiffs have produced evidence that the defendants violated the trust or confidence reposed in them. The University has declined plaintiffs' request for a share of the royalties even though the Patent Committee Chairman recommended a $30,000 award to Dr. Speck. The Dairy Foundation received well over half a million dollars in Sweet Acidophilus royalites by June of 1980, with a portion of these proceeds going to the University to fund research. The defendants arguably had a fiduciary duty to set aside a fair share of the royalties for the plaintiffs since the defendants, acting in a position of superiority and trust, assumed

control of the secret process, the defendants took credit for the plaintiffs' innovations, the defendants traditionally gave 15% of the royalties to faculty inventors, and the defendants profited from the special confidence that plaintiffs reposed in them.

The viability of plaintiffs' claim depends upon the jury finding that a breach of fiduciary duty has occurred. Without this finding, plaintiffs will not have stated a claim that comes under the ten-year statute of limitations. But if there has been a breach of fiduciary duty, the ten-year limitation period of G.S. 1-56 will control since none of the other statutes of limitations expressly apply.

North Carolina courts have long held that a constructive trust arises out of the violation of a confidential or fiduciary relation, and that, as distinguished from an express trust, it is governed by the ten-year, rather than the three-year, statute of limitations. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954).

It is important to note, however, that a constructive trust is an equitable remedy, not a true trust. *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938); D. Dobbs, Remedies § 4.3 (1973). The constructive trust remedy was created to prevent unjust enrichment and force restitution to the plaintiff of property that in equity and good conscience did not belong to the defendant. Dobbs, *supra*. The ten-year statute of limitations was originally applied to constructive trusts because the underlying cause of action was fraud or some similar wrongful act distinct from breach of contract. *Teachey, supra*. Today, the statute of limitations for fraud has been shortened to three years. G.S. 1-52. Nonetheless, North Carolina still seems to apply ten-year statutes of limitations to constructive trusts. *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979).

A decision as to which statute of limitation applies should be based on the nature of the substantive right that has been injured, not the remedy. G.S. 1-52 imposes a three-year limitations period for specific rights like those in contract and fraud, regardless of the remedy sought. By stating in G.S. 1-56, "All other actions, ten years" the General Assembly created a catch-all limitations period for substantive rights not enumerated in other statutes. It is irrelevant whether plaintiffs seek a constructive trust, or any other remedy, for purposes of determining the

statute of limitations. Instead, the statutes of limitation must be examined to find which one covers the substantive right plaintiffs are asserting; namely, a fiduciary duty owed by the defendants.

Defendants' alleged fiduciary duty was neither contractual nor the basis for fraud in the present case. Defendants made no promise that they could have breached; there was no agreement reached by the parties about plaintiffs' rights to their secret process or its royalties. Nor was there any allegation of intentional deceit. Plaintiffs' evidence simply shows they reposed a special confidence in the defendants, and the defendants did not act in good faith or fairness to look after the plaintiffs' interests. Since no statute of limitation expressly covers breaches of this type of fiduciary duty, they are governed by G.S. 1-56.

Though the decisions of our Supreme Court involving fiduciary relationships and the statutes of limitation are neither entirely clear nor consistent, as we understand them they nevertheless sanction our holding in this instance. In *Parsons v. Gunter*, 266 N.C. 731, 147 S.E. 2d 162 (1966), it was held that the three-year, rather than the ten-year, statute applied because plaintiff's claim was strictly contractual in nature and the evidence failed to establish a confidential relationship from which a constructive trust could arise. But here, plaintiffs' claim is not contractual and evidence was presented that a confidential or fiduciary relationship existed.

While some aspects of the decision in *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965) are not at all clear to us, and we doubt the validity of some of the statements made therein, which need not be analyzed here since they are irrelevant to this appeal, it is quite clear that in ruling that the three-year statute applied to the wife's claim against her husband based upon her funds being used to help build a house on a lot he had title to that the Court did so because the evidence showed her money was put into the house in reliance upon his express promise to have title to the property put in both their names. Thus, as in *Parsons*, the claim was essentially for breach of contract, rather than for breach of fiduciary duty, as in this case. Another distinguishing feature between this case and *Fulp* is that these plaintiffs claim an equitable interest in or title to the proceeds from a secret process that didn't exist before their work was done; whereas, in *Fulp*,

the plaintiff sought to recover money contributed to the pre-existing property of another.

Recent North Carolina decisions continue to say that an action for a constructive trust has a ten-year statute of limitations. *Tyson v. North Carolina National Bank*, 305 N.C. 136, 286 S.E. 2d 561 (1982); *Cline v. Cline, supra*. But the reasoning of these decisions indicates the court is determining the statute of limitations according to the substantive nature of the right involved. The *Cline* case held that defendant husband violated his fiduciary or confidential relationship to his plaintiff wife, giving rise to a constructive trust in her favor, and the court applied the ten-year statute. In *Tyson*, where plaintiff was the heir and beneficiary of an estate of which defendant was the executor and trustee, though the court agreed that there had been a breach of fiduciary duty, it applied the three-year statute of limitations because defendant had violated an express trust, for which contract damages rather than a constructive trust were the proper remedy. *Cline* and *Tyson* together stand for the proposition that breach of fiduciary duty may give rise to an action in contract or may be an independent cause of action, depending on the circumstances.

Cline provides the best precedent for the present case since both involve breach of fiduciary duty without a contractual basis. Unlike *Tyson*, no express trust exists in the present case.

Defendants also argue that breach of fiduciary duty constitutes a form of fraud; however, breach of fiduciary duty is "constructive fraud," which differs from actual fraud in that it does not require the element of intentional deceit. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Miller v. First National Bank of Catawba County*, 234 N.C. 309, 67 S.E. 2d 362 (1951). The distinction is so great Dobbs finds the term "constructive fraud" to be misleading. Dobbs, *supra*, § 10.4. Breach of fiduciary duty occurs when there is unfair dealing with one to whom the defendant has an active responsibility; it requires a special relationship unlike actual fraud. Thus, although actual fraud and constructive fraud share the name of "fraud," they are different causes of action which should come under different statutes of limitation.

Under the foregoing analysis, plaintiffs have stated a claim for breach of fiduciary duty which is not in the nature of a breach of contract or actual fraud. Accordingly, the ten-year limitations

period of G.S. 1-56 should apply. Yet even if this Court were to determine the statute of limitations issue according to whether plaintiffs had grounds for a constructive trust remedy, the plaintiffs must prevail on appeal.

A constructive trust may arise where there has been a breach of fiduciary duty. *Cline v. Cline, supra.* In such cases, the ten-year statute of limitations has been held to apply. *Id.* Defendants argue that a constructive trust requires a property interest, and that the trade secret in the present case is not a property interest, so the ten-year limitation period for constructive trusts cannot be invoked. We disagree. As an equitable remedy the constructive trust is quite flexible and may be used to recover profits or other unjust enrichment stemming from a fiduciary's misuse of confidential information.

The general rule is that, "One in a special relationship clearly should not profit at the *expense* of his beneficiary." (Emphasis in original.) Dobbs, *supra,* § 10.4. Dobbs identifies two pertinent fact situations where the preceding rule applies: (1) an employee owes a fiduciary duty of loyalty to his employer not to divulge a trade secret or take inside information for his own use, and (2) a person generates an idea and submits it to a business for development with the expectation of being paid. *Id.* at § 6.6. The present case involves elements of both these situations. A confidential relationship and duty of loyalty arguably existed between plaintiff employees and the defendant employer when defendant was entrusted with the commercial development of plaintiffs' secret process. The plaintiffs' process for introducing acidophilus into milk is in the nature of a trade secret. As such, the defendants have a duty to share profits with the plaintiffs if the jury finds a confidential relationship: "What is protectible is not property, but the confidential relationship and duty of loyalty owed by those who receive confidential information. Thus the trade secret need not be patentable or copyrightable to deserve the [defendants'] duty of loyalty concerning it." *Id.* at § 10.5. A constructive trust may be imposed to recover profits that unjustly enrich a defendant who misuses confidential information. *Id.* Dobbs carefully notes that where the defendant is not a conscious wrongdoer, equitable restitution should be limited to the gains unjustly derived from the trade secret itself, as opposed to any share of prof-

its attributable to the efforts, capital, and skill of the defendant. *Id.*

This Court has cited Dobbs' analysis with approval. In *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 228 S.E. 2d 478 (1976), this Court stated that disclosure of confidential information obtained through an employer-employee relationship was a tort in which the duty derives from the relationship of trust and confidence, not from property rights in the information.

The remedy sought in the *Travenol Laboratories* case was an injunction, but it is equally clear that a constructive trust may lie in cases of fiduciary self-dealing. *Anderson Cotton Mills v. Royal Manufacturing Co.*, 221 N.C. 500, 20 S.E. 2d 818 (1942), held that a fiduciary must account by way of constructive trust for any personal pecuniary advantage acquired when acting in his fiduciary character.

Defendants contend, in contradiction to the preceding authorities, that the *Fulp* decision requires title to property to be at issue before a constructive trust may be imposed. *Fulp* does not state that the ten-year statute of limitations for constructive trusts applies *only* if title to property is at issue. Instead, it holds that in the context of a dispute over real estate the plaintiff must state a claim for equitable ownership in the real estate, not simply a claim for money had and received, if legal title is to be conveyed to the plaintiff through a constructive trust. North Carolina law on constructive trusts, including the *Anderson Cotton Mills* and *Fulp* decisions, has received academic attention in an article that stresses the breach of duty over the need for a formal property right as the basis of a constructive trust. Lauerman, *Constructive Trusts and Restitutionary Liens in North Carolina*, 45 N.C. L. Rev. 424, 436 (1967), states:

> If there is a fiduciary or confidential relationship between the parties established by an agreement or otherwise, there need have been no trust *res* in existence at the time the fiduciary relationship was created in order to support a subsequent constructive trust. It is enough if the fiduciary or confidant has acquired any pecuniary advantage to himself through his special relationship. Hence, a constructive trust in North Carolina is primarily a tool to enforce a fiduciary duty.

This analysis makes sense because a constructive trust is not a true trust. It does not require a *res* or other incidents of true trusts. It is strictly an equitable remedy for providing restitution to the plaintiff where the defendant had been unjustly enriched.

Defendant Dairy Foundation also claims that summary judgment was properly based on plaintiffs' waiver or abandonment of their rights. Plaintiffs did acknowledge in 1973 and 1974 that the Dairy Foundation owned the rights to the acidophilus processing technique. However, if the jury finds that plaintiffs entrusted their secret process to defendants on the basis of a confidential or fiduciary relationship, then plaintiffs' acknowledgment of legal title in defendants does not establish waiver or abandonment. Plaintiffs would retain their equitable interest. Waiver is the intentional relinquishment of a known right. *Jones v. Home Security Life Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1961). Similarly, abandonment of property requires intent. *Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942). Plaintiffs' evidence shows they did not know of their ownership rights; they believed that under the Patent Policy the University had ownership and they had rights only to an "equitable arrangement" consisting of 15% of the royalties. The issue of waiver or abandonment depends on the same findings as the issue of breach of confidential relationship: if the jury finds that plaintiffs entrusted their secret process to defendants with the expectation that defendants would protect their interest in a fair share of the royalties, then no waiver or abandonment occurred.

Reversed and remanded.

Judge WELLS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

The majority grounds its decision on what it perceives to be a breach of a fiduciary relationship that gives rise to an equitable proceeding to establish a constructive trust. The record discloses that there is not now and never has been a "fiduciary relationship" between the defendants and plaintiffs, and the law will not and the court cannot declare that any of the defendants holds the

property in question or any profits realized therefrom in trust for the plaintiffs.

I vote to affirm summary judgment for the defendants.

LAWRENCE ANDERSON WHITE v. JEAN MALCOLM WHITE

No. 8210DC1178

(Filed 18 October 1983)

Divorce and Alimony § 21.9— equitable distribution of marital property—findings supporting conclusion

In an action for divorce where defendant wife counterclaimed for equitable distribution of the marital property pursuant to G.S. 50-20, the trial court's findings that defendant contributed services which exceeded in value the fair market value of her interest in jointly held property and her separately held property was consistent with the court's conclusion that the parties were entitled to an equal division of the marital property.

Judges HEDRICK and WEBB concurring in the result.

APPEAL by defendant from *Cashwell, Judge.* Order entered 9 June 1982 in District Court, WAKE County. Heard in the Court of Appeals 29 September 1983.

On 23 November 1981, plaintiff husband filed an action for divorce based on one year's separation. Defendant wife counterclaimed for equitable distribution of the marital property under G.S. 50-20. Upon trial without a jury, the court found the parties were entitled to an equal division of the marital property. From this order, defendant appealed.

James S. Warren for plaintiff appellee.

Kirby, Wallace, Creech, Sarda and Zaytoun, by John R. Wallace and Peter J. Sarda, for defendant appellant.

HILL, Judge.

The resolution of this appeal depends upon the interpretation given G.S. 50-20, the North Carolina Equitable Distribution Act. This act was enacted in recognition of the concept of marriage as a partnership, a shared enterprise to which both spouses make

valuable contributions, although often in different ways. Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis, 61 N.C. L. Rev. 247 (1983). Equitable distribution seeks to effect upon divorce those sharing principles that motivate most couples during marriage. *Id.* In particular, it gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of the assets accumulated during the marriage. *Rothman v. Rothman*, 65 N.J. 219, 228, 320 A. 2d 496, 501 (1974).

In this case, defendant argues the court erred in concluding the parties were entitled to an equal share of the marital property. She maintains her contributions to the marital estate greatly exceeded those of the plaintiff; therefore, she is entitled to a greater share of the marital estate. The findings of fact made by the court are summarized as follows:

The parties were married from 8 September 1951 until 6 April 1982. There were two children born of the marriage: Kevin Baird White, born 4 September 1952, and Elinor Bannon White, born 28 February 1954. Prior to the marriage, plaintiff received a B.S. degree in agricultural engineering from North Carolina State University and defendant received certification as a registered nurse from Rex Nursing School. Upon their marriage, plaintiff was employed as a salesman of heavy equipment and owned a 1951 Studebaker automobile. Defendant was employed at Rex Hospital.

Upon getting married, defendant gave up her job at Rex Hospital and moved to Charlotte with plaintiff. Shortly thereafter, defendant became pregnant with her first child. By mutual consent of the parties, defendant elected not to pursue her career as a nurse and chose instead to raise the parties' children and to seek only part-time employment as a nurse during the course of their minority. Plaintiff, throughout the first twenty-four years of the marriage, sold heavy equipment and was obligated to travel in connection with his employment. Defendant attended to the daily needs of the children, managed the parties' household and finances, did the housework in their home, and contributed substantially to plaintiff's career by acquiescing in the several moves required by plaintiff's work and by assisting and encourag-

ing plaintiff in the development of his career. Defendant was employed on a part-time basis in each of the communities in which the parties resided, often working at night and on weekends.

In June 1970, defendant obtained full-time employment with the U. S. Postal Service as an occupational health nurse and has pursued such career since that time. In July 1970, the parties separated for a period of nine months. Plaintiff was employed through 1975 but during the period of 1975-1978 did not have any regular full-time employment. Plaintiff acquired during the course of the marriage financial and investment skills which enabled him to earn income from his investments. During the marriage, plaintiff invested in securities in his separate name and purchased the bulk of his estate during the early 1970's. Plaintiff also helped defendant invest in securities in her separate name.

During 1975 through 1978, defendant's earnings and contributions to the parties' home greatly exceeded those of the plaintiff and such earnings enabled plaintiff to attend to his individual investments on a daily basis. Those earnings were as follows:

	Plaintiff	Defendant
1974	$18,254.00	$13,321.00
1975	$10,852.00	$14,746.00
1976	$ 428.00	$15,835.00
1977	$ 3,190.00	$16,249.00
1978	$ 5,035.00	$16,641.00

In 1978, plaintiff obtained employment with the U. S. Postal Service and is presently so employed. Plaintiff is 55 years of age and defendant is 52. Plaintiff presently earns approximately $20,500.00 a year, has prospects of inheriting a substantial estate, and has additional steps in his salary enabling him to increase his income in the coming years. Defendant earns approximately $23,000.00 a year, has reached the maximum salary level for her position but may receive longevity increases. Plaintiff has bursitis, and defendant has arthritis and osteoporosis and has had periods of depression in the past which interfered with her employment. Plaintiff has vested pension rights of $3,300.00 and defendant has vested pension rights of $8,900.00.

Either individually or jointly, the parties own the following marital property: (1) a house, lot and greenhouse valued at $57,900.00; (2) automobiles valued at $2,500.00; (3) securities in plaintiff's name valued at $45,279.95 and in defendant's name in the amount of $27,128.91; (4) savings of $1,478.00; and (5) furniture valued at $1,000.00. Since 1975, defendant has made the mortgage payments on the house.

The court found that defendant contributed services as a spouse, parent, homemaker, and wage earner which exceed in value the fair market value of her interest in jointly held property and her separately held property. Finally, the court found that "pursuant to G.S. 50-20, an equal division of the marital property of the parties is presumed appropriate."

The first issue we must address is whether the court was correct in finding that G.S. 50-20 creates a presumption of equal division. We believe the court was correct. G.S. 50-20(c) provides:

> (c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> (2) Any obligation for support arising out of a prior marriage;
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
>
> (5) Vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property;
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital

property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party; and

(12) Any other factor which the court finds to be just and proper.

We interpret the language of G.S. 50-20(c) that "[t]here shall be an equal division . . . of marital property unless the court determines that an equal division is not equitable" as establishing a presumption of equal division of the marital property. We draw this conclusion from our comparison of similar statutes in other states. The vast majority of states which provide for an equitable distribution of property direct the courts to divide the marital property in such proportions as the court deems just considering the statutorily enumerated factors. In those states, the courts do not presumptively assign any proportion of the marital assets to each spouse; rather, they examine each case as an individual and particular entity. *See Rothman, supra* at 503. But the statutes in such states are clearly distinguishable from G.S. 50-20(c) in that they make no mention of an equal division or any other starting point from which the court should work in making its distribution.

In contrast, Wisconsin and Arkansas have property division statutes which do provide for an equal division of marital assets. The statutes of these states have been interpreted as creating a

rebuttable presumption of equal division. *See Jasper v. Jasper*, 107 Wis. 2d 59, 318 N.W. 2d 792 (1982); *Forsgren v. Forsgren*, 4 Ark. App. 286, 630 S.W. 2d 64 (1982). The Wisconsin statute, Sec. 767.255, leaves no room for a contrary interpretation as it states "[t]he court shall presume that all other property is to be divided equally between the parties, but may alter this distribution . . . after considering (the enumerated factors)." The Arkansas statute, on the other hand, is in effect virtually indistinguishable from the North Carolina statute and it too has been treated by the courts as establishing such a presumption. Arkansas statute 34-1214 states:

> All marital property shall be distributed one-half [½] to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (the enumerated factors).

The North Carolina legislature's decision to word G.S. 50-20(c) so that it more closely follows the Arkansas and Wisconsin statutes rather than the statutes in the majority of states clearly indicates that a presumption was intended. The practical difference between the wordings is that the wording used by the majority of equitable distribution states allows the court more discretion in its allocation of the property. G.S. 50-20(c) allows the court considerable discretion even with the presumption; therefore, we feel our interpretation of the statute is a reasonable one.

The second issue we must address is what is the proper standard of review to be utilized in reviewing the trial court's decision. We believe the division of marital property is a matter within the sound discretion of the trial court, and its judgment should not be disturbed on review unless it is shown that the division made was an abuse of discretion. "An abuse of discretion occurs when the trial court has failed to consider proper factors, has made a mistake or error with respect to the facts upon which the division was made, or when the division itself was, under the circumstances, either excessive or inadequate. (Citation omitted.)" *Jasper v. Jasper*, 107 Wis. 2d 59, 63-64, 318 N.W. 2d 792, 795 (1982).

Virtually all of the states which provide for equitable distribution have vested broad discretion in the trial courts, and

indeed, such discretion is essential if fairness is to be achieved. The courts in this state have long recognized that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. *See Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133 (1953). This is especially so in cases involving certain aspects of family law. *See Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967); *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700 (1963); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966).

That our legislature intended to grant courts wide discretion in dividing marital property is indicated by (1) the language of G.S. 50-20(c); (2) the existence of the twelve enumerated factors in the statute which the court is to consider in determining what will be an equitable division; (3) the existence of the catchall factor in G.S. 50-20(c)(12) whereby the court is permitted to consider "any other factor which the court finds to be just and proper"; and (4) the lack of any indication as to the quantum of evidence on each of the factors required to overcome the presumption.

This is not to say the courts have unlimited discretion in this matter. The courts are limited by the presumption of equal division and by the requirement of G.S. 50-20(j) that they justify their distribution of property with written findings of fact. Furthermore, "the exercise of discretion implies conscientious judgment arrived at in accordance with established rules, and not arbitrary action." 1 Strong's N.C. Index 3d Appeal and Error § 54 (1976).

In this case, the court considered all of the relevant factors enumerated in G.S. 50-20 and concluded the evidence did not justify alteration of the equal property division presumption. The court's finding that defendant contributed services which exceed in value the fair market value of her interest in jointly held property and her separately held property is consistent with the court's conclusion. Defendant received considerably more as a result of the equal division of the marital property than she would have if she had received only the value of her interest in the jointly held property and her separate property. We find no abuse of discretion in the division of the estate.

Affirmed.

Judges HEDRICK and WEBB concur in the result.

Judge HEDRICK concurring in the result joined by Judge WEBB.

Defendant does not challenge the trial court's findings of fact, but rather contends that the findings compel a conclusion that defendant's contributions to the marriage greatly exceeded those of the plaintiff, and that this discrepancy is so great that an unequal division of the marital property was required as a matter of law. While we agree with Judge Hill that the court's findings of fact support its conclusions of law, we believe it inadvisable in this case to undertake a definitive discussion of the Equitable Distribution Act. A great deal of Judge Hill's opinion is dicta, unnecessary to the decision. We note with special concern Judge Hill's discussion of the proper standard of appellate review. He speaks first of "limited discretion," later of "broad discretion," and finally concludes that "[t]he court's conclusion is supported by the findings of fact;" and thus does not amount to "an abuse of discretion." Despite Judge Hill's conscientious discussion of the issue, we are unable to distill from the opinion a resolution of the question of the proper standard of review. Because we believe the result is the same under any standard of review, we would leave the question for another day.

JAMES L. GOBLE AND WIFE, LINDA GOBLE v. BOBBY N. HELMS AND WINN-DIXIE CHARLOTTE, INC.

No. 8224SC1082

(Filed 18 October 1983)

1. Evidence § 49.2— hypothetical question—omission of relevant facts not error

A hypothetical question to plaintiff's medical expert was not improper because of the omission of relevant facts where the facts omitted did not go to the essence of the case so as to present an obviously incomplete and unreliable basis for the expert's opinion, and where defendants were given an opportunity to cross-examine the witness and supply any additional facts they felt were necessary.

2. Evidence § 49.3— improper hypothetical question—waiver of objection

Even if a hypothetical question asked plaintiff's medical expert improperly assumed the answer to the question as part of the statement of facts, defendants waived objection to the question when evidence of the same import was thereafter admitted without objection.

3. Evidence § 44— non-expert opinion testimony—ability to relax

In an action to recover for personal injuries to plaintiff husband and loss of consortium by plaintiff wife, plaintiff wife was properly permitted to give non-expert opinion testimony that "it's very hard for [plaintiff husband] to relax now, like he used to," and that "sometimes we just can't have sexual relations because of that," since plaintiff husband's ability to relax was an aspect of his health as to which opinion testimony by a non-expert was admissible, and plaintiff wife, by virtue of observation and experience, was well qualified to offer her opinion.

4. Evidence § 44— numbness of plaintiff's face—non-expert opinion testimony

The trial court properly permitted plaintiff husband's former employer to testify that plaintiff husband "was stiff, he was moving and also in his face when he would talk to me he was talking out of one side of his mouth, because one side of his mouth or face was numb," since nonexpert testimony as to a person's physical appearance is permissible if the witness had an opportunity to observe the person, and the testimony in question was merely a shorthand statement as to an observed physical fact.

5. Damages § 13.2— evidence of lost future earnings and promotions

In an action to recover for injuries received in an automobile-truck accident, the trial court did not err in admitting evidence of plaintiff's prospects regarding future earnings and promotions with the company which employed him when the collision occurred.

6. Evidence § 50.1; Witnesses § 9— medical testimony—opening door by cross-examination

By cross-examining plaintiffs' medical expert in several respects relating to injuries to the brain, defendants opened the door to a question propounded by plaintiffs on redirect examination of the witness as to whether an observation of one pupil becoming larger and one smaller in a person who has been in an accident indicates a brain injury.

7. Damages § 16.1— instruction on damages for disfigurement—sufficiency of evidence

Plaintiff's evidence showed a spoiling or blemishing of plaintiff's mouth and facial features which justified the trial court's instruction on damages for disfigurement where plaintiff testified that he suffered numbness to much of his body and a cramping or drawing in his face, and another witness testified that, when plaintiff talked to him, "he was talking out of the side of his mouth."

8. Damages § 17.4— future medical expenses

The evidence in a personal injury action supported the trial court's instruction that the jury could award damages for medical expenses which plaintiff would pay or incur in the future as a proximate result of defendants' negligence where plaintiff testified that he continued to go to the doctor occasionally to obtain a muscle relaxant prescription; plaintiff also testified that he had averaged seeing the doctor once a month since the collision in question, and that he continued to wear a cervical collar to relieve tension or pain in his

neck; both plaintiff and his doctor testified to the possibility of plaintiff's going to a university medical center for further evaluation; and plaintiff introduced statements of account showing various medical and pharmaceutical expenses incurred as a result of the collision, from which the jury could reasonably estimate anticipated expenses.

9. Damages § 17.1— loss of use of part of body—sufficient evidence of causation

In an action to recover for personal injuries received in an automobile-truck collision, there was sufficient evidence of causation, medical and otherwise, to merit the trial court's instruction that the jury could award damages to plaintiff for loss of use of a part of his body due to numbness and weakness where a medical expert testified that plaintiff had reached maximum improvement; several witnesses testified to plaintiff's physical strength before and after the collision, indicating a diminution therein; plaintiff testified that before the collision he had never suffered from numbness in his body, and that after the collision he had numbness on his left side, in his hand, arm, chest and side, a cramping or drawing in his face, and a pain in his neck; the medical expert testified that on pin prick plaintiff had some decreased sensation on the left side and that plaintiff had a slight weakness in his left hand; and the medical expert also testified that he thought plaintiff's broken neck and other injuries could have been received in the collision.

10. Appeal and Error § 50.3; Trial § 6— erroneous instruction on stipulation—error cured by further instructions

In a personal injury action in which defendants stipulated that their negligence had caused the collision in question, the court's erroneous instruction that defendants had admitted that their negligence was the proximate cause of any injury plaintiff might have received from the accident was cured by the court's further instructions which clearly informed the jury that defendants had stipulated only to the issue of liability and not that plaintiff's condition at trial was caused by the accident.

11. Husband and Wife § 9— loss of consortium—sufficiency of evidence

The evidence was sufficient to support the trial court's instructions as to the elements of plaintiff wife's loss of consortium for which the jury could award damages where plaintiff wife testified that, prior to the collision in question, plaintiff husband was very strong and healthy and did a substantial amount of work around the plaintiffs' home and farm, and that since the collision she "hadn't seen him do anything"; that prior to the collision he was "slow tempered" but that thereafter he had been "very irritable and everything seems to just really get on his nerves"; that prior to the collision he was in very good spirits, with a happy and hopeful mental attitude, but that thereafter he was at times very discouraged and listless and did not have the same zest for life; that prior to the collision they got along very well and had a very good relationship, but that thereafter it had been very difficult for him to relax, and they sometimes could not have sexual relations because of that; and that she could not say that she loved him less subsequent to the accident but that "she loved him differently." Furthermore, medical testimony that plaintiff husband had reached maximum improvement and was "going to be the way he

is now" sufficed to justify the court's instruction on plaintiff wife's entitlement to compensation for future loss of consortium.

12. Husband and Wife § 9— loss of consortium—denial of directed verdict—denial of judgment n.o.v.

The trial court did not err in denying defendants' motions for directed verdict and judgment notwithstanding the verdict on the loss of consortium issue where there was substantial evidence of diminution of various aspects of the marital relationship which merited submission of this issue to the jury.

13. Rules of Civil Procedure § 59— denial of motion to set aside verdicts as excessive

The trial court did not abuse its discretion in refusing to set aside on grounds of excessiveness a $335,000.00 personal injury verdict for plaintiff husband and a $60,000.00 loss of consortium verdict for plaintiff wife.

APPEAL by defendants from *Allen, Judge.* Judgment entered 10 June 1982 in Superior Court, AVERY County. Heard in the Court of Appeals 31 August 1983.

Plaintiffs brought this action for personal injuries to plaintiff-husband, and loss of consortium by plaintiff-wife, arising from the collision of a tractor-trailer, owned by defendant Winn-Dixie and driven by defendant Helms, with an automobile driven by plaintiff-husband. Defendants stipulated that Helms was acting within the course and scope of his employment with Winn-Dixie at the time of the collision, and that his negligence caused the collision. A trial on the issue of damages resulted in a $335,000 verdict for plaintiff-husband and a $60,000 verdict for plaintiff-wife.

From a judgment entered on the verdicts, defendants appeal.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, P.A., by Robert B. Byrd and Sam J. Ervin, IV, for plaintiff appellees.

Morris, Golding and Phillips, by James N. Golding, for defendant appellants.

WHICHARD, Judge.

EVIDENTIARY RULINGS

[1] Defendants contend the court erred in overruling their objection to a lengthy hypothetical question to plaintiffs' medical witness inquiring "whether [plaintiff-husband's] broken neck and other injuries described could or might have been received in the

accident?" They argue that the question failed to include relevant facts and included irrelevant ones.

When this case was tried, there was no requirement that expert testimony be in response to a hypothetical question. *See* G.S. 8-58.12 (1981). When used, however, "a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper, and the expert witness's answer will be excluded." *Dean v. Coach Co.*, 287 N.C. 515, 518, 215 S.E. 2d 89, 91 (1975).

The facts allegedly omitted here, while having some bearing on plaintiff-husband's condition, did not go to the essence of the case so as to present an obviously incomplete and unreliable basis for the expert's opinion. In such situations it is incumbent upon the adversary, if concerned that omitted facts might elicit a different opinion, to supply them on cross-examination. *Dean, supra*, 287 N.C. at 520, 215 S.E. 2d at 92; *see also Rutledge v. Tultex Corp.*, 308 N.C. 85, 91, 301 S.E. 2d 359, 364 (1983); *Lee v. Tire Co.*, 40 N.C. App. 150, 154-55, 252 S.E. 2d 252, 255-56, *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979). Defendants here were given an opportunity to cross-examine the witness and supply any additional facts they felt were necessary. Thus, the omission does not require a finding of error.

Nor is the allegedly irrelevant matter, which related to plaintiff-husband's employment and absentee record, sufficiently prejudicial to constitute grounds for a new trial. For examples of irrelevant matter found to be prejudicial, see *Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964); *Lindsey v. The Clinic for Women*, 40 N.C. App. 456, 253 S.E. 2d 304 (1979). We find no merit to this contention.

[2] Defendants contend the court erred in overruling their objection to the following hypothetical question posed to plaintiffs' medical witness:

> Doctor, if the Jury should find as facts from the greater weight of the evidence that prior to the time that you saw [plaintiff-husband] on May 5, 1980, that he had been involved in a tractor-trailer accident with a head-on collision, that as a result of that he blacked out or lost consciousness, was not

> able to stand and had to hold on to a car for support, and was placed on a pallet and transported to the Emergency Room where you saw him, if the Jury should find those things as facts from the greater weight of the evidence in this case, do you have an opinion as to the cause of the unconsciousness or black out condition of this man?

They argue that the phrase "that as a result of that he blacked out or lost consciousness" assumes the answer to the question as part of the statement of facts.

A hypothetical question "should [not] assume those facts sought to be established." *Ryder v. Benfield*, 43 N.C. App. 278, 286, 258 S.E. 2d 849, 855 (1979). It is evident that the words "after that" or "immediately thereafter," rather than "as a result of that," would have more aptly stated the question.

"An objection is waived [, however,] when evidence of the same import is admitted without objection." *Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 532, 160 S.E. 2d 735, 745 (1968). Here the medical witness testified, without objection, that a direct injury to the head or brain could cause unconsciousness. Plaintiff-husband testified that he had "blacked out" following the accident. On recross counsel for defendants asked the medical witness, "[D]id [plaintiff-husband] have a concussion caused by this accident?"; and they received an affirmative answer.

In light of this and other evidence, we hold defendants' objection to the hypothetical question waived, and deem harmless any error from failure to sustain it.

[3] Defendants contend the court erred in overruling their objection to, and denying their motion to strike, the following testimony by plaintiff-wife:

> Q. Will you very frankly describe your sexual compatibility now with your husband as compared before this accident?
>
> . . .
>
> A. Well, it's very hard for [him] to relax now, you know, like he used to. And well sometimes we just can't have sexual relations because of that, I believe.

They argue that there was no medical evidence relating to plaintiff-husband's inability to engage in sexual activities, that the pathological cause of an ailment is a scientific question, and that plaintiff-wife's testimony "provides a lay opinion" as to the cause of plaintiff-husband's inability to relax and its relation to his sexual capacities.

While expert opinion on this subject would have been admissible, *see* G.S. 8-58.13, 1 H. Brandis, *North Carolina Evidence* § 132, at 511 (1982), it was not required. "The state of a person's health, a person's ability to work or engage in activities, a person's physical appearance and sleeping habits, among other things, are proper subjects of opinion testimony by non-experts." *Craven v. Chambers*, 56 N.C. App. 151, 157, 287 S.E. 2d 905, 909 (1982). Thus, when a witness is "able to describe the state of [a] plaintiff's health after the accident and to compare it with that existing before the accident," exclusion of the witness' testimony is error. *Id.* at 157-58, 287 S.E. 2d at 909; *see also Kenney v. Kenney*, 15 N.C. App. 665, 669, 190 S.E. 2d 650, 653 (1972); 1 H. Brandis, *supra*, § 129, at 498.

Plaintiff-husband's ability to relax was an aspect of his health as to which opinion testimony by a non-expert was admissible. Plaintiff-wife, by virtue of observation and experience, was well qualified to offer her opinion. We thus find defendants' contention without merit.

[4] Defendants similarly contend the court erred in denying their motion to strike testimony by plaintiff-husband's former employer that plaintiff-husband "was stiff, he was moving and also in his face when he would talk to me he was talking out of one side of his mouth, because one side of his mouth or face was numb." We find this contention equally without merit. As stated above, this is an area where non-expert testimony is permissible as long as the witness had an opportunity to observe the plaintiff. *Craven v. Chambers, supra.* The witness testified to repeated opportunities to observe plaintiff-husband in his employment situation over a four-month period before the accident and at least twice after the accident. His testimony was merely a shorthand statement as to an observed physical fact, and as such its admission was not error. *See* 1 H. Brandis, *supra*, § 125. Assuming error, *arguendo*, it was clearly non-prejudicial in view of substantial

other evidence regarding plaintiff-husband's condition of numbness.

[5] Defendants contend the court erred in admitting evidence of plaintiff-husband's prospects regarding future earnings and promotions with the company which employed him when the collision occurred. This evidence was pertinent to a determination of the extent of plaintiff-husband's damages, however, and "great latitude" is allowed in the introduction of such evidence. *See Smith v. Corsat*, 260 N.C. 92, 95-96, 131 S.E. 2d 894, 897 (1963). The right of cross-examination provides the opposing party opportunity to challenge estimates of this nature, *see Peterson v. Johnson*, 28 N.C. App. 527, 531, 221 S.E. 2d 920, 924 (1976), and defendants exercised that right only sparingly. We find no error in the admission of this evidence.

[6] Defendants contend the court erred in admitting, over objection, the following testimony on redirect examination of the medical witness:

> Q. If after a person has been involved in an accident and has a broken neck, if later there is an observation of one pupil becoming larger and one smaller at the same time, that indicates to you as a medical doctor a brain injury?
>
> . . .
>
> A. Yes, I think it would indicate that there is something intracranial; right, inside of the skull.

Defendants had cross-examined this witness in several respects relating to injuries to the brain. They thus "opened the door to the question propounded by the plaintiff[s] on re-direct examination," *Johnson v. Massengill*, 280 N.C. 376, 383, 186 S.E. 2d 168, 174 (1972), entitling plaintiffs to examine the witness regarding such matter. *See* 1 H. Brandis, *supra*, § 36. We find this contention without merit.

Defendants' final evidentiary contention is that the court erred in admitting certain evidence which it subsequently withdrew and instructed the jury not to consider. "Ordinarily it is presumed that the jury followed [the court's] instruction and the admission is not held to be reversible error unless it is apparent from the entire record that the prejudicial effect of [the evidence]

was not removed from the minds of the jury by the court's admonition." *Smith v. Perdue*, 258 N.C. 686, 690, 129 S.E. 2d 293, 297 (1963); *see also Driver v. Edwards*, 251 N.C. 650, 112 S.E. 2d 98 (1960). We have examined the matters complained of in light of the entire record, and we perceive no prejudicial effect warranting a new trial.

INSTRUCTIONS

[7] To instruct on an element of damages, absent evidence thereof, is error. *E.g., Brown v. Neal*, 283 N.C. 604, 613, 197 S.E. 2d 505, 511 (1973). Defendants contend the court erred in instructing that the jury could award plaintiff-husband damages for disfigurement when there was no evidence thereof. Plaintiff-husband testified, however, to numbness in much of his body and "a cramping or drawing . . . in [his] face [which he could feel] just like somebody closing their hand on it." Another witness testified that when plaintiff-husband talked to him, "he was talking out of one side of his mouth."

To disfigure is to spoil or blemish the appearance or shape of something. *See* American Heritage Dictionary 377 (New College Ed. 1978). The foregoing evidence showed a spoiling or blemishing of plaintiff-husband's mouth and facial features which justified an instruction on disfigurement.

[8] Defendants contend there was no evidence to support the instruction that the jury could award damages for medical expenses which plaintiff-husband would pay or incur in the future as a proximate result of their negligence. There was testimony, however, from a medical expert, that plaintiff-husband had reached maximum improvement. The witness stated: "I think he has recovered. I think he is going to be the way he is now. . . . I think he has improved to what degree he's going to improve. . . . I think he most probably will stay at the level he is at now." He also stated, though, that plaintiff-husband "could receive treatment for his present condition." Plaintiff-husband testified that he continued to go to the doctor occasionally to obtain a muscle relaxant prescription. He also testified that he had averaged seeing the doctor once a month since the collision, and that he continued to wear a cervical collar to relieve tension or pain in his neck. Both plaintiff-husband and his doctor testified to the

possibility of plaintiff-husband's going to a university medical center for further evaluation. Finally, plaintiff-husband introduced statements of account showing various medical and pharmaceutical expenses incurred as a result of the collision, from which the jury could reasonably estimate anticipated expenses.

It is proper to instruct the jury to compensate plaintiff for prospective damages "where there is sufficient evidence of pain, disability or other injury continuing into the future to justify consideration thereof." *Brown, supra*, 283 N.C. at 613, 197 S.E. 2d at 510-11. The foregoing evidence sufficed for that purpose, and the court did not err in the instruction complained of.

[9] Defendants contend the court erred in instructing that the jury could award damages to plaintiff-husband for loss of use of a part of his body due to numbness and weakness. Again, the medical expert testified that plaintiff-husband had reached maximum improvement. Several witnesses testified to his physical strength before and after the collision, indicating a diminution therein. Plaintiff-husband testified that before the collision he had never suffered from numbness in his body, and that after the collision he had "numbness in [his] body from right the center all the way down." He indicated that this began "at the bottom of [his] foot." He testified that "all the way up there's numbness on this left side in my hand, my arm, my chest and this side . . . you can touch it and touch this one it's like touching two different people." He also testified to "a cramping or drawing . . . in [his] face" and a pain in his neck. The medical expert testified that "on pin prick [plaintiff-husband had] some decrease[d] sensation . . . on the left side." He also testified to a slight weakness in plaintiff-husband's left hand.

The foregoing evidence sufficed to merit the instruction complained of. Defendants' argument that the evidence was insufficient to establish a causal connection between the collision and these conditions is without merit. Plaintiff-husband testified that he had not experienced these conditions before the collision, and that he had since. This testimony established "facts in evidence . . . such that any layman of average intelligence and experience would know what caused the injuries complained of." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E. 2d 753, 760 (1965). Medical evidence to establish the causal connection thus was not required. *Id.*

Assuming, *arguendo*, that medical evidence was necessary to establish causal connection, there was testimony from the medical expert that he thought the broken neck and other injuries could have been received in the accident. We have herein found this evidence sufficiently "based on . . . reasonable probabilities" rather than "merely speculative and mere possibility," and thus have declined to hold its admission, which is in the exercise of the trial court's discretion, erroneous. *See Lockwood v. McCaskill*, 262 N.C. 663, 668-69, 138 S.E. 2d 541, 545-46 (1964). There thus was sufficient evidence on causation, medical and otherwise, to merit the instruction.

Defendants contend the court failed in its instructions to comply with G.S. 1A-1, Rule 51(a), which provides:

> In charging the jury . . . [the] judge . . . shall declare and explain the law arising on the evidence . . . . The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties.

The gravamen of their argument is that the court reviewed evidence favorable to plaintiffs, but none favorable to defendants.

Defendants introduced no evidence, but relied on cross-examination of plaintiffs' witnesses to establish evidence favorable to them. The court instructed the jury that this was the case, and instructed that it should consider in its deliberations plaintiffs' evidence which it considered favorable to defendants. The court chose not to summarize the parties' contentions, as it had the right to do. *Board of Transportation v. Rand*, 299 N.C. 476, 483, 263 S.E. 2d 565, 570 (1980); *Rector v. James*, 41 N.C. App. 267, 271, 254 S.E. 2d 633, 637 (1979).

We perceive no basis in the summation given, or omissions therein, for awarding a new trial. Moreover, defendants did not object to the summation at trial, and thus cannot do so now. N.C. R. App. P. 10(b)(2).

[10] Defendants contend the court erred in its instructions regarding the stipulation that their negligence had caused the collision. Early in its instructions the court stated that defendants had "admitted that [their] negligence . . . was the proximate

cause of any injury that the Plaintiff might have received from this accident." Counsel for defendants immediately requested and received permission to approach the bench. The court then stated:

> Now, Members of the Jury, I may have misstated that in some respect that the negligence of the Defendants was the proximate cause of the accident that was involved out there and not necessarily the proximate cause of the injury, any injuries received, but the proximate cause of the accident that was had out there on the highway.

Counsel for defendants made no further objections or requests at that point, but at the end of the charge again objected to the instructions with respect to the stipulation. The court then further instructed as follows:

> Members of the Jury, paragraph number twelve of the stipulation . . . reads as follows:
>
> The Defendants will concede the issue of liability and admit liability in this case with respect to the allegations of negligence and will waive presenting to the Jury any issue concerning the issue of liability. That the negligence of the Defendants was the proximate cause of the motor vehicle collision. There is no stipulation that the Plaintiff's present condition was caused by the accident.

Counsel for defendants made no further objections or requests.

Defendants argue that the foregoing constitutes conflicting instructions on a material point, and thus requires a new trial. *See Barber v. Heeden*, 265 N.C. 682, 686, 144 S.E. 2d 886, 889 (1965); *Kinney v. Goley*, 4 N.C. App. 325, 332, 167 S.E. 2d 97, 102 (1969). It has long been held, however, that where the court inadvertently makes an error and expressly corrects it before the jury retires, the error is rendered harmless. *See Barnes v. House*, 253 N.C. 444, 451-52, 117 S.E. 2d 265, 270 (1960); *Wyatt v. Coach Co.*, 229 N.C. 340, 342, 49 S.E. 2d 650, 652 (1948). Further, the clear purpose of Rule 10(b)(2) of the Rules of Appellate Procedure, which makes objection to portions of the charge before the jury retires a prerequisite to assigning error thereto, was to avoid the necessity of retrials by correction of errors prior to jury deliberation. The instructions here served that purpose. The final instruction clearly informed the jury that defendants had stipulated only

to the issue of liability, and not that plaintiff-husband's condition at trial was caused by the accident. We thus find this contention without merit.

[11] Defendants' final contention regarding the instructions is that the court erred in instructing on plaintiff-wife's loss of consortium. The pertinent part of the instruction complained of was as follows:

> [Plaintiff-wife] is entitled to recover fair compensation for the actual loss of marital services, society, affection, companionship or sexual relations of her husband, which she [i]ncurred as a proximate result of the Defendant[']s negligence.
>
> . . .
>
> You are instructed to limit your consideration of damages strictly to fair compensation for [plaintiff-wife's] loss of marital services, of society, affection, companionship, sexual relations.
>
> . . .
>
> [Plaintiff-wife] is also entitled to fair compensation [for] any future loss of consortium proximately resulting from the Defendants['] negligence which will occur during [her] marriage to her husband. This means that you must award prospective damages and that recovery is limited to the shorter of the two life expectancies of [plaintiff-wife] and her husband.

Our Supreme Court recently re-established a cause of action for loss of consortium in this jurisdiction. *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980). While recognizing "that consortium is difficult to define," it stated that "it embraces service, society, companionship, sexual gratification and affection." *Id.* at 302, 266 S.E. 2d at 822. It did so "in recognition of the many tangible and intangible benefits resulting from the loving bond of the marital relationship." *Id.; see* N.C. Pattern Jury Instructions-Civil §§ 810.80, 810.85 (1981); 41 C.J.S., Husband & Wife § 11; 41 Am. Jur. 2d, Husband & Wife §§ 448-50; Annot., 74 A.L.R. 3d 805 (1976).

The court's instructions followed, almost verbatim, the language of *Nicholson, supra.* Defendants do not contend other-

wise. Their argument is that there was no evidence from which the jury "could find injury, loss or damage to or on any of these elements of consortium," and that there was no evidence from which the jury could find "that any of these elements individually or collectively would continue to exist in the future."

Plaintiff-wife, however, testified that prior to the collision plaintiff-husband was very strong and healthy and did a substantial amount of work around the parties' home and farm, and that since the collision she "[hadn't] seen him do anything"; that prior to the collision he was "slow tempered," but that thereafter he had been "very irritable and everything seems to just really get on his nerves"; and that prior to the collision he was in very good spirits, with a happy and hopeful mental attitude, but that thereafter he was at times very discouraged and listless and did not have the same zest for life. She testified that prior to the collision they got along very well, were very much in love, and had a very good relationship; but that thereafter it had been very difficult for him to relax, and they sometimes could not have sexual relations because of that. She acknowledged plaintiff-husband's testimony that prior to the collision they had intercourse several times a month, but thereafter "[s]omething like" only once or twice a month. She could not say that she loved him less subsequent to the accident, but she did say that she "love[d] him differently."

The foregoing and other evidence clearly sufficed to establish a demonstrable diminution in plaintiff-husband's capacity to render service to plaintiff-wife. It also established a reduction in the quality of his general society and companionship, and in his ability to provide sexual gratification and affection. It thus sufficed to support the instruction as to the elements of plaintiff-wife's loss for which the jury could award damages. The medical testimony that plaintiff-husband had reached maximum improvement and was "going to be the way he is now" sufficed to justify the instruction on plaintiff-wife's entitlement to compensation for future loss of consortium. This contention is thus without merit.

DIRECTED VERDICT/JNOV

[12] Defendants contend the court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on the loss of consortium issue. As noted above, we find

substantial evidence of diminution of various aspects of the marital relationship which merited submission of this issue to the jury.

As part of this argument defendants contend that while there was evidence as to household chores which plaintiff-husband performed before the collision, which he could not perform afterward, there was no evidence as to the value of such services. In light of the substantial evidence as to loss of consortium in other respects, however, absence of such evidence did not mandate removal of this issue from the jury. Moreover, our Supreme Court has expressly rejected the "inference that damages in a consortium action are too remote to measure." *Nicholson, supra*, 300 N.C. at 302, 266 S.E. 2d at 822. The assessment of damages for loss of consortium, as for wrongful death, "must, to a large extent, be left to the good sense and fair judgment of the jury—subject . . . to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require." *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E. 2d 342, 348-49 (1975); *see* 74 A.L.R. 3d 805, 811-12 (1976) (amount of damages for loss of consortium must be left to "enlightened consciences" or "experience and judgment" of impartial jurors).

The court did not err in denying the motions for directed verdict and judgment notwithstanding the verdict on the loss of consortium issue.

MOTION TO SET ASIDE VERDICTS

[13] Defendants contend the court erred in denying their G.S. 1A-1, Rule 59(b) motion to set aside the verdicts on grounds of excessiveness. The motion was directed to the sound discretion of the trial judge, and his decision will not be disturbed absent obvious abuse. *Griffin v. Griffin*, 45 N.C. App. 531, 533, 263 S.E. 2d 39, 41 (1980). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E. 2d 599, 605 (1982).

The record contains substantial evidence that as a result of the collision plaintiff-husband sustained severe temporary injuries, including lacerations, contusions, spinal fracture, and concus-

sion. It indicates that he had continuing problems which included depression, numbness, weakness, insomnia, pain in his neck and side, and sexual impairment; that he lost earnings and was incapacitated to perform physical labor; and that the general quality of his life was diminished in numerous respects. It establishes a demonstrable diminution in the quality of his relationship with plaintiff-wife. It indicates that at the time of trial he had reached maximum improvement, and thus that the numerous problems he was then experiencing could be expected to continue. Finally, it establishes that when he received the injuries, he had a life expectancy of an additional 31.57 years.

In light of the foregoing, denial of defendants' motion did not amount to a substantial miscarriage of justice, and we find no abuse of discretion.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. OLLIE BELLAMY, JR. AND NATHANIEL BELLAMY

No. 8211SC1109

(Filed 18 October 1983)

1. **Criminal Law § 92.1— joint trial of defendants proper**

In a prosecution for robbery with a firearm and assault with a deadly weapon with intent to kill, the trial court properly granted the State's motion for a joint trial pursuant to G.S. 15A-926 since defendants' respective positions at trial were not antagonistic and since the State produced ample evidence implicating both defendants in the same offenses.

2. **Criminal Law § 97.1— rebuttal testimony—admissible against codefendant**

The trial court properly allowed the State to offer rebuttal testimony from two witnesses where one witness's testimony could have been introduced in the State's case in chief pursuant to G.S. 15A-1226(a), and where the other testimony was admissible as an admission by the codefendant.

3. **Criminal Law § 89.5— corroborating testimony—slight variance—properly admitted**

The trial court properly allowed a witness to offer corroborating testimony regarding a telephone conversation with an earlier witness where

the witness's testimony was consistent with the earlier witness's testimony regarding the robbery for which defendants were being tried and the existence of the phone conversation, but where there were inconsistencies as to when the phone call occurred and the exact words spoken.

4. Assault and Battery § 14.4; Robbery § 4.3— assault with a deadly weapon with intent to kill and armed robbery—sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill and robbery with a firearm, the trial court properly denied defendants' motion to dismiss all charges at the end of the State's evidence where the evidence tended to show that a witness drove defendants to "Short Stop" where they got out of a car, a burgundy Cutlass owned by defendant Bellamy; at around the same time that evening the clerk at "Short Stop" was closing the store when he was robbed by two males wearing white masks; as the same men were running out of the store, they fired at another vehicle occupied by two people who saw these men still wearing masks run from "Short Stop" to a burgundy car similar to the one owned by defendant Bellamy; and where a witness testified that defendant Bellamy owned two white masks like ones worn during the robbery and that he had told her he was planning to use them for a robbery.

APPEAL by defendants from *Britt, Samuel E., Judge.* Judgment entered 19 May 1982 in Superior Court, LEE County. Heard in the Court of Appeals 29 August 1983.

Defendants Ollie and Nathaniel Bellamy were charged in separate indictments with the same offenses, to wit, robbery with a firearm and assault with a deadly weapon with intent to kill. Prior to trial, the Court granted the State's motion, pursuant to G.S. 15A-926 to join the cases against each defendant for trial. The jury found defendants guilty of both offenses and active sentences were imposed. Both defendants appeal.

The State's evidence tended to show:

At around 10:45 p.m. on 7 August 1981, Donald Strother, a clerk at "Short Stop," a store on Carbonton Road in Sanford, North Carolina, was closing the store when two males, wearing white masks, robbed him at gunpoint.

Cindy Gunter and Donald Cox were driving past "Short Stop" at around 10:45 p.m. on 7 August 1981 when they saw two men, wearing white masks, run out of the store and head toward a burgundy Monte Carlo or Cutlass automobile. Ms. Gunter noticed that one of the men was carrying something. Mr. Cox saw one of the men raise a gun and fire in their direction. Mr. Cox and

Ms. Gunter ducked to the floorboard of their car and heard the gun fire about five shots, one shot hitting their car.

Ruth Dowdy testified that at around 10:45 p.m., on 7 August 1981, she drove both defendants to "Short Stop" on Carbonton Road in Sanford. She drove Ollie Bellamy's car, a burgundy Cutlass. In the car, they discussed good places to rob. The defendants got out of the car at "Short Stop." A short time thereafter, she saw two people with white masks enter the store. Ten minutes later, the defendants came running toward the car. She drove the defendants to her home where they then sorted money. Sometime later, Ms. Dowdy spoke with a friend on the telephone.

Prior to 7 August, Ms. Dowdy had seen masks similar to the ones worn in the robbery on her dresser at home. Ollie Bellamy had been staying with Ms. Dowdy. Ollie had told her that Nathaniel had had them made and that they were planning to "do a robbery." After the robbery, Ms. Dowdy noticed that Ollie had a gun.

Three weeks after the robbery, Ms. Dowdy was taken into police custody where she waived her Miranda rights and gave a statement to a Sanford police detective that substantially corroborated her testimony at trial. On that same day she was arrested and jailed. Ms. Dowdy testified pursuant to a plea bargain with the State.

The evidence for defendant, Nathaniel Bellamy, tended to show:

Darlene Hayes, Nathaniel's girlfriend, testified that Nathaniel was with her in Burgaw, North Carolina, during the evening of the robbery on 7 August.

Former Deputy Sheriff George Wright testified that when he picked up defendant, Nathaniel Bellamy, Darlene Hayes asked why he was being picked up when he had been with her.

Mattie Bellamy, Nathaniel's mother, testified that Nathaniel left her house in Burgaw, North Carolina at about ten to seven on the evening of 7 August to go to his girlfriend's house and that she saw him again at around midnight when he arrived home.

On rebuttal, the State's evidence tended to show:

Sharon Smith, a friend of Ms. Dowdy's, testified that at around 8:00 p.m. on the night of the robbery, Ms. Dowdy and both defendants stopped at her home in Sanford, where they discussed possible places to rob. Later that night, Ms. Smith talked to Ms. Dowdy on the telephone and Ms. Dowdy told Ms. Smith that they had robbed a "pantry."

Ms. Dowdy was placed in jail on 28 August 1981. While in jail, she overheard Nathaniel tell Ollie that he was going to get his girlfriend to say he was in Burgaw on 7 August.

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

Gregory Davis, for defendant appellant Nathaniel Bellamy; and Edward L. Bullard, Jr., for defendant appellant Ollie Bellamy, Jr.

VAUGHN, Chief Judge.

I.

[1] Both defendants contend that the trial court erred in granting the State's motion for a joint trial. This contention is without merit. G.S. 15A-926 provides that charges against two or more defendants may be joined for trial when each of the defendants is charged with accountability for each offense. Both defendants in this case were charged with the same offenses. Furthermore, the State's evidence against each defendant was the same. "Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other." *State v. Brower*, 289 N.C. 644, 658, 224 S.E. 2d 551, 561-62 (1976).

Pursuant to G.S. 15A-926(c)(2), severance is proper when necessary to promote a fair determination of the guilt or innocence of one or more of the defendants. Severance was not necessary to a fair trial in this case. The decision whether to try defendants separately or jointly was within the discretion of the trial court and absent a showing that the appellants were deprived of a fair trial by consolidation, exercise of such discretion should not be disturbed on appeal. *State v. Brower, supra; see also State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

Defendants also contend that they had antagonistic defenses and that, therefore, joinder was improper. Nathaniel Bellamy offered evidence attempting to establish an alibi, while Ollie Bellamy did not offer any evidence. We do not find these separate defenses to be antagonistic. Neither defendant attempted to incriminate the other. *See State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Wilhite; State v. Rankin; State v. Rankin*, 58 N.C. App. 654, 294 S.E. 2d 396, *cert. denied* and *appeal dismissed*, 307 N.C. 129 (1982).

[2] Defendant Ollie Bellamy further contends that the State introduced rebuttal testimony against Nathaniel Bellamy that was unfair, prejudicial and inadmissible against himself. We disagree. The State offered rebuttal testimony from two witnesses, Sharon Smith and Ruth Dowdy. Defendant concedes that Ms. Smith's testimony could have been introduced in the State's case in chief. G.S. 15A-1226(a) provides in part: "The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief . . ." We find no error in admitting Sharon Smith's testimony. Ruth Dowdy testified that Ollie Bellamy told her "to act like I didn't know what happened" in regard to Nathaniel Bellamy's alibi. This testimony was admissible as an admission by Ollie Bellamy.

[1] The State had ample evidence against both defendants. It did not rely on refuting rebuttal testimony to prove its case. In *State v. Lee*, 28 N.C. App. 156, 220 S.E. 2d 164 (1975), defendants were jointly tried for armed robbery and kidnapping. The first defendant did not testify. The second defendant testified that he was coerced into committing the crimes by the first defendant's threats. We held that separate trials were not warranted since the State did not rely on testimony of the defendants, but rather, offered plenary evidence of both defendants' guilt. The same rationale applies against defendants here.

Since defendants' respective positions at trial were not antagonistic and since the State produced ample evidence implicating both defendants in the same offenses, joinder was proper and defendants received a fair trial. *See State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979); *State v. Wilhite; State v. Rankin; State v. Rankin, supra.*

II.

Both defendants contend that the trial court erred in allowing Sharon Smith to testify for the State on rebuttal. We find no error.

[2] Defendant Ollie Bellamy contends that since he offered no evidence, Ms. Smith's rebuttal testimony should have been limited to defendant Nathaniel Bellamy. As discussed in Part I, Ms. Smith could have testified for the State as part of its case in chief. Pursuant to G.S. 15A-1226 (which permits the State to offer new evidence during rebuttal which could have been offered as part of its case in chief), the trial judge was correct in denying Ollie Bellamy's motions to sever and exclude such testimony.

[3] Both defendants contend that Ms. Smith's testimony, admitted under the theory that it corroborated Ms. Dowdy's testimony, should have been excluded because it was not corroborative. We think the trial judge was correct in admitting Ms. Smith's testimony.

Corroborative testimony is generally allowed in this State when a witness's veracity has been impugned in any way. 1 Brandis on North Carolina Evidence § 51 (1982). Application of this liberal rule allows trial judges wide discretion in deciding whether to admit evidence they believe may aid the jury in appraising credibility. 1 Brandis on North Carolina Evidence § 52 (1982); *State v. Henley*, 296 N.C. 547, 251 S.E. 2d 463 (1979); *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953). Cross examination of Ms. Dowdy by both defendants and evidence by defendant Nathaniel Bellamy weakened Ms. Dowdy's testimony. We find no abuse of discretion in admitting corroborative testimony from Ms. Smith.

Corroborative testimony is testimony which tends to strengthen, confirm or make more certain the testimony of another witness. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980). It may consist of prior consistent statements by the witness or any other proper evidence tending to restore confidence in the witness's truthfulness and veracity. 1 Brandis on North Carolina Evidence § 50 (1982) (n. 39 and cases cited therein). Ms. Smith's testimony regarding a prior statement by Ms. Dowdy confirmed and strengthened Ms. Dowdy's testimony.

Although there was some variation in the testimonies of Ms. Dowdy and Ms. Smith, such variances do not warrant exclusion of Ms. Smith's testimony. The testimonies of the two women were generally consistent. Ms. Dowdy testified that during the evening of 7 August or on 8 August: "I know I was talking to my—my brothers and I was telling them what we done. . . . And I was talking to my friend and I called her, trying not to let Ollie hear me . . ." Ms. Smith, a friend of Ms. Dowdy's, testified that she called Ms. Dowdy on the evening of 7 August and Ms. Dowdy told her "that they had robbed a Pantry and she was afraid to tell me . . ." Inconsistencies exist as to when the phone call occurred and the exact words spoken. The content of Ms. Smith's testimony, however, was consistent with Ms. Dowdy's testimony regarding the robbery in general and the phone conversation specifically. "[I]f the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E. 2d 317, 321 (1976).

Before Ms. Smith was allowed to testify regarding her telephone conversation with Ms. Dowdy, the trial judge instructed the jury: "[T]his conversation is being allowed into evidence on the theory it may corroborate the prior witness that has been on the witness chair, Ruth Dowdy. You will be the final judge as to whether it does or does not corroborate the prior testimony of Ruth Dowdy." We agree with such instruction. The issue was one of credibility, not admissibility, an issue the jury ultimately decided.

Defendant Nathaniel Bellamy contends that Ms. Smith's testimony that Ms. Dowdy told her they had robbed a Pantry referred to a different crime and was, therefore, inadmissible. We find no support in the Record for such contention. We take judicial notice of the fact that people sometimes refer to small roadside stores as "pantries." In fact, another of the State's eyewitnesses referred to "Short Stop" as "The Pantry":

Witness: "I saw two men running out of the Pantry."

Court: "The Pantry, ma'am?"

Witness: "The Short Stop."

Ms. Smith's testimony as to her personal knowledge was admissible for substantive purposes. Her testimony as to her telephone conversation with Ruth Dowdy was admissible for corroborative purposes.

III.

[4] Defendant Ollie Bellamy contends that the trial court erred in denying defendants' motion to dismiss all charges at the end of the State's evidence. Defendant's contention is without merit.

The general rule is that a motion for nonsuit should be overruled if, when the evidence is viewed in the light most favorable to the State, there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); *State v. Benton*, 299 N.C. 16, 260 S.E. 2d 917 (1980). The State's evidence showed, in pertinent part, the following: At close to 11:00 p.m. on 7 August 1981, Ruth Dowdy drove the defendants to "Short Stop" where they got out of the car. Ms. Dowdy was driving a burgundy Cutlass owned by defendant, Ollie Bellamy. On the same evening, at around 10:45 p.m., Donald Struthers, the clerk at "Short Stop" was closing the store when he was robbed by two males wearing white masks. As these same men were running out of the store, they fired at another vehicle occupied by Cindy Gunter and Donald Cox. Ms. Gunter and Mr. Cox saw these men, still wearing masks, run from "Short Stop" to a burgundy car similar to the one owned by defendant. Ruth Dowdy testified that Ollie Bellamy owned two white masks like the ones worn during the robbery and that he had told her he was planning to use them for a robbery.

We think that the State produced substantial evidence from which a jury could find that the offenses were committed and that defendants were the perpetrators.

IV.

Defendant, Nathaniel Bellamy, contends that it was reversible error for the trial judge to deny his motion for a mistrial at the close of the State's evidence or at the close of all the evidence. He contends that the trial judge committed error resulting in substantial and irreparable prejudice to defendant's case by granting the State's motion to consolidate the cases

against Nathaniel and Ollie Bellamy for trial. The general rule is that the decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. *State v. Allen*, 50 N.C. App. 173, 272 S.E. 2d 785 (1980), *appeal dismissed*, 302 N.C. 399 (1981). We find no abuse of discretion by the trial judge. Defendant received a fair trial.

No error.

Judges WHICHARD and PHILLIPS concur.

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

No. 8219SC1098

(Filed 18 October 1983)

1. Appeal and Error § 68.2— driver of vehicle—sufficiency of evidence—law of the case

In a wrongful death action arising out of a single car accident, a decision on a prior appeal of the case that plaintiff had presented sufficient circumstantial evidence to support an inference by the jury that one defendant was the negligent driver of the car at the time of the accident became the law of the case and was controlling in a retrial of the case where the only new evidence at the second trial was the testimony of a rescue squad captain that decedent's left foot was wedged between the driver's seat and the left front door, since such testimony did not conclusively show that decedent was the driver but was merely more evidence for the jury to consider, and the evidence at the second trial was thus not materially different from that at the first trial.

2. Automobiles and Other Vehicles § 66.1; Evidence § 33.2— identity of driver—investigating officer—opinion based on information from defendants

In a wrongful death action arising out of a single car accident, testimony by the investigating patrolman that his investigation revealed that decedent was driving at the time of the accident was hearsay and improperly admitted where the patrolman stated that his determination of the driver was based only on information received from defendants.

3. Automobiles § 45.4— measurements at accident scene—failure to show proper foundation

The trial court did not err in refusing to permit testimony by the investigating officer concerning measurements of physical evidence at the accident scene where it was not shown that the measurements were taken close to the time of the accident.

APPEAL by plaintiff from *Walker (Hal H., Jr.), Judge.* Judgment entered 13 May 1982 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 2 September 1983.

Boyan and Nix by Clarence C. Boyan and Robert S. Boyan for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen P. Millikin and Jeri L. Whitfield; and Nichols, Caffrey, Hill, Evans & Murrelle by Karl N. Hill, Jr., for defendant appellees.

BRASWELL, Judge.

A 1971 Vega automobile left Miller's Mill Road on a curve at the Uwharrie River, jumped the stream, and came to rest upside down in the water's opposite bank. The rescue squad removed the lifeless body of Beverly Jones from the wreckage. Three people had occupied the vehicle: Beverly Jones, Richard Hubbard, and Toni Kinsey. The fundamental issue in this action for wrongful death in the negligent operation of the Vega on 30 October 1975 is: who was the driver?

The plaintiff initially commenced her action on 28 October 1977, but gave notice of voluntary dismissal as provided by G.S. 1A-1, Rule 41(a)(1)(i) on 27 April 1978. This action was recommenced on 26 April 1979. At the close of the plaintiff's evidence, the defendants made a motion for a directed verdict which was renewed at the close of all the evidence. The trial court granted the motion and the plaintiff appealed to this Court. This Court reversed the trial court, holding that plaintiff's evidence was sufficient to submit the case to the jury concerning the negligence of all three defendants. *Jones v. Allred*, 52 N.C. App. 38, 278 S.E. 2d 521 (1981). The defendants appealed to the North Carolina Supreme Court which affirmed the decision of the North Carolina Court of Appeals. *Jones v. Allred*, 304 N.C. 387, 283 S.E. 2d 517 (1981).

This case was retried on 10 May 1982 before a jury. At the close of the plaintiff's evidence, the defendants again made a motion for a directed verdict which was granted by the trial court. The plaintiff appeals this ruling.

The complaint's first cause of action alleges that Richard Hubbard was the driver. The plaintiff's evidence tends to show that Hubbard was the driver when the Vega departed at approximately 7:15 p.m. from Charlie's Grill, a distance of five miles from the scene. The first call to the highway patrolman about the wreck came at 7:39 p.m. The plaintiff claims that Beverly Jones was a passenger in the right front seat and that Toni Kinsey sat in the middle front. This Vega had two bucket front seats and a regular rear seat. The defendants in their answer allege that Beverly Jones was the driver.

Thomas Allred owned the Vega, the possession of which he had placed with his stepdaughter, Toni Kinsey. About an hour before the wreck Toni Kinsey had driven the vehicle to Beverly Jones' residence. After picking up Beverly Jones, her brother Harland Jones, and Steve Hill, Toni Kinsey drove the Vega to defendant Allen Hubbard's house. Hubbard then commenced driving, with Toni Kinsey in the middle front and Beverly Jones in the right front seat. Subsequently, the parties arrived at Charlie's Grill where Harland Jones and Steve Hill got out of the vehicle. At that time no change occurred in the position of those in the front seat as the vehicle left Charlie's Grill on that fateful ride.

Beverly Jones' mother stated that Beverly was 15 years of age, that she did not know of any time in which Beverly had operated a motor vehicle, and that as of the day of the accident Beverly had had only one class of bookwork in driver's education in high school. Beverly did not possess any type of driver's license.

It was Ronald White, a member of the rescue squad, who removed Beverly's body from the vehicle. The Vega was lying upside down on its top in the Uwharrie River by the bank. Because the specific location of Beverly's body in the automobile is crucial to each side's theory of the case, we now quote Mr. White's testimony directly from the record.

> Yes, the windshield was missing. And so the hood that goes across the front of the car—outside—had been knocked

back into the car the distance of approximately ten inches on the far right side, passenger side, and about two inches on the far left side, the driver's side. It was approximately six inches into the car in the middle. Beverly Jones's head had been pinned by the hood in the middle through the passenger side of the automobile. Her body and head was approximately in the middle to the passenger's side of the automobile. More to the passenger side than the driver's side, but generally in the middle. It wasn't much to the passenger's side, generally in the middle, but the place where Beverly's head was pinned to the headliner was at the place where the hood was approximately six inches into the car.

Yes, I indicated that she was lying on her back flat and that her right leg was stretched out directly toward the rear. Her left leg was suspended into the air which meant that her left leg and foot was towards the floorboard. Her left foot was flat against the floorboard. I am saying the heel of her foot was against the floorboard. The heel of her shoe which was still on. The heel of her shoe and foot was against the floorboard of the car and between the left seat and the left door, so in effect her foot then was caught between the driver's seat and the left door. It was caught sufficient hard or fast that I had difficulty pulling her foot out from that position. It was wedged between the driver's seat and the left front door. Her foot was towards the rear of the seat. The toe of her left foot was approximately about the middle of the distance between the front of the seat and the back of the seat. That would place her entire foot to the side of the seat. To the best of my knowledge no part of the rear of heel protruded out from behind the seat.

To remove Beverly's body Mr. White had to go to the rear of the automobile and slip her left foot, heel first, out from behind the driver's seat. Then her head was freed, and her body was removed through the driver's side door.

Patrolman Byrd testified that the primary damage to the front of the Vega was on the right front of the passenger side, that the steering wheel was bent, and that the headrest portion of the passenger's seat was bent backwards. Admitted over objection, Byrd testified that in his opinion from his investigation and

from his discussions with the defendants that Beverly Ann Jones was driving at the time of the accident.

Dr. Gordon Arnold, the medical examiner, determined that the immediate cause of death of Beverly was a deep, severe shearing injury to her face going back as far as the front of the spinal column, the blow having had a guillotine effect, and a skull fracture.

Dr. Arnold did briefly examine her body other than the head region, but found no significant injury below the head, such as "bruises, broken ribs, scratches, and cuts." Because of the unusually severe head injury, he did not find it necessary to remove any of her clothing to carry out his examination, so "very possibly there could have been internal injuries that were not disclosed" by his examination.

The plaintiff asserts that the trial court erred in three respects: (1) by granting the defendant's motion for a directed verdict; (2) by admitting the Highway Patrolman's determination, based on hearsay, of the driver's identity; and (3) by refusing to permit testimony concerning the physical evidence and measurements taken at the scene of the accident.

The ultimate issue in this case is whether the defendant's motion for a directed verdict was properly granted. A motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a) questions "whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it." *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E. 2d 357, 359 (1980). The scope of our review is "the identical question which was presented to the trial court . . . namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 397 (1971). The motion should be denied if the court finds more than a scintilla of evidence to support the plaintiff's *prima facie* case in all its constituent elements. *Hunt v. Montgomery Ward and Co., supra*, at 644, 272 S.E. 2d at 360 (1980).

[1] Our determination of this issue is aided by the fact that this case has previously been before both appellate courts. On appeal from the first trial, this Court, with the later approval of the Supreme Court, held that the plaintiff was entitled to have the

case submitted to the jury because she had sufficiently established through circumstantial evidence an inference that the defendant Hubbard was the negligent driver of the car at the time of the accident. Specifically, we stated that "[o]ur appellate courts have consistently approved of the use of circumstantial evidence to establish the identity of the driver of an automobile at the time of a collision." *Jones v. Allred, supra*, at 43, 278 S.E. 2d at 524. The law of the case derived from the first appeal is controlling in the present case:

> When it has been determined on appeal that the evidence warrants the submission of the case to the jury, such determination of the Supreme Court is the law of the case and, in a subsequent hearing upon substantially the same evidence, the refusal of the trial court to submit the case to the jury is error. [Citations omitted.] But where the evidence on the subsequent trial is materially different from that on the former trial, the decision of the Supreme Court on the former appeal as to the sufficiency of the evidence is not conclusive. [Citations omitted.]

Johnson v. R.R., 257 N.C. 712, 713, 127 S.E. 2d 521, 522 (1962). The question then becomes whether the evidence in the second trial when considered in the light most favorable to the plaintiff is materially different from the first trial to warrant a directed verdict in favor of the defendants. Evidence considered "materially different" in this case would be new evidence conclusively proving that Beverly Ann Jones was the driver at the time of the accident. We hold that there was no materially different evidence and the defendants' motion for a directed verdict was therefore improperly granted.

Basically, the same circumstantial evidence was introduced by the plaintiff in both trials to show that Richard Allen Hubbard was the driver of the car at the time of the collision. In the record before this Court, the plaintiff's evidence indicated: that approximately five miles and at the most twenty-four minutes before the accident the defendant Hubbard was last seen driving the car with Beverly Ann Jones in the passenger seat; that from Dr. Arnold's examination the deceased had no significant injuries, other than the blow to her head, and no bruises or marks on her stomach or chest area; that Beverly Ann Jones was too young to

obtain a driver's license; and that to her mother's knowledge the deceased had never operated a motor vehicle. The inferences which can be drawn from this evidence have been held sufficient in North Carolina to send the case to the jury. *Drumwright v. Wood*, 266 N.C. 198, 146 S.E. 2d 1 (1966); *Stegall v. Sledge*, 247 N.C. 718, 102 S.E. 2d 115 (1959); *Johnson v. Gladden*, 33 N.C. App. 191, 234 S.E. 2d 459 (1977). Yet, more importantly, this circumstantial evidence was held sufficient to overcome a directed verdict by the defendants in this case. *Jones v. Allred*, 52 N.C. App. 38, 278 S.E. 2d 521, *aff'd*, 304 N.C. 387, 283 S.E. 2d 517 (1981).

The only new evidence introduced was the testimony of Ronald White, the rescue squad captain, who stated that Beverly Ann Jones' left foot was wedged between the driver's seat and the door. The defendants argue that the granting of the directed verdict was proper because this evidence conclusively proves Beverly Ann Jones was the driver and that it would have been improper to allow the jury to speculate how she might have been thrown from the passenger seat over two people and have her foot caught in that position. We hold that White's description of exactly how Beverly Ann Jones was found does not conclusively prove she was driving, but is merely more evidence for the jury to consider in reaching their decision. He stated that with the car turned upside down she was lying on her back with her right leg stretched out directly toward the rear of the car and her left leg pointing upwards towards the floorboard with her left foot wedged between the driver's seat and the door. The hood of the car which had come through the windshield area of the car had pinned her head slightly towards the passenger side of the car. His testimony revealed that because he was unable to pull her foot down from between the seat and the door he had to slide it back, heel first, towards the back of the car, creating an inference that her foot slid into this position from the backseat. Yet, the inference to be drawn from this evidence is for the jury to decide. It is no more speculative for the jury to determine how her left foot came to rest in this position from sitting in the passenger's seat or the back seat than from sitting in the driver's seat. In light of the fact that the original circumstantial evidence was sufficient to go to the jury and that the new evidence does not conclusively prove she was the driver, the law of the case governs and the granting of a directed verdict was improper.

[2] This result is even more compelling in view of the plaintiff's second assignment of error that the patrolman's testimony that Beverly Ann Jones was the driver is incompetent. Certainly it was very damaging to the plaintiff's case to have the investigating officer report that Beverly Ann Jones was the driver. Without this evidence, there is no direct testimony which positively or conclusively identifies Beverly Ann Jones as the driver. Patrolman Byrd testified on cross-examination over repeated objections that his investigation revealed that the defendant Hubbard was seated in the middle of the bucket seats, that the defendant Kinsey was seated in the front passenger's seat, and that Beverly Ann Jones was driving at the time of the accident. After telling the jury six different times that Beverly Ann Jones was the driver, he stated, "when I say I made a determination of the driver it is strictly [from] information that I received from the defendants and the defendants only." His testimony, therefore, was hearsay: an out-of-court statement offered for the purpose of proving the truth of the matter asserted therein which probative force depends upon the competency and credibility of some other person not on the witness stand. *Randle v. Grady*, 228 N.C. 159, 163, 45 S.E. 2d 35, 39 (1947); *Financial Corp. v. Transfer, Inc.*, 42 N.C. App. 116, 122-23, 256 S.E. 2d 491, 496 (1979). These statements are inadmissible because they are hearsay and fit within no recognized exception to the hearsay rule, and their admission constitutes reversible error. Also, the initial question asked by the plaintiff concerning the patrolman's investigation was not sufficient to "open the door" with regard to the subsequent hearsay testimony.

[3] In the final assignment of error, the plaintiff complains that the trial court committed error by refusing to permit testimony of the physical evidence found and the measurements taken at the scene by Patrolman Byrd. We hold this evidence was properly excluded and in any event would not have constituted prejudicial error. The evidence was properly excluded because of the plaintiff's failure to lay a proper foundation for the evidence. Patrolman Byrd states that "[a]s to whether or not I made those measurements prior to talking with either of the defendants, that I couldn't say. . . . I couldn't say whether I talked to either one of the defendants prior to making the measurements or afterwards at that particular night." With this type of physical evidence it is

crucial that the officer at least be able to establish that the measurements were taken close to the time of the accident to insure the least amount of change in the evidence. Without this foundation, the trial court had no assurance that the evidence being recited to the jury was produced by the actual accident in question. Also, this evidence does not go to the identity of the driver, but to the driver's negligence. In *Greene v. Nichols*, 274 N.C. 18, 27, 161 S.E. 2d 521, 527 (1968), the court held that when an automobile leaves the highway without apparent cause and inflicts injury, "an inference of the driver's actionable negligence arises, which will take the case to the jury." Since there was sufficient evidence to show the driver's negligence, the exclusion of this evidence would not have prejudiced the plaintiff. This assignment of error is overruled.

Our ruling upon the first two assignments of error mandates that this case be

Reversed and remanded for a new trial.

Judges BECTON and JOHNSON concur.

Ladd v. Estate of Kellenberger

ELIZABETH COFFEY LADD, MARGARET COFFEY GRADDY, AND MARION COFFEY HENSLEY v. THE ESTATE OF MAY GORDON LATHAM KELLENBERGER; R. D. DOUGLAS, JR. AS CO-EXECUTOR OF THE ESTATE OF MAY GORDON LATHAM KELLENBERGER; NORTH CAROLINA NATIONAL BANK, AS CO-EXECUTOR OF THE ESTATE OF MAY GORDON LATHAM KELLENBERGER; MARY GARDNER NOVOTNEY; EILEEN TAYLOR LOVE; HELEN L. EUBANKS; RUTH L. SMITH; AGNES L. COX; BLANCHE L. SUTTON; MARTHA LOUISE L. WALKER; FRANK B. LATHAM; EDWARD L. LATHAM; LUCILLE L. REDFEARN; GABRIEL RUFFIN LATHAM; JOHN L. SNIPES; W. LUBY SNIPES, JR.; JAMES E. SNIPES; RUTH S. BROWN; MABLE S. TALTON; LELA S. WHITLEY; HAZEL S. HARDEE; MILDRED S. SORTINO; JOHN L. LATHAM, JR.; LOUISE L. NYGARD; MAY GORDON L. LUTHI; EDYTHE V. LATHAM; AND ALL UNKNOWN HEIRS OF MAY GORDON LATHAM KELLENBERGER

No. 8218SC1116

(Filed 18 October 1983)

Adoption § 1 — doctrine of equitable adoption — not recognized

The trial court properly dismissed plaintiffs' action for failure to state a claim for relief where plaintiffs alleged a right to share in decedent's residuary estate as decedent's "adopted" children. The allegations in plaintiffs' complaint indicated that no statutory proceeding for adoption was ever instituted, and our courts have never created the relationship of parent and child with the resulting right of inheritance solely from a private contract to adopt. G.S. 29-17(a).

APPEAL by plaintiffs from *Helms, Judge.* Orders entered 4 March and 13 May 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 September 1983.

Plaintiffs are appealing from an order of the trial court allowing motions to dismiss for lack of personal jurisdiction and from an order allowing motions to dismiss for plaintiffs' failure to state a claim for relief.

On 1 May 1975 May Gordon Latham Kellenberger died testate in Guilford County, North Carolina. After bequeathing generous amounts of money to named charitable, educational and religious organizations, the decedent provided for the distribution of her residual estate in the following manner:

> I have various relatives, both on my father's and mother's sides of the family, who would inherit from me if I died intestate. Rather than make individual bequests to

them, I hereby provide that forty percent (40%) of my residual estate (after the payment and distribution of the bequests set out) shall be set aside for my relatives. Any Federal tax due by reason of such bequest shall be paid out of the forty percent (40%), and the balance shall be divided among my relatives according to law, with each taking that proportion which he or she would take under the law of North Carolina if I had died intestate. . . .

The decedent left no surviving spouse nor any surviving lineal descendents. In a subsequent proceeding for determination of heirship and order of distribution under G.S. 28A-22-3, twenty-three persons were named as heirs of decedent and the persons who would take if decedent had died intestate. An order to this effect was entered on 21 May 1980.

Almost a year later plaintiffs instituted an action against the decedent's estate and the twenty-three persons named as heirs of decedent. Plaintiffs alleged that they were the adopted daughters of decedent and therefore entitled to her residual estate. Plaintiffs' allegations are summarized below:

In 1933 plaintiffs Elizabeth Coffey and Margaret Coffey were three years of age. Their sister, Marion Coffey was age five. Plaintiffs' father, H. Wilson Coffey, approached the decedent and her husband about taking custody of his daughters because he and his wife were unable to support them. During this meeting, Coffey agreed to surrender all rights to his daughters and the Kellenbergers agreed to rear and educate the three girls, to adopt them and to make them their heirs at law. Upon information and belief the plaintiffs' mother consented to this agreement.

Subsequent to the agreement the Kellenbergers placed plaintiffs in an orphanage but provided the girls with lavish gifts of clothing, money and toys. Plaintiffs' natural parents exercised no control over them. In 1948 plaintiffs' father again met with the Kellenbergers. The Kellenbergers agreed to adopt plaintiffs and to pay for their education if Coffey continued to exert no parental control. Decedent paid for plaintiffs' education beyond high school and continued to give them gifts during her lifetime. Decedent even provided money and assistance for the higher education of plaintiffs' children.

> The agreement between the Kellenbergers and Coffey constituted a contract to adopt the plaintiffs. Coffey and plaintiffs fully performed their duties under the contract. The decedent, however, did not carry out her contractual duties to adopt the plaintiffs and to execute a will making plaintiffs her heirs at law and partakers of her estate.

Plaintiffs prayed that the trial court decree specific performance of the contract between decedent and plaintiffs' father by declaring that plaintiffs share in decedent's estate as her heirs and children, that an adoption by estoppel or an equitable adoption be recognized and enforced by the court on plaintiffs' behalf and that defendants be estopped from disputing plaintiffs' rights of inheritance as decedent's adopted daughters.

Crisp, Davis, Schwentker & Page, by William T. Crisp and Cynthia M. Currin, and Pree & Pree, by Robert O'Shea, for plaintiff appellants.

Douglas, Ravenel, Hardy, Crihfield & Bullock, by Robert D. Douglas, III, and James M. Lung, for defendant appellees Ruth L. Smith, Frank B. Latham, Edward L. Latham, Jr., Louise L. Nygard, the estate of May Gordon Latham Kellenberger, R. D. Douglas, Jr., as co-executor of the estate of May Gordon Latham Kellenberger, North Carolina National Bank as co-executor of the estate of May Gordon Latham Kellenberger, Mary Gardner Novotney, Agnes L. Cox, Martha Louise L. Walker, Edythe V. Latham, Lucille L. Redfearn, Gabriel R. Latham and John L. Latham, Jr.

Nichols, Caffrey, Hill, Evans & Murrelle, by Edward L. Murrelle and R. Thompson Wright, for defendant appellees Blanche L. Sutton and May Gordon L. Luthi.

Daughtry, Hinton, Woodard & Murphy, by W. Kenneth Hinton, for defendant appellees John L. Snipes, W. Luby Snipes, Jr., James E. Snipes, Ruth S. Brown, Mabel S. Talton, Lela S. Whitney, Hazel S. Hardee and Mildred S. Sortino.

ARNOLD, Judge.

Since the doctrine of equitable adoption has not been adopted by this State and appears to be contrary to public policy and the

prevailing law, we affirm the trial court's order dismissing plaintiffs' action for failure to state a claim for relief.

Plaintiffs argue that the trial court erred in allowing defendants' motion to dismiss their action for failure to state a claim for relief. They claim that their complaint sets forth sufficient facts to establish a claim under the legal doctrine of equitable adoption. "A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." (Citation omitted.) *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981). Assuming *arguendo* that the plaintiffs in the case *sub judice* set forth facts sufficient to establish a claim under the doctrine of equitable adoption, their case was properly dismissed because of an absence of law in this jurisdiction to support this doctrine.

The doctrine of equitable adoption has been applied by a number of courts when parties capable of contracting enter into a clear and complete contract to adopt a child and there is consideration supporting the contract in the form of performance on the part of the child but failure of the adopting parents to complete a statutory adoption. *See* 2 Am. Jur. 2d *Adoption* § 16 (1962). *See, also,* Annot., 97 A.L.R. 3d 347 (1980). In such situations the agreement "will be enforced in equity to the extent of decreeing that the child occupy in equity the status of an adopted child, and be entitled to the same rights of inheritance in intestate property of the promisor to which he would otherwise have been entitled had the intended adoption proceedings been legally consummated." 2 Am. Jur. 2d at 872. Approximately eight states have expressly refused to allow recovery on unperformed adoption contracts.

> These courts note that adoption is everywhere a creature of statute and insist on strict construction of statutes in derogation of common law. In these jurisdictions the statutory scheme provides the exclusive method of adoption and no private agreement will suffice to bring the child within the statutes of descent and distribution.

Note, *Equitable Adoption: They Took Him Into Their Home and Called Him Fred*, 58 Va. L. Rev. 727 (1972). Examination of our

statutory and case law reveals that North Carolina is a follower of this minority position.

We have found only two cases where the North Carolina courts have discussed contracts to adopt. In *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295 (1926), the heirs of intestate's "adopted" daughter sought title to intestate's real estate. The facts showed that a petition for adoption was filed and letters of adoption were issued by the Clerk of Superior Court of Harnett County pursuant to the statutory law. The facts further showed that the natural parents of the child were not a party to the adoption proceeding within contemplation of the statute. The heirs of the deceased child argued, however, that since the intestate entered into a contract of adoption and recognized this relationship during his lifetime, his heirs at law should not be permitted to defeat the rights of a child because of a departure from the statute. The Court responded that the principle applied in case of a mere technical disregard of the statute, but found the order and letters of adoption to be void because the natural parents were never served with notice of the adoption proceedings.

The other North Carolina case, which mentions contracts to adopt, is *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938). The plaintiffs on appeal have cited this case as support for their position that North Carolina recognizes private contracts to adopt. We find plaintiffs' reliance upon this case to be erroneous. The plaintiff in *Chambers* alleged that she was entitled to the land of the intestate as his adopted daughter. When plaintiff was three years of age, the intestate had entered into a written agreement with the natural father of plaintiff. Therein the intestate agreed to adopt plaintiff and to make her his sole and only heir to what he may die possessed of. The North Carolina Supreme Court reversed the judgment of nonsuit solely on the basis that the written contract was one to make a will, and therefore subject to specific performance. The Court noted, "The parties to the agreement in this case did nothing as required by the Adoption Statute." *Id.* at 377, 199 S.E. at 401.

The language in both *Truelove* and *Chambers* supports the recognition of only those adoptions perfected under the North Carolina adoption statutes. Our Supreme Court in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950), reiterated this position:

> Adoption is a status unknown to common law, and can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government. Under statutes providing for adoption through judicial proceedings instituted by filing a petition to a court of competent jurisdiction alleging certain requisite facts from which the court decrees the status and the right of the child, the court is said to act judicially in rendering the judgment.

Id. at 215, 59 S.E. 2d at 839.

In 1933, the year plaintiffs claim a contract to adopt was executed, the statutory law required the filing of a petition in the county where the child resided and the recording of an order of adoption with the Clerk of Superior Court in said county. Consolidated Statutes of North Carolina, Vol. 1, Chapter 2 §§ 182 *et seq.* On the date of Mrs. Kellenberger's death, the statutory law provided that any child adopted *in accordance with the adoption statutes* was entitled by succession to any property through or from his adoptive parents. G.S. 29-17(a). The allegations in plaintiffs' complaint indicate that no statutory proceeding for adoption was ever instituted, and our courts have never created the relationship of parent and child with the resulting right of inheritance solely from a private contract to adopt.

In refusing to recognize the doctrine of equitable adoption in this State, this Court is acting consistently with existing North Carolina law. Our refusal to recognize this doctrine is also based on this Court's reluctance to interfere in legislative matters. The Mississippi Supreme Court expressed our sentiments exactly when it refused to adopt the doctrine of equitable adoption and stated:

> The question of the right of any person to base his claim of inheritance upon an oral agreement for adoption is a legislative matter, and in the absence of legislation authorizing the enforcement of an oral contract alleged to have been made many years prior to the death of a property owner, the courts should not lend sanction to such a doctrine.

Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699, 702 (1956).

By affirming the trial court's order dismissing plaintiffs' action for failure to state a claim for relief, we find it unnecessary

to address plaintiffs' remaining assignments of error, or defendants' cross assignment of error.

Affirmed.

Judges WELLS and EAGLES concur.

CHARLOTTE YACHT CLUB, INC. v. THE COUNTY OF MECKLENBURG; TOM RAY, FOUNTAIN ODOM, SUSAN GREEN, MARILYN BISSELL AND ROBERT WALTON AS MEMBERS OF THE MECKLENBURG BOARD OF COMMISSIONERS

No. 8226SC1135

(Filed 18 October 1983)

1. **Municipal Corporations § 30.6— zoning—special use permit**

When standards governing issuance of a special use permit are specified in a zoning ordinance and an applicant complies fully with the standards, a board of commissioners may not deny a permit to that applicant.

2. **Municipal Corporations § 30.6— zoning—special use permit for camping trailer park—failure of proof**

In a proceeding in which petitioner sought a special use permit for an overnight camping trailer park, the record supported a finding by the county board of commissioners that petitioner failed to produce substantial evidence that the proposed use would not unduly disrupt the significant natural features of the site as was required by the county zoning ordinance for issuance of a special use permit.

3. **Municipal Corporations § 30.6— denial of special use permit—violation of rule of procedure—harmless error**

In a proceeding to determine an application for a special use permit, a board of county commissioners' possible violation of its own rule of procedure by accepting affidavits relevant to one issue which were delivered to the board after the hearing was not prejudicial where the board's denial of the permit was supported by its findings on another issue.

APPEAL by respondents from *Ferrell, Judge.* Judgment entered 16 June 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 September 1983.

This case arises from the Mecklenburg Board of Commissioners' denial of Petitioner's application for a special use permit. The evidence shows that Petitioner is a non-profit corporation

which leases property adjacent to Lake Wylie in Mecklenburg County. Petitioner has operated a marina and clubhouse on the property since 1957. Since 1968, the property has been zoned "Resort-Residential," and it is conceded that operation of a marina on that property would normally require a special use permit. Because the marina was in operation prior to enactment of the zoning ordinances, however, no such permit is required; continued operation is allowed as a "nonconforming use" under the county zoning ordinances.

In 1980 the Yacht Club sought a building permit for construction of a bathhouse on the property. The bathhouse was to be for the use of campers using the Club's grounds. Petitioner contends that camping has occurred on the grounds since the Club was established in 1957. The Mecklenburg County Engineering Department refused to issue a building permit for construction of the bathhouse, citing as grounds that Petitioner must first obtain a special use permit for an overnight camping trailer park.

In February, 1981, the Yacht Club filed an application for a special use permit with the Charlotte-Mecklenburg Planning Commission, seeking to have the property designated as an "overnight camping trailer park." A hearing on the application was held on 9 March 1981 by the Board of Commissioners and the Planning Commission. Evidence was presented at the hearing by the Yacht Club and by neighbors opposing issuance of the permit.

On 11 May 1981 the Planning Commission voted to recommend conditional approval of the Yacht Club's application, with the provision that camping use of the property be limited to ten camping units. On 21 September 1981 the Board of Commissioners denied Petitioner's application. The Yacht Club sought judicial review of the Board's action by application to the Superior Court of Mecklenburg County for a writ of certiorari. A writ of certiorari was granted on 22 March 1982, and a hearing held on 26 May 1982. By a judgment entered 16 June 1982, the Superior Court judge reversed the decision of the County Commissioners and remanded with instructions that the special use permit be issued subject to reasonable provisions limiting the number of camping units on the site and the duration of their stay. From that judgment the Board of Commissioners appealed.

David W. Erdman for petitioner, appellee.

Ruff, Bond, Cobb, Wade & McNair, by Marvin A. Bethune for respondents, appellants.

Perry, Patrick, Farmer & Michaux, by Roy H. Michaux, Jr. for Dr. L. L. Parker and Mrs. Katie Ivey McCoy, amicus curiae.

HEDRICK, Judge.

We begin our discussion of this case cognizant of our role in reviewing the actions of the Superior Court and the Board of Commissioners. Our Supreme Court discussed the function of appellate review in cases such as this at some length in *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980):

> [T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:
>
> (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.

Id. at 626, 265 S.E. 2d at 383. The Court went on to discuss in greater detail the role of a reviewing court in evaluating the sufficiency and competency of the evidence:

> [T]he question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board. . . .

> The trial court, reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court. The trial court does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.

Id. at 626-27, 265 S.E. 2d at 383.

[1] A special use permit is one issued "for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974). When standards governing issuance of a special use permit are specified in a zoning ordinance and an applicant complies fully with the standards, a board of commissioners may not deny a permit to that applicant. *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 216, 261 S.E. 2d 882, 887 (1980). In determining whether to issue a permit, the board follows a two-step decision-making process:

> (1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it.
>
> (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 625, 265 S.E. 2d 379, 382 (1980).

Mecklenburg County Zoning Ordinance (hereinafter Ordinance) 9-9 provides for the issuance of a special use permit for overnight camping trailer parks on proper application and compliance with Ordinance 9-9.3:

> *Findings.* As a prerequisite to approval of an application for this special use, the Board of County Commissioners shall find that the evidence presented at the hearing establishes:
>
> (1) That the proposed use will not unduly disrupt any significant natural features of the site such as topography, streams or green cover;

(2) That the proposed use will not create or compound traffic problems for the area;

(3) That the proposed use will not endanger public health and safety or substantially reduce the value of adjoining and nearby property.

In ruling on Petitioner's application, the Board made the following conclusions of law:

1. The petitioner has demonstrated that the construction of the bathhouse would not disrupt any significant natural features of the site. However, the petitioner did not produce substantial evidence which would establish that the proposed use, an overnight camping trailer park, would not unduly disrupt the significant natural features of the site.

2. The petitioner has demonstrated that with six campers using the site at one time, the proposed use would not create or compound traffic problems for the area. Since, however, the petitioner's own evidence has established that the proposed bathhouse is designed to handle up to 15 people, and since the petitioner has not proposed any limit on the number of campers using the site, the petitioner has failed to present evidence which would establish that the proposed use will not create or compound traffic problems for the area.

3. The petitioner has demonstrated that the construction of a bathhouse would not endanger public health and safety or substantially reduce the value of adjoining and nearby property. However, the petitioner did not produce evidence on the effect that the proposed overnight camping trailer park would have on the value of adjoining or nearby properties.

4. The proposed use of the property by the petitioner as an overnight camping trailer park would substantially reduce the value of adjoining and nearby property.

. . .

Based upon the foregoing Findings of Fact and Conclusions of Law, the request for the Special Use Permit sought by the petitioner is denied.

Respondent assigns error to the Superior Court order directing issuance of a special use permit. The Board contends that its findings and conclusions were "based on competent, material, and substantial evidence appearing in the record and [were] supported by the absence of required evidence" and thus should have been upheld.

We note at the outset that the present case is complicated by the fact that the Petitioner is seeking a special use permit with respect to property presently being used as a marina, which is a nonconforming use. There is a clear dispute as to whether and to what extent the property is being used as a campground, which is also a nonconforming use. Petitioner's application and the evidence adduced at the hearing for the special use permit are not clear as to whether the Yacht Club is seeking the special use permit to alter or upgrade its nonconforming use or the permitted use under the existing zoning of resort-residential. However, we need not, nor did the Board need to, determine the extent of the alleged nonconforming use, since such use is irrelevant in a proceeding to obtain a special use permit pursuant to the ordinance in question. Under Ordinance 9(A), a special use permit may be issued so as to allow "land uses which are basically in keeping with the intent and purposes" of the existing zoning designation.

[2] After the hearing, the Board fulfilled its responsibility of making findings of fact and conclusions of law and entered its order denying the special use permit. We have reviewed the whole record and conclude that the Board's findings with respect to whether "the proposed use will not unduly disrupt any significant natural features of the site . . ." is correct. The Petitioner offered no evidence whatsoever that camping on the site would not disrupt significant natural features of the site. In regard to the first factor, then, Petitioner finds itself in a situation similar to that discussed in *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 694, 187 S.E. 2d 496, 499-500, *cert. denied*, 281 N.C. 314, 188 S.E. 2d 897 (1972):

> The ordinance requires that certain conditions be met before a special use permit can be granted. The petitioner has the burden of satisfying the Board that it meets these conditions. [citation omitted.] The Board in this case has not found as a

> fact that petitioner fails to meet the conditions set forth in the ordinance. It has merely found that petitioner has failed to produce sufficient evidence for the Board to make the required findings. There are no presumptions in favor of the petitioner and the petitioner merely failed in proof.

In light of the zoning ordinance requirement that Petitioner produce evidence on *each* of the three factors listed in the ordinance, we find it unnecessary to discuss the sufficiency of evidence introduced on the two remaining factors. Because we find the order of the Board to be supported by the record, the decision of the Superior Court will be reversed.

Petitioner's cross-assignment of error No. 1 is set out in the record as follows:

> The failure of the Court to rule on the Petitioner-Appellee's other nine (9) grounds for seeking review of the County Commission-Appellant's actions in denying Petitioner's initial Petition. The Court ruled, albeit in Petitioner-Appellee's favor, on only that one ground, as alleged by Petitioner, that "the Commission ignored the manifest weight of the evidence presented at hearing, ruling contrary to the vastly greater weight of the admissible and properly presented evidence."

In its brief Petitioner argues, based on the foregoing cross-assignment of error, that the *court* erred in not ruling on nine allegations asserted by Petitioner as alternative grounds for relief. These grounds were largely procedural in nature, involving, among other things, the consideration by the Board of evidence "strange to the record," alleged violation of the open meetings law, inconsistent and unfair treatment of the parties by the Board under the Rules of Hearing Procedure, and delay in ruling on Petitioner's application for the permit.

Since the Superior Court ruled in Petitioner's favor, there was no necessity for that court to rule on Petitioner's alternative grounds for relief. Since we are reversing the decision of the Superior Court and affirming the ruling of the Board, however, it is our role to review the record for errors in law and to insure that proper procedures were followed and that all parties were afforded their due process rights. *Concrete Co. v. Board of Commis-*

sioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383 (1980). Accordingly, we have reviewed Petitioner's nine contentions. We find all nine to be without merit, and only two to warrant discussion.

[3] Petitioner earnestly contends that the Board violated its own Rule of Hearing Procedure No. 20, which provides:

> 20. *Referral to Planning Commission and Post-Hearing Written Statements.* After the participants in the hearing have presented their evidence, the hearing shall be closed and referred to the Planning Commission for its recommendation. The participants in the hearing may submit written statements which may include: summaries of the evidence, arguments regarding whether the Board can properly consider particular evidence and what weight might be given to particular evidence; and such other arguments and discussions of the record as are believed to be helpful. *Such statements shall not include references or discussions of facts or information which were not made part of the record during the hearing* [emphasis added]. Twenty (20) copies of any submitted statement must be filed with the Planning Commission within five (5) days (excluding holidays, Saturdays and Sundays) after the close of the hearing.

The record does disclose, and Respondents do not deny, that affidavits were delivered to the Board after the hearing, and that they contained evidence about the effect of the special use permit on the value of adjacent land. Such evidence, if considered by the Board, was relevant and material to one of the three issues decided by the Board adverse to Petitioner. Affidavits submitted by Board members asserting that they did not consider this evidence does not, in our opinion, entirely erase the error. It is the duty of the Board in these proceedings to screen the material submitted pursuant to Rule 20 and to purge the record of any evidence that might deprive any party of its right to fundamental fairness. Nevertheless, we find the error non-prejudicial. The evidence challenged by this assignment of error was not relevant to and could not conceivably have affected the Board's determination that Petitioner had produced no evidence on the effect of camping on significant natural features of the site.

The order of the Superior Court is reversed and the cause remanded to that court for the entry of an order affirming the decision of the Board of Commissioners.

Reversed and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. RODNEY EUGENE THOMPSON

No. 8221SC1232

(Filed 18 October 1983)

1. Criminal Law § 75.11— confession—waiver of right to counsel

In a prosecution for armed robbery, the trial court properly admitted defendant's confession into evidence where a detective's testimony indicated that defendant never requested an attorney *during* interrogation, and where defendant presented no evidence contradicting the detective's testimony. The fact that defendant advised the detective that he had once been represented by an attorney did not render the confession inadmissible.

2. Criminal Law § 74— confession—no undue emphasis placed upon it

Because there were differences in a written confession and in an oral confession, the written statement was not unduly emphasized by allowing it to be read to, and then passed among, the jurors.

3. Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence—denial proper

In a prosecution for armed robbery, the trial court properly denied defendant's motion to set aside the verdict as contrary to the weight of the evidence even though the defendant's evidence tended to show that he did not commit the crime since defendant confessed to the robbery, and, although his accomplice testified that defendant was not the one who had committed the robbery with him, a detective testified that the accomplice had previously told him defendant had committed the robbery with him.

4. Criminal Law § 138— robbery with a firearm—consideration of aggravating factor that large sum of money taken proper

In a prosecution for robbery with a firearm under G.S. 14-87, the trial court properly submitted as an aggravating factor that a large sum of money was taken since all that is necessary to prove the offense of robbery with a firearm is that an attempt was made to rob by the use of a firearm or other dangerous weapon. G.S. 15A-1340.4(a)(1).

5. Criminal Law § 181.4— insufficient evidence to support motion for appropriate relief

The Court denied defendant's motion for appropriate relief which was based on newly discovered evidence where the person who was supposed to be defendant's accomplice testified at trial that defendant was not his accomplice but at trial refused to name the other robber, and where the new evidence consisted of the name of the "other robber." The evidence was not of such a nature that a different result would probably be reached at a new trial.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 5 August 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 2 September 1983.

Defendant was tried and convicted of armed robbery on 5 August 1982 and was sentenced to 32 years in prison.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Sapp & Mast, by Keith Stroud, for defendant appellant.

BECTON, Judge.

I

The issues on appeal relate to: (a) the admission of, and emphasis placed on, a confession by defendant; (b) the sufficiency of the evidence; (c) the court's findings of aggravating factors; and (d) newly discovered evidence as set forth in defendant's motion for appropriate relief. For the reasons that follow, we find no error in the trial.

II

At approximately 3:00 a.m. on 19 January 1982, four employees of Darryl's Restaurant in Winston-Salem were leaving work when they encountered two men wearing stocking masks over their heads. One of the two men was approximately four inches taller than the other. The shorter man was carrying a sawed-off shotgun. The two men ordered the employees to return to the restaurant and ordered one of the employees to open the safe. The employee complied and gave the taller man approximately $4,700.00 from the safe. While they were returning to the restaurant, one of the employees had caught a glimpse of the shorter man's face when he briefly lifted his mask. This employee identified the shorter man as the defendant, Rodney Thompson.

Under questioning by the police, defendant initially denied participating in the robbery, but later, according to Detective W. G. Miller, confessed to participating in the robbery with Michael Workman.

Defendant presented the testimony of four witnesses who stated that defendant was at home at the time the robbery occurred. Michael Workman, who admitted participating in the robbery, testified that defendant was not the person who was with him but refused to name the other person. Defendant himself testified that he did not participate in the robbery. Defendant also denied telling the police that he participated in the robbery.

III

[1] Defendant first argues that the trial court erred in admitting his confession into evidence. While being interrogated by Detective Miller, defendant advised Miller that he had once been represented by a Mr. Chuck Alexander. Defendant asserts that this was a request for counsel at which time interrogation should have ceased until counsel was present. Defendant contends the trial court erred in failing to make a finding of fact on defendant's alleged request for counsel during interrogation. We disagree.

"When the admissibility of an in-custody statement is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met." *State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506, 512 (1976). If there is a material conflict in the evidence, the trial judge must make findings of fact to resolve the conflict. *Id.* "If there is no conflict in the evidence on *voir dire*, it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends." *Id.*

Detective Miller, the sole witness on *voir dire*, testified that he read defendant his rights prior to interrogation. In response to Detective Miller's questions, defendant indicated that he understood his rights, that he did not want to talk to a lawyer and have a lawyer present during questioning, and that he wished to answer questions. Detective Miller recorded defendant's answers on the waiver of rights form, which defendant signed. Detective Miller further testified on *voir dire* by Mr. Stroud:

It is not true that later on in my questioning of your client that he asked me concerning having counsel present. When I talked with him he advised me that he did not wish to have counsel present.

Q. Did you inform Rodney Thompson when he could get counsel appointed if he did want counsel?

A. He didn't say anything about wanting counsel.

I advised him that he had the right to have counsel there when we were questioning him if he wanted. There was no question at this point about how long he would have to remain there. He didn't ask any questions.

Q. Did you, at any time, advise Rodney Thompson that if he could not afford an attorney, one would be appointed and at what point in time it would be appointed for him?

A. I advised him of the fact that if he couldn't afford one, one would be appointed for him.

I did not tell Ronnie Thompson that he would have to wait for the Court to appoint counsel for him. Mr. Thompson advised me that he had had some dealing in one way or the other with Chuck Alexander, that Mr. Alexander had represented him.

Q. So, you were advised that Mr. Alexander would represent him; is that correct?

A. Some time before I left him that day he told me about Mr. Alexander.

I did not at any time contact Mr. Alexander and inform him of my questioning of his client. Mr. Thompson did not request it.

Q. Did you, at any time, inform Mr. Thompson that if he wanted Mr. Alexander present, that you would wait and conduct the questioning when Mr. Alexander arrived?

A. When I advised Mr. Thompson of his constitutional rights, and I asked if he wanted to talk to a lawyer and have him present during questioning his answer was no.

VOIR DIRE EXAMINATION continuing by Mr. Lyle:

> When Rodney Thompson was talking about Mr. Alexander, he was talking about him representing him at trial. He did not ever say that he wanted Mr. Alexander there while I was asking him questions. He never requested Mr. Alexander or any attorney at that time. . . .

We do not believe that the mention of Chuck Alexander constituted a request for counsel and for interrogation to cease. Detective Miller's testimony indicates that defendant never requested an attorney *during* interrogation. Defendant presented no evidence contradicting Detective Miller's testimony. Thus, there was no conflict in the evidence, and the trial judge was not required to make a particular finding of fact concerning whether the reference to Mr. Alexander constituted a request for counsel. In fact, the trial judge found and concluded as a matter of law that "the defendant was in full understanding of his constitutional rights to remain silent and his right to counsel . . . and that he freely, knowingly and voluntarily waived each of these rights."

IV

[2] We also reject defendant's contention that the trial court allowed undue emphasis to be placed upon defendant's confession by, first, allowing Detective Miller to testify as to the substance of an oral confession and then to read aloud defendant's written confession; and by, second, allowing the State to pass the written confession among the jurors. Defendant attempts to distinguish *State v. Caldwell*, 15 N.C. App. 342, 190 S.E. 2d 371 (1972), in which this Court rejected a similar contention that a confession was unduly emphasized, but the distinction is not persuasive. Defendant gave Detective Miller a detailed oral statement and subsequently dictated a less detailed statement which Detective Miller wrote down. Because there were differences in the statements, we do not believe the written statement was unduly emphasized by allowing it to be read to, and then passed among, the jurors.

V

[3] As defendant concedes, the State produced sufficient evidence to take the case to the jury. He contends, however, that the trial court erred in denying his motion to set aside the verdict

as being contrary to the weight of the evidence. He argues that the evidence he presented—his four alibi witnesses, Michael Workman's testimony that defendant was not the accomplice, and his own testimony that he did not know of, or participate in, any robbery and that he was at home at the time of the robbery—shows that he did not commit the crime. We reject this assignment of error.

In *State v. Puckett*, 46 N.C. App. 719, 266 S.E. 2d 48 (1980), this Court held that the State's evidence was sufficient to support a conviction "[d]espite the fact that defendant presented unimpeachable alibi witnesses, which if believed, would have precluded a conviction." *Id.* at 724, 266 S.E. 2d at 51. In that case, "the victim's unshakable identification of defendant" was a key factor. *Id.* In the present case, defendant confessed to the robbery. Moreover, Workman was impeached by Detective Miller's testimony that Workman told him that defendant was his accomplice the day before Miller interrogated defendant. The contradictions in, and the credibility of, the testimony were for the jury to decide. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

VI

[4] Defendant next assigns error to the court's finding as an aggravating factor that "[t]he offense involved an actual taking of property of great monetary value." *See* N.C. Gen. Stat. § 15A-1340.4(a)(1)(m) (Cum. Supp. 1981). Defendant does not argue that this statutory aggravating factor erroneously focuses, with hindsight, on what was actually taken as opposed to what the perpetrator intended to take. Nor does defendant argue that the statutory aggravating factor is constitutionally infirm to the extent it allows a more severe sentence for one who robs the rich of much than for one who robs the poor of little. Rather, he argues that the fact that defendant took $4,700.00 from the Darryl's Restaurant was evidence necessary to prove an element of the offense of armed robbery, and thus was improperly used to prove any factor in aggravation. We disagree.

Under the Fair Sentencing Act, G.S. § 15A-1340.4(a)(1) provides in pertinent part that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to

prove more than one factor in aggravation." Thus, the question is whether the fact that defendant took $4,700.00 was evidence *necessary* or essential to prove an element of the offense of robbery with firearms. *See State v. Abdullah*, --- N.C. ---, --- S.E. 2d --- (filed 9 August 1983); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E. 2d 774 (1982).

The offense of robbery with firearms is defined in N.C. Gen. Stat. § 14-87(a) (1981) as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, *unlawfully takes or attempts to take* personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony. (Emphasis added.)

Robbery with a firearm under G.S. § 14-87 "is complete if there is an attempt to take property by [the] use of firearms or other dangerous weapons." *State v. Black*, 286 N.C. 191, 194, 209 S.E. 2d 458, 460 (1974). Thus, all that is *necessary* to prove the offense is that an attempt was made to rob by the use of a firearm or other dangerous weapon. Since the offense does not require proof that money was actually taken, the taking of the large sum of money was properly considered as an aggravating factor, in light of defendant's assignment of error.

VII

[5] Defendant also asks this Court to grant his motion for appropriate relief (filed 24 November 1982) based on the ground of newly discovered evidence. In support of his motion, defendant has produced Michael Workman's affidavit in which Workman states that an individual named Rodney Davis was his accomplice and that he did not name this person at trial for fear of retaliation against his family.

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2)

> the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. (Citation omitted.)

State v. Beaver, 291 N.C. 137, 143, 229 S.E. 2d 179, 183 (1976).

We deny defendant's motion because he has failed to satisfy all of the above requirements. Workman testified at trial that defendant was not his accomplice but refused to name the other robber. Because of Workman's trial testimony, we cannot say that: (1) the evidence was "newly discovered"; (2) due diligence was used and proper means were employed to procure the testimony at trial; and (3) the evidence was not merely cumulative or corroborative. Moreover, we cannot say that the testimony was "probably true" since Detective Miller testified that Workman told him that defendant was his accomplice. The jury clearly rejected Workman's trial testimony. Because of these factors, we cannot say that "the evidence was of such a nature that a different result will probably be reached at a new trial." *Id.*

VIII

For the foregoing reasons, we hold that defendant received a fair trial free of prejudicial error. In the trial and judgment of defendant, we find

No error.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. LANCE CRISP, SR.

No. 8330SC67

(Filed 18 October 1983)

1. **Homicide § 6.1— involuntary manslaughter defined**

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence.

2. **Homicide § 21.9— involuntary manslaughter—insufficient evidence—submission of issue as prejudicial error**

Evidence in a second degree murder case that the gun discharged while defendant and decedent struggled for it and that defendant attempted to prevent decedent's suicide by grabbing the gun failed to show that defendant was reckless in his handling of the gun so as to support the trial court's submission of an issue of involuntary manslaughter to the jury, and the court's submission of the involuntary manslaughter issue was prejudicial error where the jury returned a verdict finding defendant guilty of involuntary manslaughter, and the evidence established a reasonable possibility that defendant would have been acquitted of all wrongdoing on the ground of accident had the issue of involuntary manslaughter not been submitted.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 20 August 1982 in Superior Court, SWAIN County. Heard in the Court of Appeals 29 September 1983.

Defendant was charged in a proper bill of indictment with first degree murder. The evidence introduced at trial tended to show the following:

On 19 April 1982 decedent Leonard Cable went to defendant's home where defendant lived with his seventeen-year-old girl friend and defendant's three-year-old son. Cable and Crisp, longtime friends, shared some "liquor" and then left together in Cable's van. They returned to the house at approximately ten o'clock that evening. Shortly after their return they took defendant's 30-30 rifle outside and twice fired the gun. After they came back into the house, defendant and Cable discussed plans for a joint trip to visit relatives in Charlotte. Defendant told Ms. Beck, his girl friend, to pack for the trip. Shortly after she began to do so, the rifle discharged, killing Leonard Cable. Police arriving at the scene found both defendant and Ms. Beck splattered with blood and Cable on the floor with a gunshot wound in

his head. The rifle was next to the body. The defendant made a statement to police at the scene, related by the officer at trial as follows:

> Mr. Crisp's exact words were that Leonard Cable picked the weapon up and told Mr. Crisp " 'I show you how you can end your God damn troubles,' and he put the gun to his head and blew his brains out." He also told me that he told Mr. Cable not to do it and he grabbed the weapon and it went off.

The State introduced expert testimony that the decedent's fingers had been injured in the course of the incident, and that this injury probably occurred because Cable's fingers were in front of the gun, rather than on the trigger, when it discharged.

The evidence other than that set out above was confused and confusing. The only surviving eyewitness to the incident, other than the defendant, was the seventeen-year-old girl friend, Tommie Elaine Beck. Ms. Beck testified at trial that she was under psychiatric care and was taking medication prescribed by a doctor at the Smoky Mountain Mental Health Center. She stated that this medication "makes me forget what happened on April the 19th and since I've been taking that medication I don't really remember what happened on April the 19th. I can just barely remember."

Ms. Beck testified as a witness for the State. On direct examination she first testified that she was packing her clothes when she heard the gun go off. She went on to say that the decedent had kissed her, provoking an angry response from defendant. She stated:

> Leonard had the gun when I turned my back and then Lance took it away from Leonard and then I was packing the clothes and I felt something hit me on the ear and heard a gun go off. I turned around and Lance said "Leonard has blowed his brains out."

Immediately after testifying to the above, Ms. Beck stated that defendant threatened her if she ever told the police what she "had seen," and that he placed the gun next to the body "so it would look like . . . suicide." On cross-examination Ms. Beck testified that "Lance and Leonard came in drunk and they were fighting over the gun and then the gun went off. . . ." She next

testified that while she was packing "Lance and Leonard were in the bedroom. . . . [T]hey were not arguing or having any kind of fight or anything like that. . . . I had my back to Leonard. I heard the gun go off but I hadn't heard Leonard Cable say anything before then." Ms. Beck's final account of the incident was as follows:

> After Leonard had been pointing the gun around, Lance took it away from him. I think they were fighting over it, but I'm not sure, but I think they were. Lance tried to take the gun away from Leonard and Leonard kept pulling the gun back from him and they kept pulling the gun from one another back and forth. They were not hitting each other and they were not arguing or squabbling over the weapon. In fact, I didn't ever hear them have any arguments that night. I don't remember what Lance did with the gun when he finally got it away from Leonard, I can't remember anything hardly anymore, because I am in no shape to be up here in the witness stand today. I have already had one nervous breakdown and the next one could put me away.

At the conclusion of her testimony, Ms. Beck stated: "What I have told here today is . . . half true." A Special Agent with the North Carolina Bureau of Investigation testified as to statements made to him by Ms. Beck, for the limited purpose of corroborating her testimony. He stated: "I have taken four separate statements from Ms. Beck and on two occasions she told me that Leonard Cable committed suicide, on one occasion she told me that Lance had the gun in his hand and Leonard grabbed it and it went off and on one occasion she told me that there was a scuffle over the gun and that it went off while it was in Leonard's hands."

The court submitted second degree murder, voluntary manslaughter, involuntary manslaughter, and not guilty as permissible verdicts. The jury found defendant guilty of involuntary manslaughter and from a judgment imposing a prison sentence of ten years defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Barry S. McNeill for the State.

McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr. for the defendant, appellant.

HEDRICK, Judge.

Defendant contends the court erred to his prejudice in submitting to the jury the possible verdict of involuntary manslaughter. Resolution of this question requires a two-step analysis: (1) whether the evidence in the record will support a verdict of involuntary manslaughter, and (2) if not, whether erroneous submission of the possible verdict was prejudicial error.

[1] Our Supreme Court had defined involuntary manslaughter as "the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978) (citations omitted). "The crux of [involuntary manslaughter] is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon." *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E. 2d 129, 133 (1971).

[2] The record in the instant case is devoid of any evidence that defendant shot Cable "by some unlawful act not amounting to a felony or naturally dangerous to human life." None of the witnesses, including Ms. Beck, identified any "unlawful act" allegedly committed by defendant which resulted in the unintentional killing of Leonard Cable. We turn, then, to the question whether the evidence shows "an act or omission constituting culpable negligence" on the part of defendant.

The law is clear that the fact that a shooting occurred does not, standing alone, demonstrate culpable negligence. *See State v. Church*, 265 N.C. 534, 144 S.E. 2d 624 (1965); *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959). There must be some identifiable act or omission on the part of the defendant which was criminally negligent and which proximately caused the death of the victim. *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). We thus examine the evidence produced at trial, considered in the light most favorable to the State, to see whether the evidence establishes such an act or omission. The only evidence produced by the State in support of an unintentional killing is derived from one of the several versions of the incident testified to by Ms. Beck. She indicated that the defendant and the victim struggled for the gun, and the gun discharged. We note that this version is

consistent with defendant's statement to an officer at the scene that defendant attempted to prevent Cable's suicide by grabbing the gun. The question, then, resolves itself into whether a struggle for the gun under the circumstances here presented constitutes "wanton, reckless, culpable use of a firearm." We hold that it does not.

State v. Lindsay, 45 N.C. App. 514, 263 S.E. 2d 364 (1980) involved facts similar to those found here. In *Lindsay* there was evidence that the decedent had held a gun to her head, that defendant attempted to take the gun away, and that the gun discharged, fatally wounding the victim. On these facts this Court held that the trial court erred in submitting involuntary manslaughter as a possible verdict, saying that "[t]here is no evidence that the shooting resulted from reckless handling of the firearm." *Id.* at 516, 263 S.E. 2d at 366. Because the evidence in the present case, like that in *Lindsay,* fails to demonstrate that defendant was reckless in his handling of the gun, we hold that the trial court erred in submitting to the jury the possible verdict of involuntary manslaughter. We must thus consider the critical question whether the error was prejudicial to the defendant.

In deciding whether submission of involuntary manslaughter was prejudicial error under the facts here presented, we are guided by the words of our Supreme Court in *State v. Ray,* 299 N.C. 151, 167, 261 S.E. 2d 789, 799 (1980):

> Whether such an error is harmless depends . . . upon the facts and circumstances peculiar to each case. We hold simply that the facts and circumstances peculiar to the instant case warrant a conclusion that, absent the erroneous submission of involuntary manslaughter, there is a reasonable possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant.

The evidence in *Ray* was uncontradicted in establishing an intentional killing, which the defendant alleged was committed in self-defense. *State v. Cason,* 51 N.C. App. 144, 275 S.E. 2d 221 (1981) also involved an intentional killing allegedly committed in self-defense. In each case, our appellate courts held that the evidence established a "reasonable possibility" that the defendant would

have been acquitted of all wrongdoing had not the judge erroneously submitted the verdict of involuntary manslaughter.

In the present case Ms. Beck's testimony about the struggle for the gun, coupled with the defendant's statement that Cable was shot when defendant tried to take the gun from him in an effort to prevent his suicide, raises a clear question whether Cable's death was the result of an accident. Because the record discloses a reasonable possibility that defendant could have been acquitted of voluntary manslaughter on the grounds of accident, the submission to the jury of involuntary manslaughter when there was no evidence to support it was prejudicial error.

Finally, we reiterate the admonitions implicit in Judge Webb's statements in *Cason*. Our trial judges in homicide cases arising out of the alleged intentional use of a deadly weapon would be well-advised not to submit involuntary manslaughter as a possible verdict where there is no evidence to support it. In addition to committing the prejudicial error already discussed, the trial judge who submits involuntary manslaughter under these circumstances makes his duty of declaring and explaining the law arising on the evidence impossible to fulfill; in such a case, the court's instructions can only result in "confusion worse confounded." The present case demonstrates such confusion. After declaring and explaining the law arising on the evidence with respect to second degree murder and voluntary manslaughter, the trial judge defined involuntary manslaughter and instructed the jury that

> If you find from the evidence . . . that on or about the 19th day of April, 1982, the Defendant Lance Crisp, Sr., intentionally pointed a loaded 30-30 rifle at Cable when not exercising his right of defense of his son, or otherwise grasped and waved and handled the rifle in a criminal—that is, the 30-30 rifle introduced into evidence as State's Exhibit 6, in a criminally negligent way thereby proximately causing Leonard Cable's death, then it would be your duty to return a verdict of guilty of involuntary manslaughter.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty. Or if you find that the deceased, Leonard Cable, died by accident or misadventure,

> or that the State has failed to prove beyond a reasonable doubt that Defendant did not act in a proper defense of his son, your verdict must be not guilty.

The problem with the quoted instruction is that there is no evidence that the defendant "intentionally pointed a loaded 30-30 rifle" at Cable; even assuming that defendant did point the gun at Cable, there is not one scintilla of evidence that such act was the proximate cause of Cable's death. Furthermore, it is significant, we think, that the judge mentioned the defense of accident only in relation to the offense of involuntary manslaughter. Obviously, if the killing was accidental, the jury should have been instructed to find the defendant not guilty of any offense. Moreover, the court's instructions with respect to "defense of a family member" adds to the confusion. Assuming *arguendo* that there is some evidence from which the jury could find that the defendant intentionally shot Cable in defense of his son, the instruction is clearly misplaced in relation to involuntary manslaughter under the circumstances here presented, since the very definition of involuntary manslaughter embodies an unintentional killing.

Our concern is that when a possible verdict of involuntary manslaughter is erroneously submitted, the jury, rather than struggling with the confusing and contradictory instructions occasioned by the error, might resolve its dilemma by convicting of involuntary manslaughter and acquitting the defendant of murder or voluntary manslaughter, resulting in a manifest miscarriage of justice.

For the reasons set out herein, the judgment is reversed and the cause is remanded to the Superior Court for the entry of an order discharging the defendant.

Reversed and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. WILLIAM DONALD YARBOROUGH

No. 8210SC1175

(Filed 18 October 1983)

1. **Criminal Law § 122— court's inquiry into jury's numerical division—no per se reversible error**

A court's inquiry into a jury's numerical division is not *per se* reversible error. A "totality of the circumstances" standard should be used in evaluating such a trial judge's inquiry. Using that standard, there was no coercion where a trial judge made his inquiry as to the numerical split of a jury at a natural break in the jury's deliberations, after a full morning's deliberations, and clearly stated that he did "not want to know whether so many jurors had voted in one fashion and so many in another."

2. **Criminal Law § 122— reinstruction as to elements of offense—no error**

There was nothing in a trial judge's reinstruction as to the elements of the offense that could be considered prejudicial or coercive where the trial judge simply restated the elements of the offense and the application of the law to the facts.

3. **Criminal Law § 122— additional instruction concerning weight to give unrebutted testimony—no error**

There was no error in an instruction by the trial judge, which was given in response to a question, that the jury must govern itself in determining what weight to give unrebutted testimony.

4. **Criminal Law § 138— sentencing hearing—armed robbery—error to consider use of deadly weapon as aggravating factor**

A trial judge erred in finding as an aggravating factor that the defendant used a deadly weapon at the time of the crime since use of a deadly weapon is an element of the offense of armed robbery. G.S. 15A-1340.4(a)(1)(i).

5. **Criminal Law § 138— sentencing phase—failure to find mitigating factor**

The record did not present the Court with sufficient evidence to require the trial judge to find as a mitigating factor that defendant had testified for the State in another felony prosecution since defendant's unsubstantiated claim, though uncontradicted, was not substantial evidence and, absent corroborative evidence, left a basis to doubt its credibility.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 23 June 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 30 August 1983.

Defendant was indicted, tried and found guilty of armed robbery. At trial, the State's evidence consisted of testimony of the arresting officer and the victim who said that the defendant had

taken approximately $50 from him by threatening him with a knife and a pistol. Defendant offered no evidence.

The trial lasted one day. The jury began their deliberations early on the second day. After the lunch break, the trial judge asked the jury foreman to reveal the jury's numerical division. The foreman replied that the jury was split nine to three. In response to a further question, the foreman said that they had taken only one ballot, about an hour before the lunch break. The trial judge asked if the jury was having "any difficulty remembering the seven elements of the offense?" When the foreman replied that they were having difficulty remembering "the exact transcript of what happened," the trial judge reinstructed the jury on the elements of the offense. The trial judge ended his instructions, saying, "You want me to tell you what the seven essential elements are again? That's what you have to decide." The jury then retired again.

Later, the jury returned to ask whether, in assessing the credibility of a witness, they could take into consideration the fact that the testimony was unrebutted by evidence from the defense. The trial judge responded that the jury had "the responsibility of laying down rules to govern itself in determining what weight it will give to the testimony and what credit it will attribute to the several witnesses." The jury returned a verdict of guilty of armed robbery.

At the sentencing hearing, held pursuant to G.S. 15A-1334, defendant asked the trial judge to consider that defendant had testified for the prosecution in a case involving the murder of a prison employee. Defendant contended that his life would be in danger in prison because of his testimony. The trial judge imposed a sentence of thirty years, more than twice the presumptive sentence under the Fair Sentencing Act. The trial judge found no mitigating factors and two aggravating factors: that defendant was armed with a deadly weapon at the time of the offense and that he had prior convictions for crimes punishable by more than sixty days' confinement. From the conviction and sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Marc D. Towler and James R. Glover, for defendant.

EAGLES, Judge.

Defendant assigns as error the trial judge's inquiry as to the numerical division of the jury, his reinstruction as to the elements of the offense, his response to a question that instructed the jury to lay down its own rules as to the weight to give unrebutted testimony of a witness, and the imposition of a sentence that was more than twice the presumptive sentence. We find no reversible error in any of the trial judge's questions and instructions to the jury, but we remand for a new sentencing hearing because of error committed in the sentencing phase.

[1] Defendant urges that it is *per se* reversible error to inquire into a jury's numerical division. *Brasfield v. United States*, 272 U.S. 448, 71 L. Ed. 345, 47 S.Ct. 135 (1926), prohibited inquiries into the jury's numerical division in federal criminal cases, but this prohibition is based on the Supreme Court's supervisory power over lower federal courts, is not constitutionally based, and is a rule of procedure for federal courts that is not binding on state courts. *Ellis v. Reed*, 596 F. 2d 1195 (4th Cir.), *cert. denied*, 444 U.S. 973, 62 L.Ed. 2d 388, 100 S.Ct. 468 (1979). The context of inquiry as to the jury's numerical split may show that the inquiry is coercive, but we hold that such an inquiry is not inherently coercive or violative of the North Carolina Constitution's Article I, § 24 guarantee of the right to a trial by jury. In the absence of a federal or state constitutional basis requiring the adoption of a *per se* rule, we will look to the "totality of the circumstances" in evaluating a trial judge's inquiry as to a jury's numerical split. An inquiry is often useful in timing recesses, in determining whether there has been any progress toward verdict, and in deciding whether to declare a mistrial because of a deadlocked jury. We must examine the trial judge's inquiry in context of the totality of the circumstances to determine whether the trial judge's inquiry was coercive or whether the jury's decision was in any way affected by the inquiry. See *State v. Williams*, 303 N.C. 142, 277 S.E. 2d 434 (1981); *State v. Barnes*, 26 N.C. App. 37, 214 S.E. 2d

806 (1975). In this case, the trial judge made his inquiry as to the numerical split at a natural break in the jury's deliberations, after a full morning's deliberations, and clearly stated that he did "not want to know that so many jurors have voted in one fashion and so many in another." From the totality of the circumstances, we find no coercion and no error in the trial judge's inquiry.

[2] Using the same "totality of the circumstances" analysis, we now consider defendant's second assignment of error concerning the trial judge's reinstruction of the jury on the elements of the offense. There was nothing in the trial judge's reinstruction as to the elements of the offense that could be considered prejudicial or coercive. The trial judge simply restated the elements of the offense and the application of the law to the facts. There was nothing in the reinstruction that implied any opinion on the part of the trial judge or would affect the jury's ultimate decision. The fact that the jury came back to ask a question after the reinstruction was given and then deliberated further indicates that this jury was not coerced by the judge's reinstruction.

[3] Defendant next assigns as error the trial judge's instruction to the jury that it must govern itself in determining what weight to give to unrebutted testimony. There is no error in this instruction, which was given in response to a question, because the jury is allowed, in weighing credibility of evidence, to consider the fact that the evidence is uncontradicted or unrebutted. *State v. Tilley*, 292 N.C. 132, 143, 232 S.E. 2d 433, 441 (1977). In any event, because defendant did not make timely objection to this jury instruction, his objection is waived. N.C. R. App. P. 10(b).

[4] Defendant's final assignment of error concerns the sentencing phase of his trial. Defendant received a thirty year sentence for armed robbery, a Class D felony, for which the presumptive sentence is ordinarily twelve years. G.S. 14-87(a) and G.S. 15A-1340.4(f)(2). However, the armed robbery statute requires a minimum sentence of fourteen years. G.S. 14-87(a). This court has held that, for armed robbery, fourteen years is both the minimum and the presumptive sentence. *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982); *State v. Leeper*, 59 N.C. App. 199, 296 S.E. 2d 7 (1982). Therefore, the fourteen year sentence may be increased by the process of weighing aggravating and mitigating factors, but a sentence of less than fourteen years may not be im-

posed for armed robbery. In this case, the trial judge imposed a sentence that was more than twice the presumptive sentence, relying on two aggravating factors and no mitigating factors. We hold that the trial judge improperly found one aggravating factor.

The trial judge found as an aggravating factor that the defendant used a deadly weapon at the time of the crime. See G.S. 15A-1340.4(a)(1)(i). Use of a deadly weapon is an element of the offense of *armed* robbery. The Fair Sentencing Act dictates that "evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." G.S. 15A-1340.4(a)(1); *State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107 (1983).

[5] Defendant contends there was a second error in the sentencing phase of this trial: the trial judge's failure to find as a mitigating factor that the defendant testified for the State in another felony prosecution. See G.S. 15A-1340.4(a)(2)(h). At the sentencing hearing, defendant told the trial judge that he had testified for the State in a case where an inmate had murdered a prison employee. There was no other evidence presented to support or rebut this claim by defendant. Our Supreme Court has recently said that "when evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act." *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454 (1983). The *Jones* decision makes it clear that the burden of persuasion on mitigating factors rests on the defendant and that, to hold that the trial judge improperly failed to consider a mitigating factor, we must find that the credibility of the evidence is "manifest as a matter of law." *Id.* Here, defendant's unsubstantiated claim, though uncontradicted, is not substantial evidence and, absent corroborative evidence, does leave a basis to doubt its credibility. We hold that the record in this case does not present us with sufficient evidence to require the trial judge to find this mitigating factor.

We find no error in defendant's trial, but because of error in finding one aggravating factor, we hold that defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

No error in defendant's trial; remand for re-sentencing.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. ROY ALLEN JONES

No. 8213SC1193

(Filed 18 October 1983)

1. **Criminal Law § 75.10— confession—waiver of right to counsel—burden of proof**

The State is not required to prove beyond a reasonable doubt that a defendant knowingly and intelligently waived his right to counsel in order for his in-custody statements to be admissible in evidence.

2. **Criminal Law § 75.10— confession—waiver of constitutional rights**

The trial court did not err in admitting defendant's in-custody statements where the court made findings supported by the evidence at the voir dire hearing that an officer read defendant his rights, defendant executed a waiver thereof, defendant had sufficient intelligence and understanding to understand his rights and the meaning of the waiver, and no threats, promises, pressure or coercion were used to obtain the statement.

3. **Criminal Law § 89.5— corroboration—unsubstantial differences in testimony**

A deputy's testimony that the owner of stolen property looked through the window of a van and said he recognized several items therein as being his was properly admitted to corroborate the owner's testimony, notwithstanding the deputy's testimony differed from the owner's testimony as to who was present at the van, since the significant testimony was that the owner identified the stolen property, and any conflict regarding who was present at the time was unsubstantial.

4. **Criminal Law § 61.3— tire tracks—inadmissibility of testimony**

The trial court erred in admitting evidence relating to tire tracks found outside a building which was broken into and entered where there was no evidence that the tracks corresponded to tires on a vehicle owned or operated by defendant, but the admission of such testimony was not prejudicial in light of the other evidence of defendant's guilt of the breaking and entering.

5. **Burglary and Unlawful Breakings § 5.7; Criminal Law § 106.5— accomplice drunk at time of crimes—testimony not inherently incredible—sufficiency of evidence**

In this prosecution for felonious breaking and entering and larceny, the fact that an accomplice who was the State's chief witness was drunk at the time of the crimes did not make his testimony "inherently incredible and in conflict with the physical conditions established by the State's own evidence,"

the credibility of the accomplice's testimony that despite his condition he remembered what happened was for the jury to determine, and defendant's motion for a directed verdict was properly denied by the trial court.

6. Criminal Law § 138— court's failure to list mitigating factors—harmless error

Failure of the trial court specifically to list in the record the mitigating factors it found proved by a preponderance of the evidence as required by G.S. 15A-1340.4(b) was not prejudicial error where it is clear that the trial court considered the evidence of mitigating factors, and the court found, in the proper exercise of its discretion, that the aggravating factors outweighed the mitigating factors.

7. Criminal Law § 138— aggravating factor—prior convictions—failure to make findings as to indigency and counsel

The trial court did not err in failing to make findings as to whether defendant was indigent and represented by counsel at the time of prior convictions which the court found to be aggravating factors where defendant did not raise the issue of indigency and lack of assistance of counsel when the State introduced evidence of his prior convictions.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 22 July 1982 in Superior Court, BLADEN County. Heard in the Court of Appeals 31 August 1983.

Defendant appeals from judgments of imprisonment entered upon his conviction of felonious breaking and entering and felonious larceny.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Frank T. Grady for defendant appellant.

WHICHARD, Judge.

TRIAL PHASE

Defendant contends the court erred in admitting his in-custody statement taken in the absence of court-appointed counsel.

Although a defendant has a constitutional right to have counsel present during custodial interrogation, he may waive this right in counsel's absence. *State v. Smith,* 294 N.C. 365, 374-76, 241 S.E. 2d 674, 680-81 (1978). In determining whether a defendant has waived this right so that the confession is admissible, "the crucial question is whether the statement was freely and under-

standingly made after he had been fully advised of his constitutional rights and had specifically waived his right to . . . have counsel present." *State v. Romero*, 56 N.C. App. 48, 52, 286 S.E. 2d 903, 906 (quoting *State v. Smith*, 294 N.C. 365, 376, 241 S.E. 2d 674, 681 (1978)), *disc. rev. denied*, 306 N.C. 391, 294 S.E. 2d 218 (1982).

[1] Defendant urges us to overrule *Romero* and require that the State prove beyond a reasonable doubt that a defendant knowingly and intelligently waived his right to counsel. This exhortation was also made and rejected in *Romero*. The Court there stated: "The well-settled rule in North Carolina is, simply, that '(a) trial judges' finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence.' " It cited *State v. Harris*, 290 N.C. 681, 693, 228 S.E. 2d 437, 444 (1976), and *State v. White*, 298 N.C. 431, 259 S.E. 2d 281 (1979). These decisions of our Supreme Court set the controlling standard. It is not the province of this Court to overrule them.

[2] Evidence at the *voir dire* hearing supports the findings that the officer read defendant his rights, defendant executed a waiver thereof, defendant had sufficient intelligence and understanding to understand his rights and the meaning of the waiver, and no threats, promises, pressure, or coercion were used to obtain the statement. Under the extant standard, then, the court did not err in admitting the statement.

[3] Defendant contends the court erred in admitting a deputy sheriff's testimony that the owner of the stolen property looked through the window of a Sheriff's Department van and said he recognized several items therein as being his. The deputy also testified that another deputy was present at the van. Defendant argues that the testimony did not corroborate prior testimony of the owner because it differed as to who was present at the van, and that it should have been excluded as hearsay.

The owner had testified that he had met only with another deputy, not the one whose testimony is in question. Several questions later he testified that he had seen the stolen items, with one exception, in the van, and had identified them as his. He was not then asked, and did not then state, who was present at the van at that time. It thus appears that no conflict exists between the

owner's prior testimony and the subsequent testimony of the deputy which was admitted to corroborate it.

Assuming, *arguendo*, that the testimony as to who was present did conflict, the deputy's testimony was nevertheless properly admitted as corroborative.

> Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. *See State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830 (1961); *Lassiter v. Seaboard Air Line Ry.*, 171 N.C. 283, 88 S.E. 335 (1916). Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). It is the responsibility of the jury to decide if the proffered testimony does, in fact, corroborate the testimony of another witness. *State v. Lester, supra; State v. Case, supra.*

State v. Rogers, 299 N.C. 597, 601, 264 S.E. 2d 89, 92 (1980). The disputed testimony here meets the substantial similarity test. Both the deputy and the owner testified that the owner identified the stolen property in the van as his. Any conflict regarding who was present at the time is unsubstantial. The significant testimony was that the owner identified the stolen property. Since the deputy's testimony was corroborative in this respect, its admission was not error.

[4] Defendant contends the court erred in admitting, and summarizing in its instructions, evidence relating to tire tracks found outside the building which was broken into and entered. The building owner testified that the tracks indicated that an air compressor had been pushed to a car, and that he followed the tracks to a driveway approximately two and one-half miles away.

> Evidence of tire tracks is without probative force unless from the evidentiary circumstances the jury can reasonably infer: (1) the tracks were found at or near the scene of the crime, (2) they were made at the time of the commission of the crime, and (3) they correspond to tires on a motor vehicle owned or operated by defendant.

State v. Silhan, 302 N.C. 223, 243, 275 S.E. 2d 450, 466 (1981). There was no evidence here to meet the third prong of this test, *viz*, that the tire tracks correspond to tires on a motor vehicle owned or operated by defendant. In light of the other evidence, however, we perceive no reasonable possibility that a different result would have been reached if this evidence had been excluded and the instructions not given. Defendant thus has failed to carry his burden of showing prejudice warranting a new trial. G.S. 15A-1443(a); *see* 1 H. Brandis, *North Carolina Evidence* § 9 (1982).

[5] Defendant contends the court erred in denying his motions for directed verdict and to set aside the verdict. The evidence, viewed, as it must be, in the light most favorable to the State, *see State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977), shows that defendant and an accomplice broke into a building and removed tools therefrom. Although defendant and the accomplice were drunk at the time, the accomplice testified that he remembered what happened. Defendant argues that this testimony was the only testimony justifying submission of the case to the jury, and that it was "inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Wilson*, 293 N.C. 47, 51, 235 S.E. 2d 219, 221 (1977). We disagree.

The "inherently incredible" rule was applied in *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), when a witness stated that he was able to identify defendant even though defendant was a stranger and he had only seen him for a few seconds at a distance of 286 feet. Here, the fact that the accomplice was drunk at the time of the crime does not make his testimony "inherently incredible and in conflict with the physical conditions established by the State's own evidence." The credibility of his testimony that despite his condition he remembered what happened was for the jury to determine. The court did not err in denying the motion for directed verdict.

The motion to set aside the verdict was "addressed to the discretion of the trial court and refusal to grant [it] is not reviewable on appeal in the absence of abuse of discretion." *State v. Hamm*, 299 N.C. 519, 523, 263 S.E. 2d 556, 559 (1980). For the reasons set forth above, we find no abuse of discretion in denial of the motion.

Defendant contends the court erred in its jury instructions by not adequately describing the property he was charged with stealing. Defendant did not, however, object to the instructions at trial. The exception is thus deemed waived. N.C. R. App. P. 10(b)(2); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E. 2d 786, 790 (1983). No "plain error" mandating a new trial appears. *See State v. Odom*, 307 N.C. 655, 659-61, 300 S.E. 2d 375, 378-79 (1983).

SENTENCING PHASE

[6] The term imposed exceeded the presumptive sentence by two years. G.S. 15A-1340.4(b) thus required that the court specifically list in the record "each matter in aggravation or mitigation that [it found] proved by a preponderance of the evidence." Defendant contends the court erred by failing specifically to list mitigating factors.

The court stated at the sentencing hearing: "I have considered the mitigating factors mentioned in the law and by your lawyer, and do not find any of those sufficient to offset the aggravating factors." This weighing of the aggravating and mitigating factors was for the court's discretion. *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (cited with approval in *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E. 2d 689, 697 (1983)), *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). The court is "not required to list in the judgment statutory factors that [it] considered and rejected as being unsupported by the preponderance of the evidence." *State v. Davis, supra*, 58 N.C. App. at 334, 293 S.E. 2d at 661. Where the evidence of a mitigating factor is "both uncontradicted and manifestly credible," however, it is error for the court to fail to find it. *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 456 (1983).

Here, it is clear that the court considered the evidence of mitigating factors. The finding, in the proper exercise of the court's discretion, that the aggravating factors outweighed the mitigating, precludes any benefit to defendant from a remand for specific listing of any mitigating factors found by a preponderance of the evidence. The failure to comply with G.S. 15A-1340.4(b) thus was clearly nonprejudicial.

[7] Defendant finally contends the court erred in failing to make findings of fact as to whether he was indigent and represented by

counsel at the time of prior convictions which the court found to be aggravating factors. The law, recently enunciated by our Supreme Court in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), is that "the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant." *Id.* at 427, 307 S.E. 2d at 161. If defendant does not raise the issue, then, the court is not required to make findings thereon.

Defendant did not raise the issue when the State introduced evidence of his prior convictions. The court thus did not err in failing to make findings thereon.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. DENNIS G. BEATTY

No. 8210SC918

(Filed 18 October 1983)

1. **Social Security and Public Welfare § 1— pharmacist—provider of medical assistance—Medicaid fraud**

Defendant pharmacist who dispensed medicines to Medicaid patients was a "provider of medical assistance" within the purview of the Medicaid fraud statute, and the State's evidence was sufficient to support conviction of defendant on various Medicaid fraud charges where it tended to show that, with respect to medicines defendant purportedly dispensed to certain Medicaid patients, the State was billed for medicines which were never dispensed to the patients named on the prescriptions; was billed for more pills than some patients received; was billed for more expensive pills than certain patients received; and was billed for higher priced trade name drugs when low cost generic drugs were supplied the patients. Former G.S. 108-61.5(a)(1), now G.S. 108A-63.

2. **Criminal Law § 33— evidence of similar conditions**

In a prosecution for Medicaid fraud, testimony as to procedures for obtaining Medicaid payments followed by the pharmacy for which defendant worked immediately prior to and after the period in question was admissible to show that the same procedures were used during the period in question.

3. Criminal Law § 34.7— evidence of other crimes—admissibility to show knowledge, intent and design

In a prosecution for Medicaid fraud, evidence tending to show that defendant was causing the State to be overcharged for medicines for Medicaid patients a year and a half before the period in question was admissible to show guilty knowledge, intent, plan and design by defendant.

APPEAL by defendant from *Jolly, Judge*. Judgment entered 29 June 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 8 March 1983.

After a jury trial, defendant, indicted in forty-eight counts for Medicaid fraud in violation of G.S. 108-61.5(a)(1), was found guilty of twenty-nine counts.

The State's evidence tended to show that: Belwood Pharmacy, Inc. of Belwood, North Carolina regularly dispensed drugs to the residents of two nearby nursing or rest homes, whose medicine and drug needs were paid for by the State under its Medicaid program. The defendant had no proprietary or stock interest in the pharmacy, but was employed as its pharmacist-manager from 1974 until November, 1980. As such he filled all prescriptions the pharmacy received, dispensed the medicines ordered, rewrote and updated prescriptions as needed, wrote the price of each order on the prescription involved, and turned the prescriptions over to a secretary, who periodically filled out bills or claims for payment based thereon and submitted them to the state, which then paid the pharmacy. Between November 1, 1979 and March 31, 1980, as alleged in the indictment, the state was billed for medicines that were never dispensed to the patients named on the prescriptions; was billed for more pills than some patients received; was billed for larger, more expensive pills than certain patients received; and was billed for higher priced trade name drugs when low cost generic drugs were supplied the patients designated.

The trial lasted nearly four weeks. The defendant presented no evidence.

Attorney General Edmisten, by Assistant Attorneys General Donald W. Grimes and Francis W. Crawley, for the State.

Lamb, Young & McLain, by William E. Lamb, Jr. and Brenda S. McLain, for defendant appellant.

PHILLIPS, Judge.

[1] The main question presented by this appeal is whether the evidence presented against defendant was sufficient to convict him of the crimes charged. To sustain a conviction of crime in this state, whether the evidence is circumstantial or otherwise, it is no longer necessary that the State's evidence point "unerringly" to the defendant's guilt, as some of the earlier decisions stated. The test now is whether substantial evidence was presented as to each element of the crime charged and that the defendant committed it. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). The part of the Medicaid fraud statute [then G.S. 108-61.5(a)(1); now G.S. 108A-63] that defendant was convicted of violating states:

> (a) It shall be unlawful for any provider of medical assistance under this Part to knowingly and willfully make or cause to be made any false statement or representation of a material fact:
>
> (1) In any application for payment under this Part, or for use in determining entitlement to such payment.

Thus, the State was obliged to prove that (1) defendant was a provider of medical assistance under the Medicaid program, and (2) he knowingly and willfully (3) made or caused to be made false statements or representations (4) of material facts (5) in applications for payment under Medicaid. The evidence presented by the State clearly established all these elements and the defendant's conviction cannot be disturbed.

The element of the crime that defendant most strongly argues was not covered by the evidence was that he was a "*provider* of medical assistance" under the statute. His basis for so contending is that the pharmacy was designated as the "provider" in the contract entered into with the state, which enabled it to dispense drugs to eligible patients and to be paid for them by Medicaid. But, obviously, hospitals, clinics, and pharmacies that enter into contracts with the state are not the only ones that provide medical assistance and services to patients under Medicaid. Since defendant actually furnished and provided medical assistance to Medicaid patients, we must construe him to

be a "provider" under the statute, unless some other provision of law gives the word a different meaning from the one commonly understood. None does; whereas, several statutory and regulatory provisions we are required to follow give the word its usual, unrestricted meaning.

These statutes and regulations are to be found in the United States Code and the Code of Federal Regulations. This is because the state Medicaid programs depend upon and to a great extent are controlled by the federal Medicaid program, which was established by the Congress enacting 42 U.S.C. § 1396, *et seq.*, designated as Title XIX of the Social Security Act. The Act requires participating states, as a condition for receiving federal monies, to create companion programs of their own that comply with all provisions of Title XIX. North Carolina created its Medicaid program by Part 5 of Article 2 of Chapter 108 of the General Statutes, and accepted and adopted all of the provisions of Title XIX by G.S. 108-61. Thus, our Medicaid program must be interpreted in light of the federal requirements for it that the legislature adopted. Under Title XIX, drugs prescribed for and dispensed to eligible patients are part of the medical care and services covered by Medicaid and regulations governing all aspects of Medicaid were adopted. These regulations may be found in the Code of Federal Regulations. One of them defines a Medicaid "provider" as "any individual or entity furnishing Medicaid services under a provider agreement with the [state] Medicaid agency." 42 C.F.R. § 430.1 (1982). Another refers to a "provider" as "an individual or entity which furnishes items or services for which payment is claimed under Medicaid." 42 C.F.R. § 455.300(a) (1982). These regulations are as much a part of our law as they would be if they had been read three times and adopted by the General Assembly and explicitly set forth in the General Statutes.

Thus, in dispensing the drugs referred to in the indictment, defendant was a "provider" of medical assistance or services under both the statute and the pharmacy's provider agreement with the state. That the pharmacy was also a "provider" does not alter defendant's status in the least.

That the other elements of the crime involved were also established by the State's evidence need not detain us long. The evidence that statements defendant made and caused to be made

about the various medicines furnished and their prices were false has already been recited and need not be repeated; that the statements were material and used in applying for payment is self-evident. Finally, the defendant's knowledge and wilfulness is indicated by much evidence, particularly that which tended to show that he caused the state to be overcharged in numerous instances by his failure to supply many patients with the medicines that they were billed for. To say the least, the State's evidence was not insufficient to support the defendant's conviction.

[2] During the trial, Mavine Willis, a long-time employee of Belwood Clinic, which operated in conjunction with the pharmacy, testified as to the procedures that the defendant and the pharmacy followed in filling prescriptions, pricing them, and applying for Medicaid payments before November, 1979 and after March, 1980. Defendant contends this testimony was irrelevant, in that the offenses he allegedly committed occurred during the very period that she did not testify in regard to. Her testimony was as it was because, except for three days, she was off from work from November 2, 1979 until April, 1980, due to the illness of her boss, the Clinic director. But during the three years before November, 1979 and for several months after March, 1980, according to her testimony, she worked regularly and closely with the pharmacy and the defendant and the same procedures were followed during both periods. In our opinion, the court did not err in receiving this testimony. It has long been recognized that conditions at one time, if not too remote, are admissible as evidence that the same state of affairs existed at another time. 1 Brandis N.C. Evidence § 90 (2d ed. 1982). In this instance, that the same procedures were followed in obtaining Medicaid payments both before and after the brief hiatus involved is very strong evidence that the same procedures were used in between.

[3] Joe Edward Wagner, an accountant-auditor with the U.S. Department of Health and Human Services, testified as to an audit done in 1978 of drug inventories of the patients at one of the rest homes serviced by Belwood Pharmacy. He testified that several medicines the pharmacy claimed to be regularly dispensing to certain patients could not be found, either physically in the drug cabinets of those patients, or representatively on their medication charts, and that some of the medicines certain other patients did have were not as costly as had been paid for. The

defendant contends that this testimony was inadmissible because it tended to show he committed crimes that he was not being tried for. In our view, the testimony was properly received. Evidence as to prior crimes is admissible under our law to show knowledge, intent, plan, or design. 1 Brandis N.C. Evidence § 92 (2d ed. 1982). That defendant was shorting patients and causing the state to be overcharged a year and a half earlier tends to show that a long-standing fraudulent plan was being carried out and that the discrepancies involved here were intentional, rather than accidental.

Defendant's several other contentions, likewise without merit, require no discussion. Our study of the record and briefs leads us to the conclusion that the defendant's legal rights were not prejudicially affected during the long trial involved; and we found nothing in the record to indicate that the result would be different if the case was tried again.

No error.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. LINWOOD E. MOORE v. RALPH BENTON, JR.

No. 823SC1271

(Filed 18 October 1983)

Criminal Law § 178— law of the case

The Court is bound by the conclusion in a previous appeal that the record contained ample evidence to support a conclusion that "extraordinary cause" had been shown justifying the remission of all outstanding executions on a judgment entered against a surety arising out of criminal charges against defendant where in the previous appeal the Court had only remanded the case for the trial court to "make brief, definite, pertinent findings and conclusions" to that effect.

APPEAL by the New Bern-Craven County Board of Education, judgment creditor and private prosecutor, from *Reid, Judge.* Order entered 3 September 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 September 1983.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State-appellant.

Henderson and Baxter, by David S. Henderson, for the New Bern-Craven County Board of Education, judgment creditor-appellant.

Stubbs & Chesnutt, by Marcus W. Chesnutt, for the surety-appellee.

ARNOLD, Judge.

The New Bern-Craven County Board of Education (hereinafter the Board) is appealing from an order remitting the entire amount of all judgments and executions on said judgments against the surety on the appearance bond of a criminal defendant. In an earlier appeal involving the parties, this Court vacated an order of remission and remanded the cause to the trial court for appropriate findings and conclusions. On remand, Judge Reid made findings of fact and concluded that the surety had shown extraordinary cause justifying the remission of all outstanding executions on the judgment entered against him arising out of criminal charges against defendant. We affirm Judge Reid's order of remission.

On 12 December 1979 the defendant was arrested for assault with a deadly weapon with intent to kill. On 21 December 1979 defendant and the surety executed a bond to secure defendant's appearance for trial on the assault charge. A second warrant was issued against defendant on 27 December 1979 charging him with rape. Upon defendant's failure to appear for arraignment on both charges, the trial court ordered his arrest and forfeiture on the appearance bond signed by the surety. The surety was given notice, and on 12 January 1981 judgment was entered against the surety for the amount of the bond and costs.

On 18 August 1981, the surety moved for an order striking the bond forfeiture and recalling all outstanding executions. He alleged that subsequent to the release of defendant on the appearance bond signed by him, defendant was arrested for rape and released under the prior bond obligation; and that he had no knowledge of defendant's release on the rape charge under this prior bond. The surety alleged that under these circumstances,

defendant's release on the rape charge "was an alteration and modification of any liabilities existing on his behalf and substantially changed and modified the conditions existing at the time of the signing of the initial surety agreement."

The surety filed an affidavit in support of his motion. The averments in this affidavit were summarized by Judge Whichard in the first appeal as follows:

> The surety owned and operated a small farm with one part-time employee and provided the sole support for himself, his wife, and three minor children. In 1980 he did not report any taxable income after expenses, and his prospects for 1981 were not bright.
>
> Defendant, whose family had a history of mental retardation, had worked for the surety for approximately six years. The surety allowed defendant to work for him so defendant could provide partial support for his family. When the initial assault charge was lodged against defendant, the surety signed defendant's bond to enable defendant to remain employed and thus able to continue partial support for his family.
>
> The surety at no time realized pecuniary gain from signing the bond. He spent considerable time and money searching for defendant. He had been informed that defendant had committed suicide, but he had been unable to confirm it. Payment of the bond would work a tremendous hardship on him and his family and might force him into bankruptcy. He "did not obligate [him]self to assume any bonds" on the second charge, and in his opinion it was the second charge which accounted for defendant's disappearance.

State v. Moore, 57 N.C. App. 676, 677-678, 292 S.E. 2d 153, 154-155 (1982).

After considering the foregoing averments along with the surety's motion to strike the forfeiture and to recall all executions, the trial court entered an order setting aside the judgment against the surety. In this order, the trial court concluded "that equity would best be served by the setting aside of this Judgment upon payment of the costs by the Surety, Ralph Benton, Jr." On appeal, this Court vacated the order and remanded the

cause for two reasons: (1) Since the order of remission was entered more than 90 days after entry of judgment on the appearance bond, the judgment could only be set aside if "extraordinary cause" was shown pursuant to G.S. 15A-544(h); and (2) the order did not contain appropriate findings of fact and conclusions of law indicating the requisite "extraordinary cause." *State v. Moore v. Benton, supra.*

On remand the surety renewed his earlier motion and affidavit. The trial court considered these documents and the opinion of this Court and concluded "(t)hat the Surety has shown extraordinary good cause justifying the remission in whole of any and all outstanding executions on the Judgment entered against him in this matter." In support of this conclusion the trial court made numerous findings of fact reiterating the allegations in surety's motion and affidavit.

In this second appeal, the appellant Board has assigned error to several of the trial court's findings of fact and conclusions of law. The Board's argument, based upon these assignments of error, appears to be two-fold: that the findings of fact are not supported by the evidence; and that these findings do not support the conclusions of law. This Court's earlier opinion involving the parties, the records on appeal, and the prevailing law refute the Board's position.

In both appeals regarding the surety and the Board, the surety's motion and affidavit constituted the evidence before the trial court. In both appeals, one of the questions before this Court has been whether there was sufficient evidence to support an order of remission. Judge Whichard, writing for the Court in the first appeal, concluded, "While the record contains ample evidence to support a conclusion that 'extraordinary cause' had been shown, the trial court should 'make brief, definite, pertinent findings and conclusions' to that effect. (Citation omitted.)" *State v. Moore v. Benton, supra* at 679-680, 292 S.E. 2d at 156.

Under the foregoing set of circumstances the following general rule applies: "(W)hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the

previous appeal are involved in the second appeal. (Citations omitted.)" *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E. 2d 673, 681-682 (1956). This Court is therefore bound by the conclusion in the previous appeal that "the record contains ample evidence to support a conclusion that 'extraordinary cause' had been shown." *State v. Moore v. Benton, supra* at 679, 292 S.E. 2d at 156.

The only question remaining for determination is whether the trial court, on remand, made "brief, definite, pertinent findings and conclusions" showing an "extraordinary cause" to set aside the judgment against the surety. *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 541, 272 S.E. 2d 3, 5 (1980). Since the 17 findings of fact restate in detail the allegations in the surety's motion and affidavit and since these allegations are the same ones set out in the first appeal wherein this Court found the evidence to support a conclusion that extraordinary cause has been shown, the order setting aside any judgments against the surety and executions on said judgments is

Affirmed.

Judges WELLS and EAGLES concur.

LONNIE R. LANGLEY AND WIFE, MILDRED F. LANGLEY AND FRANCES HEDGEPETH LANGLEY v. MARY LOU MOORE

No. 822DC1128

(Filed 18 October 1983)

1. Vendor and Purchaser § 5.1— contract to convey realty—specific performance—vendor's ownership of only portion of fee

In an action seeking specific performance of a contract to convey realty and damages for the portion of the realty that defendant vendor was unable to convey, plaintiff vendees were not prohibited from obtaining specific performance because the vendor did not own the full fee but only owned a one-half undivided interest in the property, and the trial court properly entered partial summary judgment for plaintiffs on the issue of defendant's liability where plaintiffs showed the existence of a valid contract to convey; defendant admitted that plaintiffs have performed those acts required by the contract which entitle the plaintiffs to the execution and delivery of a deed from defendant; and defendant offered no affidavit or other proof to support her allegation that plaintiffs knew that she owned only one-half of the property and would need her son's signature to acquire full title to the property.

2. Courts § 14.1— motion to transfer case to another trial division—disposition of case

Whether to proceed in an action pending a motion to transfer it to another trial division rests within the sound discretion of the trial court, and the district court did not abuse its discretion in denying defendant's motion to stay all proceedings and in disposing of the case while defendant's motion to transfer the case to the superior court division was pending in the superior court. G.S. 7A-258(f).

APPEAL by defendant from *Ward, Judge.* Judgment entered 24 August 1982 in District Court, BEAUFORT County. Heard in the Court of Appeals 21 September 1983.

Rodman, Holscher & Francisco by Edward N. Rodman for plaintiff appellees.

Wayland J. Sermons, Jr., for defendant appellant.

BRASWELL, Judge.

The present controversy concerns a contract to convey certain real property in Beaufort County, North Carolina. The plaintiff-vendees seek specific performance of the contract and damages for the portion of the property that the defendant-vendor is unable to convey. The plaintiffs at trial were granted partial summary judgment on the issue of the defendant's liability. The amount of damages to be awarded the plaintiffs has not yet been decided. The defendant appeals.

On 18 November 1977, the plaintiffs and the defendant entered into a contract for the conveyance of real property in Beaufort County described as "Lot No. 11 as shown on map entitled 'Property of Henry E. Moore.'" The contract recites that the defendant is the owner of Lot No. 11 and is also the owner of a separate lot on which the "Old Moore's Store" is located. The plaintiffs, as required by the contract, must demolish the store building, remove all concrete blocks and debris, and use these blocks to replace a bulkhead which lies across the front of Lot No. 11. Within sixty days of the completion of these tasks, the defendant must execute and deliver a general warranty deed in fee simple of Lot No. 11 to the plaintiffs.

The defendant has refused to deliver the deed to Lot No. 11 to the plaintiffs. She contends that they are not now entitled to

specific performance of the contract because she does not own the full fee, but only a one-half undivided interest in the property. In her answer to the complaint, the defendant states that the plaintiffs knew "that any contract which she entered into represented only a ½ undivided interest in the property and that it would be necessary before the contract was binding on all parties for them to obtain the signature of her son, Tommy Moore," the owner of the remaining one-half interest.

In the defendant's amended answers to plaintiffs' request for admissions, the defendant admits that: (1) Exhibit A, the contract referred to in the complaint and her answer, is a true and correct copy of their agreement; (2) the plaintiffs have demolished the "Old Moore's Store"; (3) the plaintiffs have removed the concrete blocks and debris from the demolished building to replace a bulkhead as required by the contract; (4) she owned an interest in the property at the time of the execution of the contract; and (5) she has refused to deliver a deed to lot No. 11 to the plaintiffs.

At the hearing on plaintiffs' motion for summary judgment, the defendant interposed an oral motion to stay all proceedings pending a hearing of the defendant's motion to transfer the case to the Superior Court Division. The defendant's motion to stay was denied.

[1] Although the defendant has made several assignments of error, the determinative issue in this case is whether the trial court erred in granting the plaintiffs' motion for partial summary judgment. We hold the trial court committed no error. While disposing of this appeal on the merits, we note its interlocutory nature, but have found this controversy substantial to warrant present disposition. *See Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980).

Summary judgment is properly granted "when the pleadings and supporting materials show that no genuine issue as to any material fact exists, and the movant is entitled to a judgment as a matter of law." *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E. 2d 897, 904 (1981). As in the present case, G.S. 1A-1, Rule 56(c) allows summary judgment to "be rendered on the issue of liability alone although there is genuine issue as to the amount of damages." The moving party has the initial burden of showing that there is no triable issue of fact; "then the burden shifts to the

non-moving party to either show that a genuine issue of material fact does exist or provide an excuse for not doing so." *Blue Jeans Corp. v. Pinkerton, Inc.*, 51 N.C. App. 137, 138-39, 275 S.E. 2d 209, 211 (1981).

In the present case, the plaintiffs have met their burden that no genuine issue of fact exists which would prevent this contract from being specifically enforced. "The party claiming the right to specific performance 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). This contract on its face meets the requirements of a contract for the sale of real property: by being in writing and signed by the parties; by containing an adequate description of the real property; by reciting a sum of consideration; and by embodying all salient terms and conditions of their agreement. *See generally Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496, *cert. denied*, 276 N.C. 728 (1970). *See also* Webster's Real Estate Law in North Carolina, §§ 140-143 (Hetrick rev. ed. 1981). Also, according to the terms of the contract, the plaintiffs had to tear down the old store and use its concrete blocks and debris to rebuild the bulkhead before the defendant was required to perform. In the answers to the plaintiffs' request for admissions, the defendant admits that the plaintiffs have done these acts which entitle the plaintiffs to the execution and delivery of a deed to Lot No. 11 from the defendant.

The defendant in her answer asserts that the plaintiffs knew that she only owned one-half of the property and would need her son's signature to acquire full title to the property but she has offered no affidavit or other proof in support of this contention. G.S. 1A-1, Rule 56(e) states that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

We hold that because the defendant has failed to show by affidavit or otherwise that there is any genuine issue of fact to be

decided, the plaintiffs are entitled to judgment as a matter of law and partial summary judgment was properly granted. The fact that the plaintiffs have asked for damages according to the value of the remaining one-half interest owned by the defendant's son does not indicate that damages are an adequate remedy at law. "[I]t is well settled that, though the vendor is unable to convey the title called for by the contract, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest." *Timber Co. v. Wilson*, 151 N.C. 154, 157, 65 S.E. 932, 933 (1909).

Also, the defendant's contention in her brief that the contract is illegal and void as against public policy because it infringes upon the rights of her son as a cotenant of the property is without merit. G.S. 1-536 gives one cotenant the right to sue another cotenant for waste. Therefore, if the demolition of the "Old Moore's Store" pursuant to this contract constituted an act of waste, the defendant's son as a cotenant must seek his relief in an action for waste against the defendant. Nevertheless, this contract to convey is not illegal and this assignment of error is overruled.

[2] Finally, the defendant asserts that this trial judge erred by denying her motion to stay all proceedings until her motion to transfer this action to Superior Court had been heard in Superior Court. G.S. 7A-258 consists of administrative directives which a party should follow when moving to transfer a case between the trial divisions and provides that with three exceptions, inapplicable in the present case, "[t]he filing of a motion to transfer does not stay further proceedings in the case . . . ." G.S. 7A-258(f). Therefore, whether to proceed in an action pending a motion to transfer rests within the sound discretion of the court. The trial court after having given the defendant an opportunity to be heard found that "sufficient justification has not been shown to stay proceedings." Since the plaintiffs have shown they are entitled to summary judgment, the trial court did not abuse its discretion by refusing to delay the action and by disposing of the case by granting partial summary judgment.

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. EDWIN LAVERNE ELLIOTT

No. 8327SC2

(Filed 18 October 1983)

1. **Criminal Law § 128.2— improper question—error cured by court's instructions**

There was no basis for defendant's argument that the trial court grossly abused its discretion by disallowing a mistrial upon the district attorney asking defendant: "Is that because you know Mr. Cooke (defense counsel) won't let you?" after defendant had testified that he had agreed to take a polygraph test and was still willing to do so. Any possibility of error was sufficiently removed where the court properly sustained defendant's objection to the improper question and gave specific instructions to the jury not to consider it.

2. **Criminal Law § 128.2— improper and prejudicial act by district attorney—mistrial improperly denied**

After defendant had stated that he did know a young girl and had given her guitar lessons, it was highly improper and prejudicial for the district attorney to motion to the young girl to stand up in the courtroom and ask defendant, "And is it not true that at the conclusion of numerous of these guitar lessons, you would unzip her jeans and pull down her pants and proceed to stare at her?" The only conceivable purpose of having the young girl stand in the courtroom was to inflame the jury, and the trial court should have granted defendant's motion for a mistrial.

APPEAL by defendant from *Owens, Judge.* Judgments entered 8 June 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 22 September 1983.

Defendant was indicted on charges of first degree kidnapping and attempted first degree sexual offense. He was convicted of these crimes and now appeals from the imposition of consecutive prison sentences.

The State's evidence tends to show that on the evening of 22 December 1981, the prosecuting witness was at Eastridge Mall in Gastonia, North Carolina. She left the mall around 9:00 p.m. and walked to her car. Defendant grabbed her, placed a knife to her throat, and told the prosecuting witness that he had just committed robbery and needed a ride. Defendant ordered her to drive him to the Coachman's Inn, which was 1.4 miles from the mall. When the two reached the Inn, defendant ordered the prosecuting witness to park her car. He then indicated that he was going "to eat" her and asked if she wanted it "dead or alive." Defendant told her to disrobe and threatened to kill her. After the

prosecuting witness had partially disrobed, she attempted to open the car door. Defendant grabbed her, and the prosecuting witness was cut on the hand as the two struggled. She returned to the back seat of the car after the defendant threatened to kill her if she tried to escape again. The prosecuting witness was able to divert defendant's attention, and ran to the office of the Coachman's Inn. The desk clerk called the police.

After the prosecuting witness gave the police a description of her assailant, defendant was notified that he was a suspect. Defendant voluntarily went to the police station and agreed to be fingerprinted and photographed. On 6 February 1982 the prosecuting witness was shown eight photographs. She selected defendant's photograph from this lineup.

The defendant and other witnesses presented evidence tending to show that on 22 December 1981, defendant was at Honey's Restaurant in Gastonia from 8:45 p.m. until a few minutes after 9:00 p.m. Defendant then picked his wife up at Gaston College around 9:30 p.m. Defendant presented further evidence which refuted the State's evidence regarding defendant's appearance on the evening of 22 December 1981. Numerous witnesses also testified of defendant's good character and reputation.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Gray & Stroud, by Jay Stroud, for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first two assignments of error are based upon the trial court's denials of motions for mistrial. On cross-examination, defendant testified that he had agreed to take a polygraph test and was still willing to do so. The district attorney then asked the following question: "Is that because you know Mr. Cooke (defense counsel) won't let you?" Defendant objected and moved to strike the question as being highly improper. The court properly sustained the objection, allowed the motion to strike and instructed the jury not to consider the question. The court, however, denied defendant's motion for mistrial.

"A mistrial is appropriate only for serious improprieties which render impossible a fair and impartial verdict under the

law." *State v. Chapman*, 294 N.C. 407, 417-18, 241 S.E. 2d 667, 674 (1978). Rulings on motions for mistrial are not reviewable unless there is a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). We find no basis for defendant's argument that the trial court grossly abused its discretion by disallowing a mistrial. The court promptly sustained defendant's objection to the improper question and gave specific instructions to the jury not to consider it. Any possibility of error was sufficiently removed. *See State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972).

[2] Defendant next assigns error to the court's denial of his motion for mistrial made after the following proceedings:

Q. Mr. Elliott, did you say you knew Candice Wright?

A. Yes, I did.

Q. Gave her guitar lessons?

A. Yes, I did.

Q. Lessons started in October, 1980. Is that correct?

A. Yes, I did.

Prosecutor Langson then motioned to Candice Wright to stand up and asked her to stand up, whereupon Candice Wright stood up.

Q. And is it not true that at the conclusion of numerous of these guitar lessons, you would unzip her jeans and pull down her pants and proceed to stare at her?

MR. COOKE: OBJECTION. MOVE TO STRIKE that question.

COURT: OVERRULED.

MR. COOKE: MOVE for a mistrial.

COURT: DENIED.

Defendant contends that by motioning to and asking young Candice Wright to stand in the courtroom, the district attorney committed a highly improper and prejudicial act. It is difficult to disagree with defendant's conclusion. Defendant had stated that he did know Candice Wright and had given her guitar lessons. It

was improper for the district attorney then to have her stand before the jury.

In *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980), a defendant who had been charged with rape was asked if he recognized anyone on a particular row of seats in the courtroom, and the defendant replied that he did not know anyone "but the Ledfords." The district attorney then had a woman on that row stand and asked the defendant if he had raped the woman on the front row with the black blouse. On appeal, the court found that there was no error "because she was asked to stand only after defendant stated that he didn't know anyone on that row 'but the Ledfords.' " 300 N.C. at 545, 268 S.E. 2d at 168. The purpose of asking the woman to stand was to determine whether the defendant could recognize her after stating that he did not. *Id.*

The facts at hand differ. Defendant had answered that he *did* know Candice Wright and had given her guitar lessons. There was no need to refresh his memory. The only conceivable purpose of having the young girl stand in the courtroom was to inflame the jury.

Moreover, adding to his impropriety, during his closing argument to the jury, in referring to defendant's alleged misconduct with Candice Wright and another female who was also present in the courtroom during the trial, the district attorney stated, "Ladies and gentlemen, I submit that you know that I didn't corral two people . . ." before defendant objected. The trial judge sustained defendant's objection and instructed the jury not to consider "the remarks of counsel concerning the going out and corraling the witnesses."

We recognize the principle that "[t]he control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial." *State v. Morrison*, 19 N.C. App. 573, 574, 199 S.E. 2d 500, 501, *cert. denied*, 284 N.C. 257, 200 S.E. 2d 657 (1973).

It is clear, however, that the remarks by the district attorney were unfairly prejudicial to the defendant. The judge's attempt to cure was insufficient. The damage already was done. *See State v. Eagle*, 233 N.C. 218, 63 S.E. 2d 170 (1951). Fairness demands that defendant be given a new trial.

New trial.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. RUFFIN KEYES

STATE OF NORTH CAROLINA v. FRANK CASHION

Nos. 832SC50 and 832SC342

(Filed 18 October 1983)

1. Criminal Law § 104— consideration of evidence on motion for nonsuit

In ruling on a motion for dismissal, the trial judge must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence. If the evidence is sufficient only to raise a suspicion or conjecture as to the commission of the offense or the identity of the perpetrator, the motion to dismiss should be allowed.

2. Embezzlement § 6— insufficient evidence of embezzlement

The State's evidence was insufficient for the jury in a prosecution of defendants for embezzlement of machinery parts where it tended to show only that defendants may have had access to machinery parts, but there was no evidence that defendants received machinery parts by the terms of their employment.

3. Embezzlement § 1— offense defined

Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, *i.e.*, in a fiduciary capacity.

4. Embezzlement § 3— necessity for lawful possession

The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property.

APPEAL by defendants from *Small, Judge.* Judgments entered 8 June 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 27 September 1983.

In August of 1981, defendants were each indicted for embezzlement of brass and copper materials from the Texasgulf plant in Aurora, North Carolina. Pursuant to a motion by the State, and

over objections by each defendant, the trial court ordered defendant Cashion's and defendant Keyes' trials joined on 8 October 1981. On 1 March 1982, the grand jury issued a corrected bill of indictment, changing the dates of the alleged embezzlements, from 18 July 1981 for Cashion and 4 November 1980 for Keyes, to "from July 31, 1980 through July 18, 1981" for each defendant.

At trial the State's evidence tended to show the following facts: Defendants worked together as a troubleshooting team for the plant, Cashion as a shift electrician and Keyes as a shift mechanic. In these positions, defendants had free access to the plant, but neither had the authority to buy or sell machinery components. Several brass and copper components disappeared from the plant during the weekend of 17 July 1981 through 19 July 1981. A private investigator hired by Texasgulf located some of the missing items at a local salvage yard. Defendant Cashion sold various machinery parts to this salvage dealer on 18 July 1981. Cashion and Keyes had sold similar items to the salvage dealer on previous occasions. The defendants were arrested on 29 July 1981. After his arrest Keyes made the statement: "I'm guilty for selling, there's no doubt about it."

At several points during the State's evidence, both defendants made motions to sever, all of which were denied. When the State rested, both defendants made motions to dismiss, renewed their motions to sever, moved to quash the bills of indictment, and moved for mistrial. All motions were denied. Defendants put on no evidence. The jury returned verdicts of "guilty of embezzlement" against both Cashion and Keyes and each defendant received a five year sentence. Defendants each appeal. Upon motion of counsel and pursuant to N.C. R. App. P. 40, the actions were consolidated for hearing before the North Carolina Court of Appeals.

Attorney General Edmisten, by Assistant Attorney General Richard H. Carlton, for the State in No. 832SC342.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General John F. Maddrey, for the State in No. 832SC50.

Sumrell, Sugg & Carmichael, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellant Cashion.

Stephen A. Graves for defendant-appellant Keyes.

EAGLES, Judge.

Defendants assign as error the trial court's denial of defendants' motions to dismiss at the end of the evidence. We agree that the trial court erred.

[1] To withstand a motion to dismiss for insufficiency of the evidence, there must be substantial evidence of all material elements of the offense charged. G.S. 15A-1227; *State v. Murphy*, 49 N.C. App. 443, 271 S.E. 2d 573 (1980). Whether the State offered substantial evidence of all the material elements is a question of law for the trial judge. In ruling on a motion for dismissal, the trial judge must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). If the evidence is sufficient only to raise suspicion or conjecture as to the commission of the offense or the identity of the perpetrator, the motion to dismiss should be allowed. *State v. Bright*, 301 N.C. 243, 257, 271 S.E. 2d 368, 377 (1980).

[2] The elements of embezzlement on which the State must offer substantial evidence in order to withstand a motion to dismiss are:

(1) [T]hat the defendant was the agent of the prosecutor, and

(2) by the terms of his employment had received property of his principal;

(3) that he received it in the course of his employment; and

(4) knowing it was not his own, converted it to his own.

G.S. 14-90; *State v. McCaskill*, 47 N.C. App. 289, 292, 267 S.E. 2d 331, 333, *cert. denied*, 301 N.C. 101, 273 S.E. 2d 306 (1980). The State offered no substantial evidence that either defendant had received the machinery components by virtue of their fiduciary capacity. In fact, the foreman who had direct supervision over defendants testified that: "I had never given them approval to

purchase an impeller or any brass bearing housings. Nor had I given either of them authority to sell any materials or equipment of Texasgulf. Neither Cashion nor Keyes ever asked my permission to sell or remove from the premises a brass Hazelton bearing housing or a Worthington impeller." The evidence shows that defendants may have had access to machinery parts, but there is no evidence that they received machinery parts by the terms of their employment.

[3, 4] There is a difference between having access to property and possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. Larceny is the fraudulent conversion of property by one who has acquired possession of it by trespass. *State v. McDonald*, 133 N.C. 680, 683, 45 S.E. 582, 583 (1903). The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property. *State v. Whitley*, 208 N.C. 661, 663, 182 S.E. 338, 340 (1935). This case is unlike *State v. Lancaster*, 37 N.C. App. 528, 246 S.E. 2d 575, *cert. denied*, 295 N.C. 650, 248 S.E. 2d 255 (1978), where a warehouse manager was properly charged with embezzling component parts because he had the responsibility of supervising and receiving all materials in the warehouse. Here, neither Cashion nor Keyes received, took lawful possession of, or were entrusted with components by virtue of a fiduciary capacity.

A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. *State v. Babb*, 34 N.C. App. 336, 340, 238 S.E. 2d 308, 310 (1977). We hold that there was a fatal variance between the allegations of the indictment and the proof the State presented at trial, and, therefore, the motion to dismiss the embezzlement charges should have been granted.

We do not reach defendants' other assignments of error, concerning the trial court's denial of defense motions to sever, deficiency of the corrected indictments, admission of the results of chemical tests, introduction of certain statements by defendant Cashion, the jury instructions, application of aggravating and mitigating factors during the sentencing hearing, and denial of defendants' motion for appropriate relief.

Reversed.

Judges ARNOLD and PHILLIPS concur.

JAMES LENARD SMALL v. EVANDER M. BRITT AND CHARLES H. KIRKMAN

No. 8216SC1113

(Filed 18 October 1983)

Limitation of Actions § 4.1— attorney malpractice suit—complaint not filed within three years of accrual of action

Defendant's Rule 12(b)(6) motion to dismiss was properly granted where it was clear, from the face of the complaint, that plaintiff's action for attorney malpractice was commenced after the statute of limitations had run. Plaintiff, prison inmate, mailed his complaint and affidavit exactly three years from the date his cause of action accrued, and even if plaintiff's complaint had been permitted to be filed when it was first received in the mail by the clerk of superior court, the three year statute of limitations would have run. G.S. 1-15(c).

APPEAL by plaintiff from *Martin, John C., Judge.* Order entered 27 August 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 20 September 1983.

This case concerns the statute of limitations for a professional malpractice suit brought by plaintiff, a defendant in a criminal case, against his court-appointed attorneys. On 20 April 1979, plaintiff was convicted of first degree murder, and, on 24 April 1979, was sentenced to death. On 24 April 1979, the trial court also entered an order discharging plaintiff's court-appointed attorneys, the defendants here. The North Carolina Supreme Court subsequently reviewed the case, and plaintiff's conviction was reduced to a conviction of accessory before the fact and his sentence reduced to life imprisonment. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

On 20 April 1982, plaintiff signed, verified, and allegedly mailed his complaint in this action, along with an affidavit in support of his request to proceed in forma pauperis, to the Clerk of Superior Court of Robeson County. On the in forma pauperis affidavit, plaintiff answered question number 3 ("Do you own cash,

or do you have money in a checking or savings account?") by marking the answer "yes." He failed to respond to the second part of the question, which stated: "If the answer is 'yes,' state the total value of the items owned." Typed on the second page of the affidavit was a certificate from Central Prison reporting that plaintiff had $38.00 in the prison trust fund. Ruling that plaintiff's in forma pauperis affidavit was incomplete, the presiding judge in Robeson County, on 26 April 1982, ordered the Clerk of Superior Court to return the complaint to plaintiff and not to file it until plaintiff paid the filing costs.

Plaintiff completed question number 3 in the affidavit, reporting that the total value of his money was the $38.00 that was in the prison trust fund, and mailed it back to the Clerk of Superior Court, on or about 28 April 1982. On 5 May 1982, the presiding judge ordered that the plaintiff could proceed in forma pauperis and that the action should be filed. The Clerk of Superior Court filed the complaint and issued the summonses on 7 May 1982.

On 1 June 1982, defendants filed a Rule 12(b)(6) motion to dismiss, alleging that the action was barred by the applicable statute of limitations, G.S. 1-15(c). Plaintiff filed a response to defendants' motion on 10 June 1982 and submitted a request for appointment of counsel pursuant to G.S. 1-110 on 15 June 1982. On 27 August 1982, the trial court allowed defendants' motion to dismiss on the grounds that the applicable statute of limitations was three years, under G.S. 1-15(c). The trial court found that the face of the complaint showed that the plaintiff's action accrued no later than 24 April 1979, was commenced on 7 May 1982, and was thus barred. On the same day, the trial court denied plaintiff's request for appointment of counsel.

From the granting of defendants' motion to dismiss and the denial of plaintiff's request for appointment of counsel, plaintiff appeals.

James Lenard Small, pro se, plaintiff-appellant.

Tharrington, Smith & Hargrove, by Wade M. Smith, John R. Edwards, Elizabeth F. Kuniholm, for defendant-appellees.

EAGLES, Judge.

We find no error in the trial court's granting of defendants' motion to dismiss. A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is the proper method to test whether a pleading is legally sufficient. In determining as a matter of law whether the allegations state a claim for which relief may be granted, the allegations of a complaint are viewed as admitted. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). A complaint may be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. This generally precludes dismissal except where the face of the complaint discloses some insurmountable bar to recovery. *Forbis v. Honeycutt*, 301 N.C. 699, 273 S.E. 2d 240 (1980). In this case, the trial court properly ruled that the face of the complaint disclosed an insurmountable bar to recovery in that the complaint was filed after the applicable statute of limitations had run.

The statute of limitations applicable to this legal malpractice action is G.S. 1-15(c). *Clodfelter v. Bates*, 44 N.C. App. 107, 260 S.E. 2d 672 (1979). The three year statute of limitations of G.S. 1-15(c) applies here, for defendant's imprisonment was not a disability that tolled the running of the statute of limitations. G.S. 1-17; *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E. 2d 426 (1982).

According to G.S. 1-15(c), a cause of action for professional malpractice accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . ." See *Flippen v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980). Here, plaintiff alleged numerous acts of negligence on the part of the defendants during the pre-trial and trial phases of the prosecution, but there are no allegations of negligence on the part of the defendants subsequent to the jury's verdict on 20 April 1979. In particular, there are no allegations of negligence on the part of defendants during the sentencing portion of the trial, which ended on 24 April 1979. Taking all the allegations of the plaintiff's complaint as true for the purpose of evaluating this motion to dismiss, we conclude that the defendants' alleged negligence was complete on 20 April 1979, and that the cause of action accrued on 20 April 1979.

Mailing the complaint and affidavit on 20 April 1982 did not constitute commencement of the action. A civil action is commenced by filing a complaint with the court or, in some cases, by issuing a summons. N.C. R. Civ. P. 3. Even if the complaint had been permitted to be filed when it was first received in the mails by the clerk of superior court, the three year statute of limitations would have already run. Because the requirements as to payment of fees had not been complied with, the complaint and affidavit were returned to the plaintiff without filing. G.S. 7A-305(c). It was only on 7 May 1979, after plaintiff had completed the in forma pauperis affidavit and the presiding judge ordered that plaintiff be allowed to proceed in forma pauperis, that the complaint was filed and summonses issued. It is clear, from the face of the complaint, that this filing commenced the action after the statute of limitations had run. Therefore, the Rule 12(b)(6) motion to dismiss was properly granted.

Plaintiff's second assignment of error, that the trial court erred in denying his request for appointment of counsel, has no merit. There is no statutory right to appointed counsel in civil cases, and a due process right to appointed counsel in a civil case arises only if needed to insure fundamental fairness (because of the complexity of the case or the party's inability to speak for himself). *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). There was no due process violation in the trial court's denial of plaintiff's request for appointed counsel.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. WADE HENDERSON, JR.

No. 8327SC99

(Filed 18 October 1983)

1. Criminal Law § 7.5— defense of duress or coercion—instruction not required

In an armed robbery prosecution in which an accomplice testified that he and defendant were coerced into committing the robbery by a third person, the trial court did not err in failing to charge the jury on the defense of duress

or coercion where the accomplice's testimony showed that defendant and the accomplice entered a shopping mall alone to commit the robbery and thus had more than a reasonable opportunity to avoid the act without risking death or serious bodily injury, and where the evidence showed that defendant did not surrender himself and the stolen property to the police once he was no longer under the coercive influence of the third person. Furthermore, defendant's alibi theory would have been seriously undermined by the submission of the issue of duress to the jury which was propounded by an admitted perpetrator of the crime whom defendant himself had impeached.

2. Constitutional Law § 48— effective assistance of counsel—failure of counsel to request instruction on duress

Defendant was not denied the effective assistance of counsel because of the failure of his counsel to request an instruction on the defense of coercion or duress where the evidence would not have required the trial court to give such an instruction.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 29 September 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 28 September 1983.

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

Assistant Public Defender Malcolm B. McSpadden for defendant appellant.

BRASWELL, Judge.

The defendant was convicted of armed robbery with a deadly weapon and sentenced to fourteen years' imprisonment. He sought to verify his innocence through an alibi defense established through his father. A State's witness, Robert Shaw, Jr., testified that he and the defendant were coerced into committing the crime by Emery Bradley who was also convicted of the robbery. The defendant on appeal asserts that reversible error was committed by the trial judge's failure to charge the jury on the defense of duress or coercion or that he was denied effective assistance of counsel by the failure of his counsel to timely file a request for such an instruction. We hold that the trial judge committed no error and that the defendant was not denied effective assistance of counsel.

The State's evidence tended to show through the testimony of Robert Shaw, Jr., that on the morning of 30 April 1982, Shaw and Emery Bradley were driving in Bradley's car to West Char-

lotte High School to pick up a cap and gown for Shaw's graduation. At 9:20 a.m., Bradley drove to the Busy Body Food Mart in Charlotte where they saw the defendant. Bradley asked the defendant when he was going to pay him the money he owed him. The defendant replied that he would repay him, then got into the car.

The three men then drove to the Alamo Motel where Bradley met two other men who also got into the car. As they were driving towards Gaston County, Shaw and the defendant learned that they had been chosen to rob a jewelry store in the Oak Tree Mall. Bradley and the other two men, revealing four guns and a sawed-off shotgun, gave the defendant and Shaw each a gun with which to commit the crime.

They arrived at Oak Tree Mall in Gastonia at approximately 9:45 a.m. Bradley retrieved some pillowcases from the trunk of the car and gave them to the defendant. After determining where the car would be parked after the robbery, Shaw and the defendant entered the mall. They went into "Precious Metals & Stones" jewelry store, looked over the merchandise for several minutes, then left.

They walked to the end of the mall while Shaw searched for the nerve to go through with the robbery. The defendant stated that Bradley would kill them if they did not commit the crime so they might as well go ahead with it. They re-entered the jewelry store and after asking Vickie Dameron, the store's owner, if they could see a man's diamond ring, the defendant and Shaw drew their guns. Shaw walked to the back of the store with the other store clerk to the safe, but found it empty. The defendant told Mrs. Dameron to fill up the pillowcase with jewelry. Mrs. Dameron dropped her keys to the glass display case which angered the defendant. Mrs. Dameron told the defendant to go ahead and shoot and began to scream. She tried to take the pillowcase from the defendant, but he snatched it from her hand and ran out of the mall. Shaw immediately followed.

Other evidence produced by the State determined that the defendant had left a latent palm print on the glass jewelry display case which had been cleaned earlier that morning by the store's clerk.

The defendant's evidence, on the other hand, tends to show that on 30 April 1982 he woke up, cleaned the kitchen, watched television, and went to a friend's home to play cards. His father testified that the defendant was at his home in Charlotte until 9:40 a.m., thus was incapable of committing a robbery that morning in Gastonia.

The defendant also presented evidence that he does not match the description given by Mrs. Dameron to the police. She stated that the other robber with Shaw was between 5 feet 10 inches and 5 feet 11 inches tall. The defendant is 6 feet 1 inch tall and has always worn a beard. He also explains that his fingerprint might have possibly been left in the store on the evening of 29 April 1982 while shopping in Gaston County. Finally, when the defendant was arrested and his home was searched, no jewelry or other objects were found in his possession, except $50.00 which was loaned to the defendant by his grandfather.

[1] The major issue raised only in the defendant's brief concerns whether the trial judge committed error by failing to instruct the jury with respect to the law on the defense of coercion or duress. The general rule requires the trial judge to instruct the jury on every substantial feature of the case regardless of whether there has been a request from the parties for the instruction. *State v. Mitchell*, 48 N.C. App. 680, 270 S.E. 2d 117 (1980). Each defense raised by the evidence constitutes a substantial feature requiring an instruction. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). If the trial judge had no duty to instruct the jury on duress or coercion as a justification for his participation in the crime, the defendant was not denied the effective assistance of his counsel who failed to request such an instruction.

In the present case, the defendant pled not guilty to the charge of armed robbery, claiming that he was somewhere else at the time the crime was committed. Robert Shaw, Jr., alleged accomplice in the robbery and State's witness, claimed that he and the defendant were forced to commit the crime by Emery Bradley who would kill them if they did not carry out the robbery.

North Carolina case law recognizes the doctrine of duress or coercion as a defense to criminal prosecutions other than homicide. *State v. Kearns*, 27 N.C. App. 354, 219 S.E. 2d 228 (1975), *disc. rev. denied*, 289 N.C. 300, 222 S.E. 2d 700 (1976). *See also*

State v. Sherian, 234 N.C. 30, 65 S.E. 2d 331 (1951). In *Kearns*, this Court stated:

> It is the general rule that in order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.

Id. at 357, 219 S.E. 2d at 230-31. In order to have the court instruct the jury on the defense, the defendant must present some credible evidence on every element of the defense. *See State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). If the testimony of Shaw is believed, the facts clearly show that the defendant and Shaw, armed with guns, went into the mall alone, walked around for several minutes, and entered the jewelry store twice before attempting the robbery. Neither Bradley nor the other two unknown passengers in the car were present to continually pressure the robbers into committing the crime. This break in the continuity of the coercion is fatal to the defense because it is evident that the defendant and Shaw had more than a reasonable opportunity to avoid the act without risking death or serious bodily harm.

[2] Secondly, once the crime was committed under duress and the defendant was out from under Bradley's coercive influence, the defendant was under a duty to surrender himself and the stolen goods to the police. The defendant as a matter of law is not entitled to an instruction on the theory of duress until he has proffered evidence in satisfaction of this element. *See United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed. 2d 575 (1980); *State v. Watts*, 60 N.C. App. 191, 298 S.E. 2d 436 (1982). Since the evidence at trial did not warrant an instruction on the defense of duress, the trial judge did not err by failing to so instruct the jury. Likewise, the defendant was not denied the effective assistance of his counsel who refused to futilely request such an instruction from the trial judge.

Finally, as a practical matter, it is important to note that the defense of coercion or duress was not raised by the defendant,

but by a State's witness attempting to explain his participation in the crime. Shaw's credibility was severely impeached by the defendant when through the testimony of the defendant's father a letter written by Shaw was admitted into evidence. In the letter, Shaw stated that if the defendant wanted to be free, he should use the story given by Shaw in court that they were forced to commit the crime by Bradley.

The defendant impeached Shaw because he did not want Shaw's testimony implicating him in the robbery to be believed. The defendant in using an alibi defense attempted to show that he was simply not guilty of the crime because he was somewhere else during its commission. A duress defense, on the other hand, assumes the defendant had committed the offense but merely offers an excuse for his participation in the crime. Although a defendant may rely on two inconsistent defenses, *State v. Walker*, 34 N.C. App. 485, 238 S.E. 2d 666 (1977), *disc. rev. denied*, 294 N.C. 445, 241 S.E. 2d 847 (1978), in the present case the defendant's own alibi theory would have been seriously undermined by the submission of the issue of duress to the jury which was propounded by an admitted perpetrator of the crime whom the defendant himself had impeached.

No error.

Judges BECTON and JOHNSON concur.

Roberts v. City of Brevard

RICHARD ROBERTS ET UX, BEVERLY ROBERTS; J. T. BLACKWELL ET UX, JEAN BLACKWELL; HALL SMITH ET UX, MABEL SMITH; JOHN M. PETIT ET UX, PATRICIA PETIT; CHARLES SPANBAUR ET UX, MARGARET SPANBAUER; J. A. GRAY ET UX, EFFIE GRAY; ROBERT DIXON ET UX, ELIZABETH DIXON; TOM CRAWFORD ET UX, PAT CRAWFORD; CLYDE BROOKS ET UX, LINDA BROOKS; OTIS L. CALHOUN (WIDOWER); CHARLES N. KELLY ET UX, JIMMY LOU KELLY; H. W. GREGORY ET UX, ESTHER GREGORY; ROBERT C. FOSTER ET UX, BETTY FOSTER; ELBERT CHAPMAN ET UX, JANIE W. CHAPMAN; ALBERT B. CANTRELL ET UX, DOROTHY CANTRELL; AND KARL HARBIN ET UX, AMMIE HARBIN; PLAINTIFFS v. THE CITY OF BREVARD; CHARLES H. CAMPBELL, MAYOR OF THE CITY OF BREVARD; DAVID THORNE, KATHERINE D. ANDERSON, CORNELIUS HUNT, BEN LONG, JR., AND JOHNNY PETERSON, ALDERMEN OF THE CITY OF BREVARD; TOM MITCHELL, CHAIRMAN OF THE BREVARD BOARD OF ADJUSTMENT; W. P. HENSON, DEAN BROWNWELL, ANN PICKELSIMER, AND PAUL STUCKLAND, MEMBERS OF THE BREVARD BOARD OF ADJUSTMENT; JAMES EDWARDS, CITY PLANNER FOR THE CITY OF BREVARD; AND WADE HALL, BUILDING INSPECTOR FOR THE CITY OF BREVARD, DEFENDANTS AND ANDERSON, BENTON, HOLMES, INC., INTERVENOR-DEFENDANT

No. 8229SC1148

(Filed 18 October 1983)

Municipal Corporations § 29.3— development as within guidelines of zoning ordinance—wrong question considered by trial court

In a civil action in which plaintiff property owners sought to prevent defendant city from allowing developers to proceed with a proposed real estate development, the question that was properly before the trial court was not whether the proposed development was a planned development within the meaning of the ordinance, but whether it failed to conform to the requirements of the zoning ordinance and therefore required consideration as a special exception.

APPEAL by plaintiffs from *Kirby, Judge.* Judgment entered 1 July 1982 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 22 September 1983.

In this civil action, plaintiff property owners seek to prevent defendant City of Brevard (the city) from allowing defendant-intervenor Anderson, Benton, Holmes, Inc. (ABH), to proceed with a proposed real estate development in a manner that plaintiffs allege violates the city's zoning ordinance.

In November of 1981, ABH, a real estate developer, acquired an option to purchase 3.29 acres of land within the city. In May of

1982, ABH applied for and obtained preliminary plat approval for the subdivision of the land and the construction thereon of eleven duplexes containing a total of twenty-two residential rental units.

On 28 May 1982, plaintiffs filed their complaint in Superior Court naming the city as defendant. ABH intervened and answered on 4 June 1982. Plaintiffs alleged that ABH's proposed development was a "planned development" under the zoning ordinance and therefore subject to certain procedural requirements that had not been met. The complaint sought injunctive relief to require the city to comply with the ordinance.

At the hearing, the only evidence presented was a stipulation by the parties and the testimony of two expert witnesses. The court concluded as a matter of law that the proposed development was not a planned development and not subject to the additional procedural requirements of the zoning ordinance. The court also concluded that the proposed development was in compliance with the zoning ordinance. Accordingly, the court refused to grant the injunction and plaintiffs appealed.

William R. White for plaintiff-appellants.

Ramsey, Smart, Ramsey and Pratt, by John K. Smart, Jr., for defendant.

House, Blanco and Osborne, by Mary Ward Root, for intervenor-defendant.

EAGLES, Judge.

Plaintiffs assign as error the conclusions by the trial court that the proposed development was not a planned development, that it was in compliance with the zoning ordinance, and that the additional procedural requirements of the zoning ordinance did not apply. Planned development is defined by the Brevard zoning ordinance as follows:

> Article IV. *Definitions.* . . .
>
> 4. Planned Development: a large development consisting of one (1) continuous tract of land which is planned and developed as an integrated unit conforming to the density requirements of the zone in which it is located but not necessarily to the individual lot size requirements.

Under Article VIII of the ordinance, dealing with Special Exceptions, is a section entitled "Planned Development." That section contains the following provision:

> 801.2 *Planned Development Requirements.* The following only shall be subject to the provisions of this section: The construction of principal building(s) on any lot with the building(s) having a gross floor area of twenty-five thousand (25,000) or more square feet or any multifamily residential development containing more than one building and/or more than twelve (12) units. . . .

Plaintiffs contend that the development proposed by ABH is a planned development within the meaning of the quoted provisions of the ordinance because of (1) the number of units involved, (2) the size of the tract of land, and (3) the fact that it is a multifamily development. Plaintiffs further contend that the provisions of section 801 of the ordinance, dealing with planned developments, are mandatory with respect to any development that is a planned development within the meaning of the above definitions. Defendants, however, point out that the proposed development is a permitted principal use under the ordinance. As long as the proposed development is a permitted use, defendants argue, the provisions of section 801 are not mandatory.

The trial court concluded that the proposed development was a permitted principal use of the property under the zoning ordinance. The proposed development also arguably falls within the definition of planned development, as plaintiffs contend. Plaintiffs' contention, however, rests on the assumption that planned development and permitted use are, for purposes of the zoning ordinance, mutually exclusive concepts.

Although the ordinance is less than clear on this point, we find plaintiffs' argument is without support. Article VIII of the zoning ordinance deals with Special Exceptions. Section 800.1, the first provision of Article VIII, reads as follows:

> *Purpose.* To ascertain that certain designated uses have met the specific conditions set forth by this ordinance. . . .

Contained within Article VIII is section 801, dealing specifically with planned developments. Section 801.1 reads as follows:

> *Purpose.* To establish additional guidelines for special exceptions when tracts of land of considerable size are developed, redeveloped or renewed as integrated and harmonious units, when the overall design is so outstanding as to warrant modification of the standards contained elsewhere in this ordinance, and when an approved site plan is considered necessary to assure the appropriate development of uses in a compatible manner.

Based on the language of these provisions and the provisions quoted earlier, together with their juxtaposition within the ordinance, we conclude that "planned development" is one of the "designated uses" for which the zoning ordinance allows a "special exception" to be granted.

The existence of a "special exceptions" section within the ordinance indicates that its provisions are not invoked unless a proposed development does not otherwise fall within the use, lot size, and density standards set out in the ordinance. Under the ordinance, planned developments are a type of special exception warranting the establishment and application of additional guidelines. The additional guidelines are apparently appropriate only to the peculiar nature of planned developments. However, as with special exceptions generally, the additional guidelines regarding planned developments are only invoked where the proposed development does not fall within the zoning ordinance.

The question that was properly before the trial court was not whether the proposed development by ABH was a planned development within the meaning of the ordinance, but whether it failed to conform to the requirements of the zoning ordinance and therefore required consideration as a special exception. Only if this question were answered in the affirmative would it have become necessary to determine whether the development warranted the application of the additional guidelines dealing with planned developments.

Here, the trial court concluded on the basis of facts that are not in dispute that the proposed development was a permitted principal use under the R-2 Residential Zoning classification attached to the tract of land under the ordinance. Based on our interpretation of the applicable provisions of the zoning ordinance, this conclusion was correct. The court also correctly concluded

that the proposed development was not subject to the additional guidelines dealing with planned developments and special exceptions and properly refused to grant the requested relief.

The conclusion that the development was not a planned development is not necessary to support the judgment rendered and the judgment is modified accordingly.

We have found no error in this case that is prejudicial to defendants and therefore need not address their cross-assignment of error or their supporting argument. The judgment appealed from is

Modified and affirmed.

Judges ARNOLD and WELLS concur.

ROBERT E. SAGER, JR. AND MARY ANN SAGER v. W. M. C., INC., LOG SYSTEMS, INC. AND LINCOLN LOG HOMES, INC.

No. 8219SC1146

(Filed 18 October 1983)

Contracts § 6.1 — unlicensed general contractor — supervision by licensed contractor — no recovery on contract

Unlicensed general contractors may not recover from the owners under a contract for construction of a home costing more than $30,000.00 when the unlicensed contractors have all worked supervised by a licensed general contractor. G.S. 87-1.

APPEAL by defendants from *Gaines, Judge.* Judgment entered 2 July 1982 in Superior Court, ROWAN County. Heard in the Court of Appeals 22 September 1983.

On 7 November 1980 plaintiffs filed an action against defendants for breach of contract. They alleged that defendants failed to construct plaintiffs' house before the contractual completion date, modified specifications in the house plan and breached both specific and implied warranties of workmanship. Plaintiffs further alleged that they sustained loss of use of the house and a diminution in its value because defendants were not and never have

been licensed general contractors as required by Article 1 of Chapter 87 of the General Statutes. Plaintiffs sought damages and removal of defendants' claim of lien against their property.

In their answer defendants admitted that they were not licensed general contractors. They alleged, however, that all work by them was supervised by a licensed general contractor. Defendants counterclaimed for $7,045, alleging that this sum was due and owing for contract work performed.

On 7 April 1982 plaintiffs moved for summary judgment as to defendants' counterclaim. Plaintiffs grounded their motion on defendants' status as unlicensed general contractors, and filed supporting affidavits and brief. In opposition to this motion defendants filed an affidavit averring that plaintiffs' house was constructed under the supervision of Isenhour Real Estate and Construction Company, Inc.; that Isenhour was licensed during the contractual period and that building permits regarding the construction were issued to Isenhour.

After considering the pleadings and affidavits filed by the parties, the trial court concluded that plaintiffs were entitled to a judgment as to defendants' counterclaim and declared the claim of lien against plaintiffs' property null and void.

Alexander and Brown, by William G. Alexander, for plaintiff appellees.

Hamel, Hamel & Pearce, by Hugo A. Pearce, III, and Mary Jill Ledford, for defendant appellants.

ARNOLD, Judge.

The issue before this Court is whether unlicensed general contractors may recover from owners for the owners' breach of a contract to construct a home costing more than $30,000 when the unlicensed contractors have all work supervised by a licensed general contractor. We believe that under the circumstances here, the trial court acted correctly in dismissing the defendant general contractors' counterclaim and granting summary judgment in plaintiff owners' favor.

The uncontroverted facts show that on 29 January 1979 plaintiffs and defendant W. M. C., Inc., entered into a contract

wherein plaintiffs agreed to purchase a "log home package." This contract was supplemented and modified in later agreements. In the 25 April 1979 contract W. M. C., Inc., as "contractor," agreed to furnish a "log package" to plaintiffs, to erect the foundation, to complete the sub-floor system, to contract electrical wiring, plumbing, heat and air packages and to install carpet, vinyl, and insulation. W. M. C., Inc., guaranteed that the work and materials would be first class and would meet county and state code requirements. In the 24 May 1979 contract, W. M. C., Inc., as "contractor," agreed to build a log home for plaintiffs for the contract price of $57,800. On 10 July 1980, defendant Log Systems, Inc., assumed the obligations of W. M. C., Inc., under these contracts. At no time during the contractual period were defendants licensed general contractors.

The law pertinent to these uncontested facts requires a general contractor to be licensed before entering into a contract to construct a building where the cost is $30,000 or more. *See* Article 1 of Chapter 87 of the General Statutes; *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976); *Construction Co. v. Anderson*, 5 N.C. App. 12, 168 S.E. 2d 18 (1969). At the time the parties entered into the contracts, G.S. 87-1 provided:

> [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 . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing thirty thousand dollars ($30,000) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

If an unlicensed general contractor constructs a project whose value equals or exceeds $30,000, then he "may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment." *Helms v. Dawkins*, 32 N.C. App. 453, 455, 232 S.E. 2d 710, 711 (1977).

In the matter before us defendants referred to themselves as general contractors, agreed to construct a building for a price ex-

ceeding $30,000 and guaranteed that the work and materials would be first class. Their allegation that the construction was supervised by a licensed contractor is to no avail. We do not believe, as defendants contend, that by having their work supervised by a licensed contractor, defendants substantially complied with the licensing requirements of G.S. 87-1. "Article 1 of Chapter 87 clearly contemplates that a contractor should be licensed at the time of contracting and during the contract period." *Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 139, 296 S.E. 2d 10, 14, *disc. review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). The purpose of Article 1 is to protect the public from incompetent builders. *Builders Supply v. Midyette, supra.* By holding themselves out as general contractors with control over construction, defendants have subjected themselves to the licensing requirement. Furthermore, the public will not be protected from incompetent builders in such situations unless licensing is required. Specifically, plaintiffs' sole recourse for the defective construction of their house is against defendants. The licensed contractor who allegedly supervised construction is not a party to any contract with plaintiffs.

We are mindful of the amendment to G.S. 87-1, which now defines a "general contractor" as one:

> who for a fixed price, fee or wage, undertakes to bid upon or to construct or *who undertakes to superintend or manage, on his own behalf or for any person, firm* or corporation that is *not licensed as a general contractor* pursuant to this Article, the construction of any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more. [Emphasis supplied.]

G.S. 87-1 (Supp. 1981).

This Court raises the question without deciding whether the amended statute, if applicable, would aid defendants in their recovery. Since the amended statute did not become effective until 1 January 1982, the language in the earlier statute must control.

We are also aware of defendants' right to assert their claim against plaintiffs as a set-off to plaintiffs' claim for damages. *Builders Supply v. Midyette, supra.* In the order awarding summary judgment in plaintiffs' favor, the trial court allowed defend-

ants twenty days to amend their pleadings to allege a set-off. It appears from the record that defendants never amended their answer.

Defendants have failed to show the existence of a genuine issue for trial, and summary judgment for plaintiffs is

Affirmed.

Judges WELLS and EAGLES concur.

ANITA HODGES v. CLARENCE DON HODGES, JR.

No. 8219DC1051

(Filed 18 October 1983)

1. **Constitutional Law § 23— civil contempt for nonsupport—no due process right to counsel**

There was no error in the court's failure to appoint counsel for defendant at his civil contempt hearing for nonsupport of his child. G.S. 5A-21.

2. **Divorce and Alimony § 24.9— civil contempt proceeding for nonsupport—error in failing to find defendant's present ability to pay**

In a civil contempt proceeding for nonsupport of a minor child, the trial court erred in failing to find defendant presently had the means to comply with the order to make child support payments, and the evidence was otherwise insufficient to plainly show that defendant was capable of complying with the court's order.

APPEAL by defendant from *Neely, Judge.* Order entered 27 July 1982 in District Court, RANDOLPH County. Heard in the Court of Appeals 26 August 1983.

On 13 July 1982, a hearing was held to determine whether defendant was in civil contempt for failing to comply with an order, entered 11 September 1981, requiring child support payments. Defendant's request that a lawyer be appointed to represent him was denied. Defendant told the trial judge that he had not made child support payments from September 1981 through June 1982 because of surgery in July 1981, a December 1981 layoff from his job, and June 1982 surgery to remove a cancerous growth. The trial judge continued the case until 27 July 1982 to

allow defendant "to obtain medical records and records showing efforts he has made to obtain unemployment compensation and Social Security payments."

On 27 July 1982, the continued hearing was held, with the same trial judge presiding and the plaintiff wife represented by private counsel. The trial judge denied defendant's renewed request for appointed counsel. Defendant represented himself. Defendant's evidence included a letter from a doctor concerning the period before the September 1981 order, a letter from a doctor concerning the June 1982 cancer surgery which did not indicate how long defendant would be disabled, and defendant's own testimony that he was not working presently due to doctor's orders. Defendant presented no evidence as to his attempts to apply for unemployment compensation or Social Security disability benefits. There was no evidence that defendant owned any real or personal property that he could sell to pay the arrearage.

The trial court found, *inter alia*, the following facts: that defendant presented no evidence from his doctors as to his inability to work from 11 September 1981 through 27 July 1982, no evidence of applying for unemployment compensation or Social Security disability benefits, and no evidence of his living expenses or drug bills during this time period. The trial judge also found that defendant was "able-bodied at least during the months of January through June 19th of 1982, and was capable of and had the means or should have had the means" to make his child support payments. The trial judge then concluded that defendant was in civil contempt for his failure to make his child support payments. The order directed that if defendant did not pay $375.00 of the arrearage into the clerk's office by 14 August 1982, he would be imprisoned "until further orders of this Court." From this order, defendant appeals.

Rodney Mason, for plaintiff-appellee.

Central Carolina Legal Services, Inc., by Stanley Sprague, for defendant-appellant.

EAGLES, Judge.

[1] Defendant's first assignment of error is that the trial court erred in not appointing counsel for defendant at the civil con-

tempt hearing. We find no error. In reaching this result, we are bound by the North Carolina Supreme Court's holding in *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980), that (1) the Sixth Amendment right to counsel is inapplicable to civil contempt because that right is confined to criminal proceedings and (2) due process does not guarantee appointment of counsel in nonsupport civil contempt proceedings.

The Sixth Amendment right to counsel is guaranteed in any criminal prosecution where the defendant may face imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). A civil contempt proceeding is not a criminal prosecution; its purpose is not to punish, but to compel a defendant to comply with an order of the court. *Jolly v. Wright*, 300 N.C. at 92, 265 S.E. 2d at 142. North Carolina's civil contempt statute requires that the court find that the defendant has the present ability to comply with its order before the defendant can be imprisoned. G.S. 5A-21. A defendant who has not made child support payments because he is actually unable to make the payments does not face a loss of liberty. A defendant in a nonsupport civil contempt proceeding can be imprisoned only if he has willfully violated the court order and has the present ability to make the payments. *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E. 2d 345, 350 (1983); *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E. 2d 786, 787 (1980). He can regain his liberty by doing that which the court has ordered him to do and he has the ability to do; i.e., make the payments. This is consistent with the notion that civil contempt is not criminal punishment, but a civil remedy to be utilized exclusively to enforce compliance with court orders. See *Jolly v. Wright, supra.*

When a civil proceeding may result in imprisonment, due process requirements are met by evaluating the necessity for appointed counsel on a case-by-case basis. *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). The court in *Jolly* held that since nonsupport civil contempt cases usually are not sufficiently complex to necessitate the assistance of counsel, appointment of counsel for indigents is required only "where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness." *Jolly v. Wright*, 300 N.C. at 93, 265 S.E. 2d at 143; see also, *Daugherty v. Daugherty*, 62 N.C. App. 318, 302 S.E. 2d 664 (1983). A similar ap-

proach is utilized in civil paternity cases when determining whether due process requires appointment of counsel. *Wake County, Ex Rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E. 2d 95 (1982). The instant case presents no unusually complex issues of law or fact which would necessitate the appointment of counsel.

[2] Defendant next assigns as error the trial court's order that defendant be imprisoned if he did not pay $350.00 because the court made no finding that defendant had the present ability to pay the money. We agree that the trial court erred.

G.S. 5A-21 provides that civil contempt is the failure to comply with an order of a court if the individual "is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." In order to imprison a defendant found in civil contempt, the trial judge must find that the defendant has the present ability to comply or to take reasonable measures to enable him to comply with the order. *Henderson v. Henderson, supra; Teachey v. Teachey, supra.*

The trial judge here found that the defendant was "able-bodied at least during the months of January through June 19th of 1982, and was capable of and had the means or should have had the means" to make his child support payments. The court made no findings that defendant had, on 27 July 1982, the present ability to pay all or part of his arrearage or that he owned any real or personal property that he could sell to pay the arrearage. Our Supreme Court has held that a trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill-health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not support confinement in jail for contempt. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1968).

This case is unlike *Daugherty v. Daugherty*, 62 N.C. App. 318, 302 S.E. 2d 664 (1983), where, though there was no finding of fact, the evidence plainly showed that defendant was capable of complying with the order. Here, the trial judge made no finding that the defendant presently had the means to comply with the order to make child support payments and the evidence was otherwise insufficient to plainly show that defendant was capable of complying with the court's order.

The order must be vacated and the cause remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. HELEN RIVERS A/K/A HELEN RIVERS DEVONE

No. 834SC6

(Filed 18 October 1983)

1. **Criminal Law § 138— voluntary manslaughter—use of deadly weapon as aggravating factor**

In imposing a sentence upon defendant for voluntary manslaughter, the trial court erred in considering defendant's use of a deadly weapon as an aggravating factor because such evidence was necessary to prove the unlawful killing element of the crime. G.S. 15A-1340.4(a)(1).

2. **Criminal Law § 138— voluntary manslaughter—age of victim as aggravating circumstance**

In imposing a sentence upon defendant for voluntary manslaughter by shooting the victim with a rifle, the trial court erred in considering the victim's age of 71 as an aggravating factor since defendant did not take advantage of the victim's age or helplessness to commit the crime.

3. **Criminal Law § 138— aggravating circumstance—deception in early stages of investigation**

The trial court erred in finding as an aggravating factor that defendant was deceptive in the early stages of the investigation since the fact that the General Assembly made cooperation with the authorities a mitigating factor does not give a court license to find the absence of cooperation as an aggravating factor, and the use of lack of cooperation as an aggravating factor to increase a sentence impermissibly infringes upon an accused's right to plead not guilty.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 8 September 1982 in Superior Court, SAMPSON County. Heard in the Court of Appeals 23 September 1983.

Defendant pled guilty to voluntary manslaughter for the shooting death of her common law husband. She was sentenced to

15 years in prison. Her assignments of error relate solely to her sentence.

Attorney General Rufus Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Bacon & Cummings, by William M. Bacon, III, for the defendant appellant.

BECTON, Judge.

I

At the plea acceptance hearing, the State presented evidence tending to show that on the afternoon of 3 April 1982, the Sampson County Sheriff's Department received a telephone call from a woman who said that there had been a shooting and that she needed an ambulance. The woman refused the dispatcher's request for her name, and she gave the dispatcher an incorrect telephone number. When asked by the dispatcher if the shooting was accidental, the woman responded: "No, I shot him."

Shortly, rescue personnel arrived at the scene of the shooting and found a man lying on his back and a woman, the defendant. The defendant and the victim were the only persons in the house when the rescue personnel arrived. Defendant said to the rescue men, "you'll never find out where the gun is." Underneath the man was a loaded, but uncocked, shotgun. Defendant tried to grab the shotgun when they removed it from underneath the man's body. One of the rescue men stated that defendant was very uncooperative. Defendant smelled of alcohol and appeared to be intoxicated.

After being advised of her rights, defendant stated to the first detective to arrive on the scene that the man "hit me and knocked me cold." She further stated that they had had an argument and that the man was coming after her with a shotgun when she grabbed her rifle and shot him before he could shoot.

The next day, an S.B.I. agent conducting a crime scene search found a .22 rifle underneath the bed in the bedroom where the man, Raymond Devone, had been shot. A bullet removed from the victim's body was subsequently analyzed to have been shot from the rifle. In addition to the cartridge actually fired, an un-

fired cartridge was found beside Devone, and another cartridge had jammed in the chamber of the rifle.

Defendant told the S.B.I. agent that she had been living with Mr. Devone, who was 75 years old, for several years; that they had been arguing over some Ginsu knives and bowls she had ordered; that Devone was going to "blow her brains out"; and that he went to get his shotgun, but that she shot him first.

Defendant said Devone was holding the shotgun over her when she shot him. However, the evidence from the State's expert would have shown that Devone was either sitting or lying down when he was shot as indicated by the downward path of the bullet. The S.B.I. agent could find no evidence of defendant being struck or beaten, and was given conflicting statements by defendant as to where she had been struck.

Defendant also took a polygraph test, which indicated that she was being deceptive when she gave a negative answer to the question whether she had intentionally lied to the examiner in any way about what Devone was doing when he was shot, and when she gave an affirmative answer to the question whether Devone was holding a gun when he was shot.

II

At the sentencing hearing, defendant presented several witnesses who testified that defendant's character was good despite her drinking problem.

In his statement to the court, the district attorney said he had gone over the aggravating factors and that he could not "justify pointing any out." He further stated that defendant was a good woman who had never bothered anyone but who had a drinking problem and that her drinking was what killed Devone.

As aggravating factors, the court found:

9. The defendant was armed with or used a deadly weapon at the time of the crime.

10. The victim was very old.

16. At early stages of the investigation the defendant was deceptive in that she attempted to mislead the investigators.

As mitigating factors the court found:

1. The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days imprisonment.

4. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense, to wit: alcoholism.

13. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

The court found that the aggravating factors outweighed the mitigating factors and sentenced defendant to 15 years. The presumptive term for voluntary manslaughter, a Class F felony, is six years. N.C. Gen. Stat. § 14-18 (1981); N.C. Gen. Stat. § 15A-1340.4(f)(4) (Cum. Supp. 1981).

III

[1] Defendant first contends that the use of a deadly weapon was improperly considered as an aggravating factor because it was evidence necessary to prove an element of the offense. N.C. Gen. Stat. § 15A-1340.4(a)(1) (Cum. Supp. 1981). We agree.

Manslaughter is defined as "the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury." *State v. Roseboro*, 276 N.C. 185, 194, 171 S.E. 2d 886, 892 (1970), *death sentence rev'd.*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971). In order to convict defendant of manslaughter, the State, therefore, had to prove an unlawful killing. In order to prove an unlawful killing in the present case, the State had to prove the use of a deadly weapon, the rifle. The use of the rifle was evidence necessary to prove an element of the offense, and, therefore, was improperly considered as an aggravating factor. G.S. § 15A-1340.4(a)(1); *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983).

IV

[2] We also agree with defendant that the court improperly considered the victim's age as an aggravating factor. Although the

General Assembly has prescribed that extreme youth or old age of the victim may be considered as an aggravating factor, the age of the victim should not be considered 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 victim's age or infirmity increased the harm. G.S. § 15A-1340.4(a)(1); *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983); *State v. Mitchell*, 62 N.C. App. 21, 302 S.E. 2d 265 (1983); *see also, State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

In the present case, the defendant, who was 41 years old, shot the victim with a .22 rifle. She did not take advantage of the victim's age or helplessness to commit the crime. The victim was shot in the chest and died as a result of a gunshot wound in the aorta. The victim's age did not worsen the harm, as the strongest man might have succumbed.

V

[3] Defendant's last contention is that the court erred in finding as an aggravating factor that she was deceptive in the early stages of the investigation. She argues that the fact that the General Assembly made cooperation with the authorities a mitigating factor does not give a court license to find the absence of cooperation as an aggravating factor. With this statement we concur. The use of the lack of cooperation as an aggravating factor to increase a sentence impermissibly infringes upon an accused's right to plead not guilty. *State v. Blackwood*, 60 N.C. App. 150, 298 S.E. 2d 196 (1982).

In the present case, defendant freely admitted killing Devone. Indeed, the evidence would have supported a finding in mitigation that she voluntarily acknowledged wrongdoing at an early stage of the investigation. Defendant voluntarily reported the shooting to the Sheriff's Department and she remained at the scene when she could have run. There is no evidence or proof that defendant intentionally gave the wrong phone number. Defendant was intoxicated at the time. Her actions did not impede the arrival of the authorities.

VI

Because the court erred in its findings of factors in aggravation, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. TONY LEE OXENDINE AND EDDIE LEE OXENDINE, JR.

No. 8216SC1266

(Filed 18 October 1983)

Arson and Other Burnings § 4.1— burning a barn—sufficiency of evidence

The evidence was sufficient to support a conviction of burning a barn in violation of G.S. 14-62 where the evidence tended to show that defendants went upon the property involved to steal a radio, and that they broke into the dwelling house near the barn to obtain some of the implements to set the fires, and that the fires were set in more than one location on the property.

APPEAL by defendants from *Lane, Judge.* Judgment entered 9 June 1982 in the Superior Court, ROBESON County. Heard in the Court of Appeals 20 September 1983.

Defendants were charged in a true bill of indictment with burning a barn owned by the Charles R. Tolar estate in violation of G.S. 14-62. Upon a jury's verdict of guilty, the trial judge imposed an active sentence. Defendants appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Assistant Appellate Defender Lorinzo L. Joyner for defendant appellant Tony Lee Oxendine. Ertle Knox Chavis for defendant appellant Eddie Lee Oxendine, Jr.

HILL, Judge.

The question dispositive of this appeal is whether the trial court erred in denying defendants' motion to dismiss the charge at the close of all the evidence. We conclude that there was sufficient evidence for a jury to find beyond a reasonable doubt that the defendants wantonly and willfully set fire to a barn, and therefore, we affirm the trial court's judgment.

Of the three defendants below, Tony, Eddie, and Larry Oxendine, only Tony and Eddie have appealed their respective convictions. Defendants were charged with wantonly and willfully burning a barn belonging to the estate of Charles Tolar in violation of G.S. 14-62. At trial the State's evidence tended to show:

On the afternoon of 18 January 1982, Mrs. Evelyn Tolar and some friends were cleaning up a house on the Tolar property so tenants could soon move in. They used stick brooms to sweep out the house. The property consisted of a house, a barn, a packhouse, and two other buildings. After completing their task and securing the house, the laborers departed. Later that evening, Mrs. Tolar returned to the house and noticed a light down by the barn. She and a neighbor returned to the property. The barn was in flames and was subsequently destroyed. A small fire occupied the packhouse which the neighbor was able to extinguish. The dwelling house smelled of smoke and throughout it there were slightly burned areas with trails of ashes. A window screen on the house had been cut, a window raised, and the back door stood open. Charred stick brooms were found in the vicinity of the burned buildings.

On the day before the fire, Randy Oxendine and the defendants walked through the Tolar property, passing by the barn. Eddie looked in the barn and said there was a radio inside that he was going to get. On the day of the fire, Eddie said the defendants were going to get a radio at a house "where there were some pecan trees." Pecan trees are prevalent on the Tolar property.

From a store nearby the Tolar property, Randy Oxendine could see the fire burning. When the defendants came up to the store, he asked them who had set the fire. Eddie said that Larry

had thrown a broom that was on fire at a bird in the barn. Larry later said that he, Eddie, and Tony had set the barn on fire.

The defendants put on no evidence.

Defendant Eddie Oxendine appealed his conviction, but his counsel declares that he diligently reviewed the record and found no "legitimate assignment of error." Because there are no arguments presented in defendant's brief, his appeal is deemed abandoned.

Defendant Tony Oxendine contends that there was not sufficient evidence for a jury to find beyond a reasonable doubt that the defendants intentionally, or willfully and wantonly set fire to the barn. The statute under which defendants were charged, G.S. 14-62, prohibits "wantonly and willfully set[ting] fire to . . . any uninhabited house, any church, chapel, or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary . . . ." The indictment charged the defendants with wanton and willful burning. Thus, the intent which the State is required to prove is that the barn was burned willfully and wantonly.

"Willfulness" means the wrongful doing of an act without justification or excuse. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). "Wantonness" means the doing of an act in conscious and intentional disregard of and indifference to the rights and safety of others. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). "The attempt to draw a sharp line between a 'wilful' act and a 'wanton' act . . . would be futile. The elements of each are substantially the same." *State v. Williams, supra*, 284 N.C. at 73, 199 S.E. 2d at 412.

Defendants challenge the sufficiency of the evidence on this element of the crime, assigning as error the trial court's denial of the motion to dismiss the charge at the close of all the evidence. The evidence will withstand a motion to dismiss if there is substantial evidence of all essential elements of the offense. *E.g., State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982). In determining sufficiency of the evidence, all the evidence must be viewed in the light most favorable to the State, and "the State is entitled to

every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

Considering the evidence in the light most favorable to the State, there is substantial evidence of willfulness and wantonness. The evidence indicates that the defendants went upon the property to steal a radio, and that they broke into the dwelling house to obtain some of the implements used to set the fires. The fires were set in more than one location on the Tolar property. Such conduct connotes intentional wrongdoing in conscious disregard of and indifference to the rights and safety of the property owner. Thus, willfulness and wantonness is shown; the conviction of the defendants should be sustained.

Defendant Tony Oxendine next contends there is insufficient evidence identifying him as a perpetrator of the offenses charged. This contention is meritless. All the evidence tends to show that each defendant was a willing participant in a common scheme acting jointly until its completion. Thus, the defendants are jointly accountable regardless of which defendant actually did what act. *See State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1981).

For the reasons stated above we conclude that the trial court properly denied defendant's motion to dismiss the charge at the close of all the evidence. The judgment of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

TASTEE FREEZ CAFETERIA, EMPLOYER v. ROBERT A. WATSON, CLAIMANT, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 827SC1125

(Filed 18 October 1983)

1. Appeal and Error § 6.2— remand of unemployment compensation proceeding for new hearing—right of immediate appeal

An order of the superior court remanding an unemployment compensation proceeding to the Employment Security Commission for a new hearing was immediately appealable. G.S. 1-277(a); G.S. 7A-27(d)(4).

2. Master and Servant § 111— unemployment compensation hearing—scope of review in superior court

The superior court exceeded its scope of review in an unemployment compensation proceeding by ordering further findings without first determining whether the referee's findings were sufficient to support her conclusion that claimant had good cause to leave his employment.

3. Master and Servant § 108— unemployment compensation—leaving employment for good cause—racial discrimination

The referee's conclusion in an unemployment compensation proceeding that claimant had "good cause" for termination of his employment for racial discrimination and was entitled to unemployment benefits was supported by the referee's findings that the employer had "told claimant that he was a sorry individual, and that the only reason he did not fire claimant was because he was black," and that the employer had told claimant "not to talk, or otherwise associate with any of the white females employed at the cafeteria except to the extent that such activity was necessary to perform claimant's job." G.S. 96-14(1).

4. Master and Servant § 110— unemployment compensation hearing—no lack of fundamental fairness

An unemployment compensation rehearing before an appeals referee did not lack fundamental fairness because the same referee presided over the original hearing and the rehearing, because the appeals referee made references to the original hearing in stating the history of the case and in prefacing a question with a comment that she had asked the same question at the first hearing, or because leading questions were permitted. Nor was there support in the record for the conclusion that the rehearing lacked fundamental fairness on the ground that the referee took a "zealous and participatory" role in the rehearing.

APPEAL by employee-claimant from *Winberry, Judge.* Judgment entered 19 August 1982 in Superior Court, WILSON County. Heard in the Court of Appeals 21 September 1983.

East Central Community Legal Services, Inc., by Leonard G. Green, for claimant-appellant.

Donald R. Teeter, for Employment Security Commission of North Carolina, appellee.

No brief filed by employer-appellee.

BECTON, Judge.

Claimant filed a claim for unemployment benefits on 12 January 1982. He appealed from the initial denial of his claim by a claims adjudicator. The appeals referee, upon a hearing of the

matter, ruled that claimant was entitled to unemployment benefits because he had "good cause" for terminating his employment—racial discrimination—which was attributable to his employer. The Chief Appeals Referee, however, vacated this decision because the employer had not received notice of the hearing. The matter was heard again before the original appeals referee with both parties present. The appeals referee again ruled that claimant was entitled to unemployment benefits on a finding of "good cause."

The Employment Security Commission (Commission) affirmed the appeals referee's decision, adopting it as its own.[1] The employer appealed to superior court, which remanded the case to the Commission for a new hearing. Claimant appeals from that remand order, contending that the superior court erred in failing to affirm the Commission's decision and in remanding the case for a new hearing.

I

[1] We reject the Commission's argument that this appeal is interlocutory and must be dismissed. An appeal from an order granting a new trial is specifically allowed by N.C. Gen. Stat. §§ 1-277(a) (Cum. Supp. 1981) and 7A-27(d)(4) (1981).

II

[2] Claimant first contends that the superior court exceeded its scope of review by ordering further findings without first determining whether the referee's findings were sufficient to support her conclusion that claimant had good cause to leave his employment. We agree.

As this Court stated in *Employment Security Comm. v. Paul's Young Men's Shop, Inc.*, 32 N.C. App. 23, 231 S.E. 2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977): "[T]he reviewing court may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions." *Id.* at 29, 231 S.E. 2d at 160. In its order dated 19

1. Because the Commission adopted the appeals referee's findings and conclusions as its own, we shall continue to refer to the findings and conclusions made by the appeals referee.

August 1982, the superior court found that the referee's "broad conclusionary factual findings [were] supported by evidence." The superior court then found that the findings were not sufficient to resolve all the issues raised by the evidence. By so doing, however, the superior court failed to assess whether the specific facts found by the referee supported her legal conclusion. The reviewing court may remand for further findings *only if* the original findings were insufficient to sustain the legal conclusion. *Id.*

III

[3] We hold the referee's findings sufficient to sustain her conclusions of law. The referee found as a fact that the employer had "told claimant that he was a sorry individual, and that the only reason he did not fire claimant was because he was black." The referee found further that the employer had told claimant "not to talk, or otherwise associate with any of the white females employed at the cafeteria except to the extent that such activity was necessary to perform claimant's job." Based on these findings, the referee concluded that claimant was not disqualified for benefits under N.C. Gen. Stat. § 96-14(1) (Cum. Supp. 1981) because "claimant had *good cause* for leaving the job and . . . such cause was *attributable to the employer* because of demeaning remarks made to claimant by the owner attacking claimant's character and integrity." (Emphasis added.)

It is undisputed that claimant terminated his employment and was not discharged for misconduct. Thus, the only issue was whether such termination was for "good cause attributable to the employer." G.S. § 96-14(1). Racial discrimination by an employer is "good cause" for an employee's voluntary termination. *In re Bolden*, 47 N.C. App. 468, 267 S.E. 2d 397 (1980). The referee's findings of racial discrimination are sufficient to sustain her conclusion that claimant had "good cause" to leave his job. These findings were all that was necessary to address the only issue before the Commission. Further factual findings were not required. In fact, the superior court's order does not identify any other factual issue in the case. Rather, the superior court summarily concluded that the Commission's findings of fact did not resolve "all of the basic factual issues that [arose] from this evidence." The superior court therefore erred in remanding the case for further findings.

IV

[4] Claimant next argues that the superior court erred in granting a new hearing after concluding that the appeals referee hearing lacked fundamental fairness because: (a) the same referee presided over both hearings; (b) some references were made to the prior hearing; (c) leading questions were permitted; and (d) the referee took a "zealous and participatory" role in the hearing. We agree with claimant.

There is no prohibition against the same judge presiding over a second hearing, unless there is substantial evidence that her role in the first hearing would have some prejudicial effect on her decision. *State v. Vega*, 40 N.C. App. 326, 253 S.E. 2d 94, *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 809, *cert. denied*, 444 U.S. 968, 100 S.Ct. 459, 62 L.Ed. 2d 382 (1979); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). Such evidence is lacking in the present case. The only references to the previous hearing were the referee's statement of the history of the case when the hearing was called to order and the referee's preface to a question when she stated that she had asked the same question at the first hearing. These references do not constitute prejudicial error as a matter of law.

Leading questions are not absolutely prohibited in an Employment Security Commission hearing. An unemployment hearing is not as formal as a hearing in a court of law. Indeed, the Employment Security Commission is authorized to prescribe regulations for the conduct of hearings, "whether or not such regulations conform to common-law or statutory rules of evidence." N.C. Gen. Stat. § 96-15(f) (Cum. Supp. 1981). Nothing in the record in the present case indicates an abuse of discretion.

Nor is there support in the record for the conclusion that the referee took a "zealous and participatory" role in the hearing. Many of the questions asked by the referee were for purposes of clarifying testimony and eliciting preliminary matters regarding claimant's employment history. There was no jury to be misled or influenced by the questioning. We find no evidence of prejudice in the record.

We, therefore, find that the appeals referee hearing did not lack fundamental fairness.

V

The superior court erred in failing to affirm the Commission's decision. This case, therefore, must be remanded to the superior court for the entry of an order in accordance with this opinion.

Reversed and remanded.

Judges JOHNSON and BRASWELL concur.

EVELYN D. SELLERS v. NATIONAL SPINNING COMPANY, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8216SC1130

(Filed 18 October 1983)

Master and Servant § 108.2— disqualification for unemployment compensation—employee voluntarily leaving work

Claimant was disqualified from receiving benefits under G.S. 96-14(1), which mandates such disqualification once the Commission determines that a person is unemployed because she left work voluntarily without good cause attributable to the employer, where the evidence tended to show that claimant's pregnancy made performing her job difficult and was the reason for a month-long leave of absence which began on 27 May 1981; that plaintiff's doctor would not approve a maternity leave; and that plaintiff failed to return to work on 27 June 1981, failed to request an extension of her leave of absence, and failed to request a less strenuous job with her employer.

APPEAL by claimant from *Long, Judge.* Judgment entered 21 July 1982 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 19 September 1983.

Claimant appealed from an order affirming a decision of the Employment Security Commission which disqualified her from receiving unemployment benefits because pursuant to G.S. 96-14(1), she left work voluntarily without good cause attributable to her employer.

The relevant facts are: Claimant worked for National Spinning Company in the package winding department. In May, 1981, when claimant was two months pregnant, she was having difficulties performing her job, which required reaching and pulling.

Because of her condition, she had missed some work days; therefore, her supervisor suggested that she take a medical leave of absence. Claimant consented and on 26 May 1981, she was granted a one-month leave of absence. She was to return to work on 27 June 1981.

On or about 4 June 1981, a representative of the employer sent claimant a letter confirming her one-month leave and telling her that if she could not return on 27 June to contact him.

On 10 June, plaintiff visited her physician. He would not approve a maternity leave. He felt that claimant should not perform her old job; but that she could perform other, less strenuous work. There was never any communication between the doctor and the employer.

Between 26 May and 26 June, claimant's immediate supervisor visited her approximately three times. On these occasions, claimant asked him about the possibility of one less strenuous job in his department, but that job was unavailable.

Claimant did not return to work on 27 June. She did not request an extension of the leave of absence. Other than talking with her supervisor about one particular job, she did not inquire into any other less strenuous work available at the company.

The employer tried to contact claimant on several occasions but was unable to do so. Work was available for claimant on 27 June. Had she been unable on that date to perform her old job, the employer would have attempted to find her less strenuous work in another department. Claimant was formally removed from the employer's records on 27 July 1981.

Lumbee River Legal Services, Inc., by Phillip Wright, for claimant-appellant.

Thelma M. Hill, for defendant-appellee.

VAUGHN, Chief Judge.

The Employment Security Commission is vested by statute with the "power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security law . . ." G.S. 96-4(m); *See Employment Security Comm. v. Young Men's Shop*, 32 N.C. App. 23, 231 S.E.

2d 157, *review denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977). On appeal from a decision of the Commission, our task is twofold: First, we must determine whether there was evidence before the Commission to support its findings of fact. Second, we must decide whether the facts found sustain the Commission's conclusions of law and its resulting decision. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982); *Employment Security Com. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950). We find substantial evidence in the Record to support the Commission's findings of fact.

Claimant was disqualified from receiving benefits under G.S. 96-14(1) which mandates such disqualification if the Commission determines that a person in unemployed because she left work voluntarily without good cause attributable to the employer. "Good cause," as used in the statute, connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). The Commission found that claimant may have had a good personal reason for leaving, but her leaving was without good cause *attributable to the employer* (emphasis added). It is undisputed that claimant's pregnancy made performing her job difficult and was the reason for the leave of absence on 27 May 1981. As found by the Commission, however, plaintiff had a duty to either return to work on 27 June, to request an extension of her leave of absence, or to request other employment. She did not do any of these. Her failure to return to work on 27 June was a voluntary termination.

"Attributable to the employer" as used in G.S. 96-14(1) means "produced, caused, created, or as a result of actions by the employer." *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979). Plaintiff's employer made several attempts to contact her when she did not report to work on 27 June. Had she returned, continuing work was available. Had the employer received word from plaintiff's physician that it was inadvisable to continue work, the employer testified that the company would have given plaintiff an additional leave of absence for the duration of her pregnancy. Claimant was not formally removed from the employer's records until one month later, on 27 July 1981. Plaintiff's termination was caused, not by the employer's actions, but by her own inaction.

Plaintiff contends that she was forced to leave her job because of pregnancy and, therefore, she is entitled to unemployment compensation. While pregnancy was the reason for the plaintiff's initial leave, it was not the reason for her final termination. We agree with plaintiff that a pregnant woman's acceptance of a leave of absence is not voluntary. *See Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), *aff'd*, 660 F. 2d 1001 (4th Cir. 1981), *cert. denied*, U.S. 103 S.Ct. 796, 74 L.Ed. 2d 1000 (1983); *Bogucki v. Unempl. Comp. Bd. of Review*, 54 Pa. Commw. 419, 421 A. 2d 528 (1980); 26 U.S.C. § 3304(a)12 (1976). The issue in this case, however, does not concern plaintiff's temporary leave on 27 May, but rather, her failure, one month later, to take the necessary minimal steps to preserve the employment relationship. *See Unempl. Comp. Bd. of Review v. Metzger*, 28 Pa. Commw. 571, 368 A. 2d 1384 (1977). We find the rationale from several recent Pennsylvania cases to be compelling:

> [W]here an employe [sic] leaves employment because of a temporary disability with the expectation of later returning to work he is required to apply for a leave of absence, give a timely notice, or otherwise manifest an intention not to abandon the labor force. This is especially applicable where the leaving is an equivocal act, as where a pregnant woman leaves her employment and the leaving can be construed either as a temporary absence or an abandonment of the labor force.

Flannick Unempl. Compensation Case, 168 Pa. Super. 606, 610, 82 A. 2d 671, 673 (1951); *quoted in Hegley Unempl. Compensation Case*, 195 Pa. Super. 630, 633-34, 171 A. 2d 797, 798 (1961); *See also Pfeffer v. Unempl. Comp. Bd. of Review*, 33 Pa. Commw. 601, 382 A. 2d 511 (1978). We find nothing in the Record to merit reversing the conclusion that claimant left work voluntarily without good cause attributable to her employer.

The judgment of the Superior Court is, therefore, affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DAVID LEE McLAIN

No. 8320SC76

(Filed 18 October 1983)

1. **Indictment and Warrant § 4.1— failure to call all witnesses marked on indictment—validity of indictment**

The provision of G.S. 15A-626(b) stating that, in grand jury proceedings, "the clerk must call as witnesses the persons whose names are listed on the bills by the prosecutor" is merely directory, not mandatory, and an indictment was not invalid because only one of the two persons whose names were listed on the indictment was called to testify before the grand jury.

2. **Criminal Law §§ 66.11, 66.17— pretrial identification in patrol car—no unnecessary suggestiveness—independent origin of in-court identification**

A pretrial identification procedure whereby defendant was shown to a robbery victim while sitting in a police car some 30 minutes after the robbery was not unnecessarily suggestive and did not taint the victim's in-court identification of defendant. Moreover, the in-court identification was competent as being of independent origin where the victim had plenty of time to observe the robber during the robbery in a store and had seen him in the store earlier on the night of the robbery, and where defendant was wearing the same clothing on each occasion that the victim saw him.

APPEAL by defendant from *Morgan, Judge.* Judgment entered 15 September 1982 in Superior Court, RICHMOND County. Heard in the Court of Appeals 29 September 1983.

Defendant was tried on a bill of indictment charging him with robbery with a dangerous weapon. On 10 July 1982 at approximately 3:00 a.m., Shirley Murphy was alone in the Fast Fare in Hamlet where she worked as a cashier. A white male wearing an orange shirt and blue jeans came into the store and asked if he could look at sunglasses. The man grabbed Shirley Murphy by the hair and, while holding a penknife with a one to two inch blade to her neck, told her to open the cash register or he would kill her. When Shirley Murphy opened the register, he grabbed the money and ran out the door.

About the same time, Shirley Murphy saw a police officer in his car and ran to the door yelling to him that she had been robbed. Approximately 30 minutes later, the officer returned and told her to go to the police car to see if she could identify the person in the car. The man, who was wearing an orange shirt and who was seated next to another police officer, had been found

three houses from the Fast Fare. After observing the man in the car for 15 seconds, Shirley Murphy returned to the store and told the officer that the man in the car was the man who had robbed her. She had also seen the same man wearing the same clothes earlier that night at around 12:30 or 1:00 a.m., at which time he had remained in the store for around five minutes. The man was later identified as the defendant.

When the defendant was taken to the Hamlet Police Station, he had a strong odor of alcohol and appeared intoxicated. The defendant had been drinking to the point where the officers did not attempt to take a statement from him.

Later that morning, the officers returned to the Fast Fare and found a knife behind the store and some money in the area where the defendant was found. There was also a car registered to the defendant parked beside the Fast Fare.

The defendant was convicted of robbery with a dangerous weapon, a Class D felony, and was sentenced to 18 years. From judgment thereon, he appeals.

Attorney General Edmisten, by Associate Attorney Charles H. Hobgood, for the State.

W. Reece Saunders for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to quash the bill of indictment. This contention is based on the fact that only one of two persons whose names were listed on the bill of indictment was called to testify before the grand jury. Defendant cites G.S. 15A-626(b) as controlling in this matter. That statute reads in part:

> In proceedings upon bills of indictment submitted by the prosecutor to the grand jury, the clerk must call as witnesses the persons whose names are listed on the bills by the prosecutor. . . .

The success of defendant's contention depends on whether the language of G.S. 15A-626(b) is mandatory or merely directory. In determining if a statutory provision is to be considered mandatory or directory, legislative intent will control, "and this is

usually to be ascertained not only from the phraseology of the provision, but also from the nature and purpose, and the consequences which would follow its construction one way or the other." *Art Society v. Bridges, State Auditor*, 235 N.C. 125, 130, 69 S.E. 2d 1, 5 (1952). The logical purpose of the statute is not to insure that *all* witnesses *must* be called by the clerk. The purpose of G.S. 15A-626(b) is, in fact, to provide that the clerk *only* call as witnesses persons whose names appear on the indictment.

In similar cases involving grand jury proceedings the courts have held that the applicable statutory provisions are directory, not mandatory. In *State v. Mitchell*, the court held that the provisions of G.S. 9-27 (now repealed) relating to the requirement that the foreman *shall* mark names of witnesses who appeared before the grand jury on the indictment were directory and not mandatory. 260 N.C. 235, 132 S.E. 2d 481 (1963). *See also State v. Lancaster*, 210 N.C. 584, 187 S.E. 802 (1936) and *State v. Tudor*, 14 N.C. App. 526, 188 S.E. 2d 583 (1972). We hold that defendant's motion to quash the bill of indictment was properly denied.

[2] Defendant next contends that the trial court erred in denying his motion to suppress identification testimony of Shirley Murphy. He contends that the pretrial identification which occurred in the Fast Fare parking lot was unnecessarily suggestive and tainted the in-court identification. Defendant further alleges that the pretrial identification occurred at a time when he should have been afforded the benefit of counsel. We disagree with both aspects of his argument. First, it was found at trial that when the officer asked Shirley Murphy to see if she could identify the person in the police car, no suggestions were made to her about that person being the actual perpetrator. Furthermore, the showing of a suspect to a witness while the suspect is in a patrol car beside a policeman is not in and of itself impermissibly suggestive. *United States v. Hines*, 455 F. 2d 1317 (D.C. Cir. 1972).

Regardless of the pretrial identification, Shirley Murphy's in-court identification of the defendant was competent since it was clearly of independent origin. *See State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982). She had had plenty of time to observe him and, in fact, had seen him earlier in the store on the night of the robbery. The defendant had been shown to her approximately 30 minutes after the robbery, and he was wearing the same clothing

on each occasion that she saw him. We find that the court properly denied defendant's motion to suppress.

Defendant's contention that he was entitled to the presence of counsel when he was shown to Shirley Murphy at the scene of the crime is without merit. Counsel for indigents is required at pretrial identification proceedings only after formal charges have been preferred and where the presence of the indigent was required. G.S. 7A-451(b)(2). *See State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976).

Defendant's third and fourth contentions are that the court erred in failing to properly instruct the jury on the defenses of intoxication and automatism. In both instances we find that defendant failed to object to the judge's charges at trial as is required by Rule 10(b)(2) of the Rules of Appellate Procedure.

We have examined defendant's remaining assignments of error and have found in them no merit.

No error.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. WALTER JUNIOR KING

No. 8215SC1336

(Filed 18 October 1983)

1. **Criminal Law § 66.18— voir dire to qualify identification witness unnecessary**

Because the record showed no impropriety in the pretrial identification procedures and provided ample evidence that the identification witness's in-court identification of defendant was independent in origin of the pretrial photographic lineup, the failure to hold a voir dire was harmless error.

2. **Criminal Law § 99.4— sustaining court's own objections—no prejudicial error**

There is no prejudicial error in the court, on two occasions, stating to defense counsel that his questions were "argumentative as raised," since defense counsel was allowed to rephrase the question and elicited the desired testimony.

3. Searches and Seizures § 15— standing to challenge search—waiver of right to challenge

Defendant failed to establish his standing to object to the admission of a sweatshirt into evidence where the record indicated that the apartment searched was that of defendant's brother and where defendant neither asserted a property interest nor possessory interest in the premises searched and further failed to show any other circumstances giving rise to a reasonable expectation of privacy therein. Further, defendant made no pretrial motion to suppress the evidence and thus waived his right to challenge its admission. G.S. 15A-975.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 20 May 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 19 September 1983.

Defendant was convicted of robbery with a dangerous weapon. The evidence tended to show that he and an accomplice entered a shoe store, where defendant brandished a meat cleaver and demanded money. They obtained $70.82 in cash and fled.

From a judgment of imprisonment, defendant appeals.

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

Raiford & Harviel, by R. Chase Raiford, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in refusing his request for a *voir dire* to "qualify" an identification witness.

> The general rule in this State is that the failure . . . to hold a *voir dire* examination and make findings of fact upon objection by a defendant to an in-court identification, while not approved, will be deemed harmless error where the record shows that the pretrial identification was proper or that the in-court identification of defendant had an origin independent from the pretrial identification.

State v. Jordan, 49 N.C. App. 561, 565, 272 S.E. 2d 405, 408 (1980). Nothing in the record suggests that the photographic lineups here were impermissibly suggestive. Further, the record establishes that the in-court identification had an origin independent of the pretrial identification. *See Neil v. Biggers,* 409 U.S. 188, 93 S.Ct.

375, 34 L.Ed. 2d 401 (1972); *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982). The identification witness viewed defendant on two occasions—the first when defendant was in the store without a mask for approximately three minutes prior to the robbery, and the second during the robbery. At the time of the robbery the witness saw defendant's face before defendant pulled a mask over it, and he stood approximately two feet from defendant during the robbery. He was able to describe defendant to the police; and within a two day period, before he saw any photographs, he was able to assist the police in preparing a composite drawing of defendant. Although he could not identify defendant from the first photographic lineup, in which the pictures were several years old, he readily identified him when shown more recent photographs.

While the failure to hold a *voir dire* in *State v. Jordan* was upon a general objection, and the failure to hold a *voir dire* here was upon a specific request, no reason for a different rule in the two situations appears. We thus hold that because the record shows no impropriety in the pretrial identification procedures, and provides ample evidence that the identification witness' in-court identification of defendant was independent in origin of the pretrial photographic lineups, the failure to hold a *voir dire* was harmless error. *State v. Jordan, supra; see also State v. Hamilton*, 298 N.C. 238, 243, 258 S.E. 2d 350, 353 (1979) (conceding findings of fact on admission of identification testimony insufficient, error harmless where record shows pretrial identification procedure was proper and in-court identification had independent origin).

We note further that, without objection, another employee of the store identified defendant as one of the robbers. "It is . . . well settled that the admission of testimony over objection ordinarily is harmless error when testimony of the same import is theretofore or thereafter introduced without objection." *State v. Blount*, 20 N.C. App. 448, 450, 201 S.E. 2d 566, 568, *cert. denied*, 285 N.C. 86, 203 S.E. 2d 59 (1974).

[2] Defendant contends the court erred on two occasions when it sustained its own objections to questions by defense counsel when the State had made no objections. On each occasion the court stated, "It's argumentative as phrased." Defense counsel then rephrased the questions and elicited the desired testimony.

The court has discretion to ban argumentative questioning. *State v. Satterfield*, 300 N.C. 621, 627, 268 S.E. 2d 510, 515 (1980). We find no impropriety in the manner in which that discretion was exercised here. *See State v. Hughes*, 54 N.C. App. 117, 121, 282 S.E. 2d 504, 507 (1981). We further perceive no conceivable prejudice to defendant, since counsel was allowed to rephrase the questions and elicit the desired testimony.

[3] Defendant contends the court erred in admitting, over objection, a sweatshirt identified as the one he wore during the robbery. He argues that it was seized during a search pursuant to an invalid warrant.

Defendant was present when the sweatshirt was seized. The State gave him timely notice that it would be introduced at trial. Defendant made no pretrial motion to suppress, however, and thus waived his right to challenge its admission. G.S. 15A-975.

Further, to establish standing to object to introduction of this evidence, defendant had the burden of establishing that his personal rights were violated by the search and seizure. He had to demonstrate that the area searched was one in which he had a reasonable expectation of privacy. *See State v. Jones*, 299 N.C. 298, 306, 261 S.E. 2d 860, 865 (1980); *State v. Taylor*, 298 N.C. 405, 415-16, 259 S.E. 2d 502, 508 (1979).

The record indicates that the apartment searched was that of defendant's brother, and that defendant lived next door. Defendant has asserted neither a property nor a possessory interest in the premises searched, nor has he made a showing of other circumstances giving rise to a reasonable expectation of privacy therein. Thus, irrespective of the validity of the warrant, he has failed to establish his standing to object. *State v. Jones, supra.*

Defendant finally contends the court erred in not allowing an officer to testify on cross-examination that a defendant in a "physical lineup" would be advised of certain rights which are unavailable in a photographic lineup. Defendant, however, was not entitled to a "physical lineup." *State v. Williams*, 308 N.C. 357, 360-61, 302 S.E. 2d 438, 440 (1983). Absent a showing of prejudice, the identification procedure employed will be deemed appropriate under the circumstances. *Id.* No prejudice has been shown in the procedure employed here.

Defense counsel was entitled on cross-examination to expose to the jury the potential for error in the procedure employed. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed. 2d 1247, 1253 (1968). This did not, however, entitle him to inquire into other procedures which conceivably could have been employed. The testimony sought concerned a matter of law not involved in the case being tried. It thus had, at best, "only tenuous relevance," and the court had discretion to exclude it. *State v. Satterfield, supra*, 300 N.C. at 627, 268 S.E. 2d at 515.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. LUTHER MONROE BROWN, JR.

No. 8219SC1251

(Filed 18 October 1983)

1. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for the voluntary manslaughter of his father where it tended to show that defendant, his father, and his brother were watching television in the den of their home; defendant left the room, stayed out some 15 or 20 minutes, and returned with a double-barrelled shotgun; defendant walked to his father, holding the gun toward his father's chest, and asked his father to look at the gun sight; the end of the gun barrel was between one and three feet from the father's chest; the father asked whether the gun was loaded and then a gunshot was heard; both barrels of the shotgun had been fired; the shotgun was one of 20-25 guns owned by the deceased father and his sons; all three of the men were familiar with the gun in question and guns in general; and a ballistics expert testified that it required a six and one quarter pound pull to trigger the gun and cause it to fire.

2. Criminal Law § 102.8— jury argument—comment on failure to testify

The trial court did not err in ruling that defendant's counsel could not argue to the jury concerning defendant's failure to testify or to introduce any evidence.

3. Criminal Law § 138— voluntary manslaughter—aggravating factors—sufficient evidence of first degree murder—failure to acknowledge guilt

The evidence in a sentencing hearing for voluntary manslaughter did not support the trial court's findings as aggravating factors that there was strong

evidence of premeditation and deliberation and that the evidence would have warranted submission of an issue of first degree murder to the jury. Furthermore, the trial court erred in finding as an aggravating factor that defendant had not acknowledged his guilt or wrongdoing.

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Wood, Judge.* Judgment entered 22 July 1982 in the Superior Court of CABARRUS County. Heard in the Court of Appeals 20 September 1983.

Defendant was indicted for the murder of his father. The case went to the jury on second degree murder, voluntary manslaughter and involuntary manslaughter. The jury returned a verdict of guilty of voluntary manslaughter, and the trial judge sentenced the defendant to prison for a period of twenty years. Defendant appeals.

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

Williams, Boger, Grady, Davis and Tuttle, P.A., by Thomas M. Grady and John Hugh Williams for defendant-appellant.

HILL, Judge.

We first examine defendant's contention that the trial court erred in denying his motion for dismissal as to all of the offenses charged and the motion for a directed verdict as to second degree murder and voluntary manslaughter. Inasmuch as the jury failed to find the defendant guilty of second degree murder, that issue becomes moot, leaving only the issues pertaining to voluntary and involuntary manslaughter.

The definitions of the remaining offenses are well established. Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). The difference between voluntary and involuntary manslaughter is a question of intent. As it relates to involuntary manslaughter, intent is not an

issue. The crux of that crime is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon. *State v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337 (1965); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

In considering a motion to dismiss a criminal charge the court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). All the evidence, whether competent or incompetent, must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).

[1] The evidence is summarized in pertinent part as follows:

Defendant, his father, and his brother were watching television in the den of their home. The mother was studying for an exam in the kitchen which adjoins the den. The defendant left the room, stayed out some fifteen or twenty minutes, and returned with a double-barrelled shotgun. He walked to his father, holding the gun toward his father's chest and asked his father to look at the gun sight. The end of the gun barrel was between one and three feet from the father's chest. His father remained seated, but asked: "Son, that gun is not loaded, is it?" Then a gunshot was heard. Both barrels had been fired, and bullets had entered the father's chest separated only by a small piece of skin. The brother of the defendant went first to the kitchen where his mother was and then to a neighbor's house where he said: "Luther has just shot my father, but it was an accident."

The gun was one of twenty to twenty-five guns owned by the deceased father and sons and kept in the house. Two days previously the three had gone out to the family farm to do target practice, taking the gun with which the father was shot, but not using it. All three of the men were familiar with the gun in question and guns in general. A ballistics expert testified that it required a six and one quarter pound pull to trigger the gun, causing it to fire.

Defendant offered no evidence. We conclude there was ample evidence, when considered in the light most favorable to the State, for a jury to find the defendant guilty of voluntary manslaughter. The defendant was familiar with the gun, must have known the difficulty to trigger the gun, and certainly knew that pointing a double-barrelled shotgun one to three feet from the chest of his father constituted an act devoid of social responsibility. The jury so found, and we overrule this assignment.

[2] Nor did the court err by ruling that defendant's counsel could not argue to the jury concerning defendant's failure to testify or introduce any evidence. A contrary ruling would have permitted the defendant's attorney to speculate on facts not in evidence. See *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975).

We find no error in the trial of the case, but the case must be remanded for resentencing.

[3] Defendant was convicted of voluntary manslaughter, which carries a presumptive sentence of six years. The trial judge imposed a sentence of twenty years, finding the following aggravating factors:

> 15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.
>
> 16. Additional findings of factors in aggravation.
>
> A. That the evidence in this case is very strong, there is very strong evidence of premeditation and deliberation.
>
> B. That the evidence in this case would have warranted this case going to the jury on First Degree Murder.
>
> C. That the defendant has not acknowledged his guilt or wrongdoing.
>
> D. That there was nothing to provoke the defendant to commit this crime. That the defendant has a past reputation for violence.

As a mitigating factor the judge found:

> 4. That the defendant was suffering from some sort of mental or drug condition that was insufficient to constitute a

defense that possibly could have reduced his culpability for the offense.

We conclude the court erred in its additional findings of factors in aggravation. Nowhere in the record do we find very strong evidence of premeditation and deliberation, or that the evidence would have warranted this case going to the jury as First Degree Murder.

The court further found the defendant has not acknowledged his guilt or wrongdoing. We know of no reason why he should have been expected to do so. Defendant pleaded "Not Guilty." By doing so, he denied his liability and proclaimed his innocence. He was presumed to be innocent at the time, and this presumption continued until he was found guilty by the jury.

When it is found that the judge erred in a finding in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded with instructions.

Judge HEDRICK concurs in the result.

Judge WEBB concurs.

ROBERT H. GILBERT v. JOE Q. THOMAS, JR.

No. 828SC967

(Filed 18 October 1983)

Appeal and Error § 59.2; Rules of Civil Procedure § 15— appellate review of directed verdict—inability to consider theories on appeal that were not before trial court

In a breach of contract action where the issue at trial, as stipulated in a pre-trial order and as defined in the complaint, required evidence of an agency relationship to support the action for breach of contract, appellant could not offer on appeal five new theories to establish the existence of a contract that were not considered at the trial level since to do so would be to review the case "as the parties might have tried it." G.S. 1A-1, Rules 15 and 16.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 27 April 1982 in Superior Court, LENIOR County. Heard in the Court of Appeals 22 August 1983.

Plaintiff appeals from trial court's granting of motion for directed verdict at close of plaintiff's evidence in action for breach of contract.

Wallace, Barwick, Landis, Rodgman & Bower, P.A., by P. C. Barwick, Jr. and Joseph S. Bower, for plaintiff appellant.

White, Allen, Hooten, Hodges & Hines, P.A., by Thomas J. White and John R. Hooten, for defendant appellee.

BECTON, Judge.

I

On 24 March 1979, plaintiff Robert H. Gilbert, made the high bid to purchase the J. W. Gates Farm at an auction conducted by Barrow-Kennedy Auction Company (Barrow-Kennedy). Barrow-Kennedy acted as selling agent for the true owners, Gates' heirs. Originally the farm had been offered at auction as nine separate tracts, identified as such on the Barrow-Kennedy sales map. Barrow-Kennedy next offered to sell the farm in groups of two or three tracts, and then, even later, offered to sell the farm as a whole. According to the Barrow-Kennedy map, only two of the nine tracts, tracts 8 and 9, carried tobacco allotments. Since the total price of the entire farm to Gilbert was higher than anticipated, Gilbert advertised to sell his right to purchase twenty acres of the farm, tracts 1 and 2 on the Barrow-Kennedy map. The closing on all the tracts had to be made on or before 24 April 1979.

On 11 April 1979 defendant, Joe Q. Thomas, Jr., agreed in writing "to purchase Tract Number 1 and Number 2 of the Gates Farm (Barrow-Kennedy Map dated 24 March 1979) for the price of $51,250.00." The existence of a tobacco allotment was not discussed. Under the terms of the agreement, Gilbert received $1,250.00 as a binder. The balance was to be paid to Barrow-Kennedy on 23 April 1979.

The following day, 12 April 1979, Thomas entered into a contract of sale with W. W. Kennedy of Barrow-Kennedy to purchase

Tracts 1 and 2 for $51,250.00. The contract specifically stated "These tracts do not contain tobacco allotments with them." Under the terms of the contract, Thomas made an $11,250 down payment—$10,000 deposited with Kennedy, and the $1,250 he previously paid to Gilbert. The balance was due on or before 24 April 1979.

Kennedy testified that he informed Thomas prior to signing the 12 April 1979 contract that Thomas would have to execute a U.S. Department of Agriculture, ASCS Form 155 before the closing on 23 April 1979. The sale of the farm had precipitated a reallocation of the tobacco allotments. Form 155 served to waive any tobacco allotment granted to Tracts 1 and 2. Thomas assured Kennedy that he would sign the form before the closing, but he failed to do so, despite repeated reminders by Kennedy. As a result, the ASCS committee gave Thomas 2219 pounds of the Gates Farm's tobacco allotment. Further, the deed conveying Tracts 1 and 2 to Thomas contained no reservation of the tobacco allotment to the grantor.

Gilbert brought this action against Thomas for breach of the 12 April 1979 contract and for fraud. At the close of Gilbert's evidence, Thomas was granted a directed verdict. Gilbert appeals.

II

Gilbert excepts and assigns error to the trial court's granting of Thomas' motion for directed verdict. Gilbert argues that there was sufficient evidence of "the existence of a contract between defendant and plaintiff" to withstand the motion for directed verdict.

On appeal, Gilbert frames the question for this Court in the broad language of the motion for directed verdict. "In passing upon a trial judge's ruling as to a directed verdict, we cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal." *Tallent v. Blake*, 57 N.C. App. 249, 252, 291 S.E. 2d 336, 339 (1982). In the pleadings, Gilbert based his actions for breach of contract and for fraud solely on the 12 April 1979 contract. He alleged that Kennedy acted as his agent in the transaction. The parties later stipulated in a pre-trial order that the Gilbert's issue on breach of contract was: "Did the defendant breach his contract

with the plaintiff as alleged in the complaint?" A pre-trial order "controls the subsequent course of the action, unless modified at the trial to prevent *manifest injustice.*" N.C. Gen. Stat. § 1A-1, Rule 16 (1969) (emphasis added). In this case, Gilbert had not asked leave to modify the pre-trial order prior to the granting of the motion. Thus, the narrow issue before the trial court required evidence of an agency relationship to support the action for breach of the 12 April 1979 contract.

Gilbert offers this Court five new theories to establish the existence of a contract between plaintiff and defendant: (a) the 11 April 1979 agreement created a binding contract; (b) the 11 April 1979 agreement is a contract of assignment; (c) the reservation of the tobacco allotment was omitted by Gilbert and Thomas from the 11 April 1979 contract by mutual mistake and the parties should be allowed to reform the contract; (d) Gilbert is an intended beneficiary of the 12 April 1979 contract; and (e) the 12 April 1979 contract is a new substitute contract—a novation. We are unable to consider these different theories in passing upon the trial judge's ruling on the motion for directed verdict. To do so would be to review the case "as the parties might have tried it." *Tallent* at 252, 291 S.E. 2d at 339.

Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. *Roberts v. William N. and Kate B. Reynolds Mem. Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended, as in a contract case in which plaintiff, without objection, presents evidence of negligence. *See* N.C. Gen. Stat. § 1A-1, Rule 15(b) (1969); 1 McIntosh, *North Carolina Practice and Procedure* § 970.80 (Supp. 1970). When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Therefore, defendant's failure to object does not constitute "implied consent." *See*, 1 McIntosh, *North Carolina Practice and Procedure* § 970.80 (Supp. 1970); 6 C. Wright and A. Miller, *Federal Practice and Procedure* § 1493, at 456 & n. 71 (1971).

In this case, the evidence relied on by Gilbert to support his new theories was essential to proving the original agency theory. Thomas was not put on notice of Gilbert's new theories. Rule 15(b) allows "amendment by implied consent to change the legal theory of the case so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case." *Roberts* at 59; 187 S.E. 2d at 727.

By analogy, in ruling on a motion for directed verdict, the trial judge must have a fair opportunity to evaluate the evidence on *all issues.* In this case, the trial judge's focus had been narrowed by the pretrial order. Even assuming that "manifest injustice" might allow an amendment by implied consent, the nature of the evidence presented failed to put Thomas and the trial judge on notice. Gilbert had the burden of asking leave of the court to modify the pleadings and pre-trial order, thereby broadening the trial judge's evaluation of the evidence and issues.

Since the agency theory was the sole theory before the trial court, we are unable to consider Gilbert's additional theories on appeal. "A party may not acquiesce in the trial of his case upon one theory below and then argue on appeal that it should have been tried upon another. *Bryan Builder's Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968) . . . This is true with respect to a motion for directed verdict." *Tallent* at 252, 291 S.E. 2d at 339.

For the foregoing reasons, we uphold the trial court's granting of Thomas' motion for a directed verdict.

Affirmed.

Chief Judge VAUGHN and Judge HILL concur.

CITY OF WILMINGTON v. SHELDON PIGOTT AND WIFE, JANICE PIGOTT, AND THE TRAVELERS INSURANCE COMPANY

No. 825DC1194

(Filed 18 October 1983)

Insurance § 149— municipal liability policy—building inspector's order to remove greenhouses

A city building inspector's order that defendants remove two greenhouses from their property because he mistakenly believed they violated the city building code was not an "accident" which resulted in property damage "neither expected nor intended" by plaintiff city so as to constitute an "occurrence" which would be covered by multi-peril insurance policy purchased by the city.

APPEAL by defendant Travelers Insurance Company from *Lambeth, Judge.* Judgment entered 11 August 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 29 September 1983.

On 10 May 1978 defendants Sheldon and Janice Pigott were informed by A. Haywood Rowan, chief building inspector for the City of Wilmington, that two greenhouses on their property did not meet the requirements of the city building code. The Pigotts were further advised that if the buildings were not brought into compliance with the code within 30 days they would have to be demolished. The two greenhouses were in fact removed by plaintiff at Rowan's direction at the conclusion of the 30 day period.

On 6 November 1978, after the removal of the buildings, the Pigotts received a letter from Rowan stating that if the greenhouses were less than 400 square feet they would be allowed. Since one of the two buildings in question was 216 square feet and, thus, clearly within the code, and the other was 416 square feet and, thus, easily conformable to the code, the Pigotts filed suit against the City of Wilmington, contending that they were entitled to damages for the loss of the greenhouses.

At the time of these events, the City of Wilmington had in effect a multi-peril policy with the Travelers Insurance Company. After receiving notice from the City of the Pigotts' complaint, Travelers denied coverage on the ground that there was no "occurrence" within the meaning of the policy.

A motion for summary judgment was granted as to defendant Rowan and subsequently affirmed on appeal. *See* 50 N.C. App. 401, 273 S.E. 2d 752 (1981). A similar motion was denied as to the City of Wilmington. The City then filed an action for declaratory judgment to determine the rights and obligations of all the parties involved. At that hearing it was determined that there was coverage available to the City under its policy with Travelers Insurance Company. From that judgment defendant Travelers Insurance appeals.

Martin, Wessell and Owens, by John C. Wessell, III, for plaintiff-appellee.

Franklin L. Block for defendant-appellees.

Crossley and Johnson, by Robert W. Johnson, for defendant-appellant.

ARNOLD, Judge.

Defendant Travelers Insurance contends that the court erred in ordering it to provide coverage to the City of Wilmington in that there was no "occurrence" within the meaning of the policy. We agree. The trial court's order is reversed.

Section 2, Coverage C of the insurance policy in question provides in part:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies, *caused by an occurrence* . . . (emphasis added).

The definition section of the policy provides that " 'occurrence' means an *accident*, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from a standpoint of the insured.*" (Emphasis added.)

From the facts at hand then, in order for there to have been an "occurrence," ordering the Pigotts to remove their two greenhouses must have constituted an "accident" which resulted in property damage "neither expected nor intended" by the City.

Both plaintiff and defendant rely on the case of *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E. 2d 894, *aff'd*, 304 N.C. 585, 284 S.E. 2d 518 (1981). In that case a garbage collector in the City of Raleigh became involved in an argument with the plaintiff over whether he should remove a tire from her backyard. The City had in effect a liability insurance policy which defined "occurrence" in a manner which is essentially the same as the definition involved in the case at hand. This Court held in *Edwards* that an intentional assault committed by a city employee, when neither expected nor intended by the City, was an occurrence if committed within the scope of the employer's duties. 52 N.C. App. at 693, 279 S.E. 2d at 897.

Defendant contends that the facts of *Edwards* are substantially different from those being considered here. We agree. In *Edwards*, it was clearly not expected or intended that the city employee assault residents along his route. His action did constitute an "accident" as defined by the policy.

The words "accident" and "accidental" have generally been held by the courts to mean "that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen." 43 Am. Jur. 2d, Insurance, § 559, *Skillman v. Insurance Co.*, 258 N.C. 1, 7, 127 S.E. 2d 789, 793 (1962). We cannot label Inspector Rowan's order to the Pigotts to remove their greenhouses an "accident." The decision did not happen by chance and was not unexpected, unusual or unforeseen. It was certainly intended by the City that as chief building inspector Rowan would exercise his discretion to make these sorts of decisions as he saw fit. While Rowan may have mistakenly or erroneously interpreted the Wilmington building code, his conduct did not amount to an "accident." Since there was no showing at trial that the act of the City constituted an "accident," we find that there was no "occurrence" within the meaning of the multiperil insurance policy. The trial court's order is, therefore, reversed.

Reversed.

Judges PHILLIPS and EAGLES concur.

BUDDY SEXTON AND WIFE, NANCY SEXTON v. CLOYD BOLICK AND WIFE, ROSE BOLICK

No. 8224SC1186

(Filed 18 October 1983)

Torts § 1— failure to show existence of duty—directed verdict improperly denied

In an action which was pled and tried in tort and in which plaintiffs sought damages for damage caused to their trees by defendants' horses running at large, in order to establish negligence on the part of defendants it was imperative that plaintiffs show a breach of some duty, and the record was devoid of any evidence of any duty on the part of the defendants. Therefore, defendants' motion for a directed verdict at the close of the evidence should have been granted.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgment entered 10 June 1982 in Superior Court, WATAUGA County. Heard in the Court of Appeals 29 September 1983.

In May 1978 plaintiffs began cultivating a number of seedlings on the property of J. D. Harmon for the purpose of selling them as Christmas trees. Plaintiffs had orally agreed to share their profits with Harmon in exchange for the privilege of using his land. This agreement was later reduced to writing on 7 May 1979.

Prior to this agreement, defendants, who owned property adjacent to Harmon, orally agreed with Harmon that the livestock of each would be allowed to graze and roam on the land of the other. At the time that plaintiffs began their tree business, the Harmon property was being used by defendants as a pasture for their four horses and plaintiffs had been told of this agreement by Harmon. In addition, Harmon told plaintiffs that he would be unable to build a fence between his property and that of defendants.

Plaintiffs testified at trial that defendants promised to build a fence to keep the horses off of the Harmon property, but failed to do so until 1980. Plaintiffs constructed an electric fence around their trees in 1978, but the fence proved inadequate as the horses entered the property in 1978, 1979 and 1980. Plaintiffs testified that they lost 2,642 trees at two dollars per tree in 1979 and 3,421 trees at three dollars per tree in 1980 due to the horses being in

the pasture and stepping on and eating the trees. Plaintiffs did not claim damages for the time period following the date when defendants erected the fence.

At the close of plaintiffs' evidence, and again at the close of all of the evidence, defendants moved for a directed verdict on the ground that plaintiff failed to establish a *prima facie* case of negligence against the defendants and on the ground that plaintiffs established their own contributory negligence as a matter of law. Both motions were denied. The jury returned a verdict for plaintiffs in the amount of $3,750. From that verdict, defendants appealed.

Randal S. Marsh for plaintiff-appellees.

Morris, Golding and Phillips, by William C. Morris, Jr., John C. Cloninger and Kathy G. Lindsay for defendant-appellants.

ARNOLD, Judge.

Defendants contend that the trial court erred in denying their motion for directed verdict. They allege that plaintiffs failed to prove facts or circumstances which would establish that defendants did in fact have a duty to keep their horses from "running at large." We agree and hold that defendants' motion for directed verdict should have been granted at trial.

This case was pled and tried in tort. In order to establish negligence on the part of defendants it was imperative that plaintiffs show a breach of some duty. *Jenkins v. Stewart and Everette Theatres, Inc.*, 41 N.C. App. 262, 254 S.E. 2d 776, *cert. denied*, 297 N.C. 698, 259 S.E. 2d 295 (1979). *See* W. Prosser, Torts § 30 (4th ed. 1971).

The evidence in the record before us shows that plaintiffs and defendants both had a right to use the property for their own particular purposes. Defendants had been granted permission from Harmon to use the land as grazing pasture for their horses. Plaintiffs were subsequently allowed to use the same land for the purpose of growing Christmas trees, and although that agreement was later reduced to writing there is no evidence that the writing in any way revoked the prior agreement with defendants, or that it was even relevant as between these parties.

In fact, we are unable to determine what rights and duties were bestowed upon plaintiffs by their agreement with Harmon since it does not appear in the record at all. We are bound by the record and find no evidence of any duty on the part of defendants. For that reason defendants' motion for directed verdict was improperly denied.

Reversed.

Judges WELLS and EAGLES concur.

G & M SALES OF EASTERN NORTH CAROLINA, INC. v. WILLIAM F. BROWN

No. 828DC1180

(Filed 18 October 1983)

1. **Rules of Civil Procedure § 55— entry of default and default judgment before time to answer expired**

The clerk of court was without authority to make an entry of default and to enter a default judgment one day before the time to answer had expired. G.S. 1A-1, Rule 55.

2. **Rules of Civil Procedure § 55— filing of motion—correspondence between counsel—no filing of pleading which would prohibit entry of default**

Defendant's filing of a motion to set aside an entry of default and a default judgment and correspondence between counsel for both parties did not constitute the filing of a pleading within the purview of G.S. 1A-1, Rule 55(a) which would prohibit the clerk from subsequently making another entry of default.

APPEAL by defendant from *Jones (Arnold O.), Judge.* Judgment entered 23 September 1982 in District Court, WAYNE County. Heard in the Court of Appeals 29 September 1983.

The following facts are not controverted. This is a civil action in which plaintiff seeks to recover $6,842.57 with interest for merchandise delivered to defendant on an open account. This action was filed and summons issued on 12 February 1982. Defendant was served with the complaint and summons on 18 February 1982. On 19 March 1982, twenty-nine days later, the Clerk of

Superior Court filed an entry of default and a default judgment against defendant for his failure to answer. On 19 August 1982, at 2:51 p.m., defendant filed a motion to strike the entry of default and default judgment of 19 March. That same day at 2:54 p.m. plaintiff successfully sought a second entry of default. On 26 August 1982 defendant moved for dismissal of the second entry of default and filed a proposed answer. After a hearing on defendant's motions to set aside the 19 March entry and judgment of default and to dismiss the 19 August entry of default, the trial court entered an order denying both motions. From that order defendant appealed.

Taylor, Warren, Kerr & Walker, by David E. Hollowell for the plaintiff, appellee.

Wells, Blossom & Burrows, by Richard L. Burrows, and Phillips & Phillips, by David T. Phillips, for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant first argues that the court erred in denying his motion to set aside the entry of default and default judgment entered on 19 March 1982. We agree. Rule 55 of the North Carolina Rules of Civil Procedure, in pertinent part, provides:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought *has failed to plead* . . . the clerk shall enter his default.
>
> (b) Judgment. . . .
>
> (1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain . . . the clerk upon request of the plaintiff . . . shall enter judgment for that amount and costs against the defendant, if he has been defaulted *for failure to appear*. . . .

(Emphasis added.) All parties recognize that the entry of default and default judgment dated 19 March 1982 were entered one day before the time to answer had expired. Thus the Clerk was without authority to make an entry of default and enter a default judgment on 19 March 1982, and the same are nullities.

Finally, defendant contends the court erred in denying his motion to set aside the "second entry of default" dated 19 August 1982. Defendant argues that since plaintiff made a motion on 19 August 1982 for the entry of default in question, he was entitled to five days notice pursuant to Rule 6(d) of the North Carolina Rules of Civil Procedure, which provides: "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing. . . ." Clearly, the motion in question "may be heard ex parte." Thus the rule relied on by defendant is inapplicable.

[2] Defendant next argues that the Clerk was without authority to make an entry of default on 19 August because defendant had filed a pleading within the meaning of Rule 55(a) of the North Carolina Rules of Civil Procedure. Citing *Peebles v. Moore*, 302 N.C. 351, 275 S.E. 2d 833 (1981) and *Miller v. Belk*, 18 N.C. App. 70, 196 S.E. 2d 44 (1973), defendant argues that his lawyer's correspondence with plaintiff's counsel, together with his motion to set aside the entry of default and default judgment dated 19 March 1982, constituted a pleading within the meaning of the Rule; defendant then argues that he was thus entitled to notice within the meaning of Rule 55(a) because he had made an appearance.

The cited cases are clearly distinguishable on the critical point of whether defendant had filed a pleading within the meaning of Rule 55(a). The filing of a motion to set aside the entry of default and default judgment dated 19 March 1982 and the correspondence between counsel clearly do not amount to the filing of an answer within the meaning of the Rule. While it is uncontroverted that defendant had made an appearance in the action, this fact is of no significance in determining whether he was entitled to notice of plaintiff's motion for an entry of default under Rule 55(a). It is only in reference to entry of a default judgment, under Rule 55(b), that a party's appearance entitles him to notice. Since defendant had not filed an answer within the time prescribed by Rule 12, the Clerk had authority to make an entry of default on 19 August 1982, and the court did not err in denying defendant's motion to set it aside.

The result is: that portion of the order denying defendant's motion to set aside the entry of default and default judgment dated 19 March 1982 is reversed; that portion of the order denying defendant's motion to set aside the entry of default dated 19 August 1982 is affirmed; the cause is remanded to the District Court for further proceedings.

Reversed in part, affirmed in part, and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. CLINTON MORRIS

No. 8220SC1333

(Filed 18 October 1983)

Assault and Battery § 14.5— assault with a deadly weapon with intent to kill—sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill, the trial court properly submitted the case to the jury where the State's evidence tended to show that defendant slit the prosecuting witness's neck, face and stomach with a knife and at one point warned the witness that when he fell the next time, he would be dead, and where the witness was rushed to the hospital and received over forty stitches in his neck, stomach and face.

APPEAL by defendant from *Beaty, Judge*. Judgment entered 17 August 1982 in Superior Court, UNION County. Heard in the Court of Appeals 19 September 1983.

Defendant was charged with assault with a deadly weapon with intent to kill. The State's evidence tended to show: At around 9:00 p.m. on 31 May 1982, defendant, who had been hiding behind a telephone pole, jumped State's witness, Mr. Cecil Earp, and cut his neck with a knife. As Earp fell to the ground, defendant warned him that when Earp fell the next time, he would be dead. Earp stood and defendant then cut his face with the knife. Earp again fell and defendant jumped to the ground near Earp and cut his stomach.

Earp was taken to the hospital by ambulance, where he received twenty-six stitches in his stomach, four stitches on his face and stitches on his neck.

Earp had not provoked defendant; he had neither struck defendant nor said anything to him prior to being attacked.

The defendant's evidence tended to show: At around 9:00 p.m. on 31 May 1982, State's witness, Ms. Annie Knight, was walking down the road with Cecil Earp when she spotted defendant standing on a corner waiting for a ride. Upon seeing defendant, Ms. Knight pointed to him and said, "There he is. Get him." Earp walked over to defendant, knocked him down and held him to the ground. Earp was on top of defendant, choking him when defendant pulled out his knife and warned him that if he didn't get off, defendant would force him off. When Earp would not let defendant up, defendant cut him on the neck. Earp drew back, allowing defendant to stand, but as defendant rose, Earp hit him. Defendant then slit Earp's stomach.

Defendant walked to the home of Reverend and Mrs. Helms down the street and told Mrs. Helms that Earp had jumped him and that defendant had cut and perhaps killed him. Defendant asked them to call the police.

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

Joseph P. McCollum, Jr., for defendant appellant.

VAUGHN, Chief Judge.

In his first Assignment of Error, defendant contends that the trial judge erred in denying defendant's motion for judgment of nonsuit at the close of the State's evidence. Defendant argues that there was insufficient evidence of intent to kill to merit submission to the jury on the charge of assault with a deadly weapon with intent to kill. For the reasons set forth below, we find that the judge was correct in denying defendant's motion and submitting the case to the jury.

When ruling on a motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978). Any evidence at all, even a mere scintilla, that tends to prove defendant's guilt or which leads to that conclusion as a logical or

legitimate deduction is for the jury to resolve. Once the State produces evidence of the fact in issue, the jury must decide whether it is convinced beyond a reasonable doubt of defendant's guilt. *See id.; State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

The State, in this case, produced substantial evidence warranting submission to the jury on the question of defendant's guilt. The State's evidence tended to show that defendant slit witness Earp's neck, face and stomach with a knife and at one point warned Earp that when he fell the next time, he would be dead. Earp was rushed to the hospital, where he received over forty stitches on his neck, stomach and face.

Intent to kill, being a state of mind of the defendant, is not easily susceptible of proof, and ordinarily must be proven by circumstantial evidence from which a jury could reasonably infer intent. *State v. Ransom*, 41 N.C. App. 583, 255 S.E. 2d 237 (1979). The nature of the assault, the manner in which it was made, and the surrounding circumstances are all matters from which an intent to kill could be inferred. *Id.* The inference is to be drawn by the jury, not the Court. *See State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). The circumstances and manner of the assault in this case, viewed in the light most favorable to the State, was sufficient to withstand defendant's motion for nonsuit. The evidence merited consideration by the jury.

In response to defendant's second contention that the trial court committed prejudicial error in instructing the jury on assault with intent to kill inflicting serious injury, we find that for the reasons set out above, there was sufficient evidence meriting such instruction.

No error.

Judges WHICHARD and PHILLIPS concur.

WARREN BROTHERS COMPANY, A DIVISION OF ASHLAND OIL, INC. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8221SC1159

(Filed 18 October 1983)

Highways and Cartways § 9— highway construction contract—no right of action by subcontractor

Where a highway construction contract provided that a subcontractor could not assert a claim against defendant Department of Transportation, the contractor could not assert a claim against defendant on behalf of its subcontractor.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 23 July 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 September 1983.

This is a civil action upon a highway construction contract in which plaintiff seeks to recover on behalf of Lancaster Brothers, Inc. (hereinafter Lancaster), a subcontractor, because of difficulties encountered by Lancaster in installing guardrails. Plaintiff sued alleging among other things:

> 11. Upon information and belief, the total reasonable and additional costs incurred to perform the work at the Project . . . amount to $52,442.12, and Lancaster is entitled to recover said amount from the Defendant through the Plaintiff.
>
> . . .
>
> 17. Upon information and belief, the Defendant owes Lancaster through the Plaintiff the additional sum of $1,394.57.
>
> . . .
>
> 21. Upon information and belief, Lancaster has been damaged by the retention of $28,800.00 in liquidated damages by the Defendant and Lancaster is entitled to have said sum remitted to it.

On 12 March 1982 the defendant moved to dismiss the complaint pursuant to Rule 17, North Carolina Rules of Civil Procedure, for failure to prosecute in the name of the real party in

interest. The motion was denied on 23 July 1982. Following the denial of the motion and with the consent of both parties, the trial court heard an oral motion by the defendant for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. The court, after reviewing the pleadings and discovery conducted, granted summary judgment for the defendant.

From entry of summary judgment for the defendant, plaintiff appealed. The defendant cross-appealed from the denial of its motion to dismiss under Rule 17 and from an earlier ruling denying a motion to quash an alias and pluries summons.

Miller, Johnston, Taylor & Allison, by Robert J. Greene, Jr., for the plaintiff, appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Blackwell M. Brogden, Jr., for the defendant, appellee, cross-appellant.

HEDRICK, Judge.

PLAINTIFF'S APPEAL

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. RULES CIV. PROC. 56(c). Where the pleadings or proof of either party disclose that no claim or defense exists, summary judgment is proper. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). In such cases the claim or defense of a party is said to be insurmountably barred. *See e.g., Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E. 2d 562 (1981). Our examination of the record in the instant case discloses such a bar to plaintiff's claim and dictates that the trial court's grant of summary judgment for defendant be affirmed.

It is undisputed that plaintiff brings this action on behalf of its subcontractor, Lancaster, and that any recovery by plaintiff from defendant will inure to the benefit of Lancaster. Also undisputed is that the contract entered into by plaintiff and defendant contains the following provision:

> The Contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the contract or any portion thereof, or of his right, title or interest therein, without written consent of the Engineer. . . . The approval of any subcontract will not release the Contractor of his liability under the contract and bonds, nor will the Sub-contractor have any claim against the Commission (now NCDOT) by reason of the approval of the subcontract.

Under this provision, Lancaster has no claim against the defendant; plaintiff thus has no claim on behalf of Lancaster. Because the record discloses an insurmountable bar to any claim by plaintiff on behalf of Lancaster, summary judgment for defendant was proper.

Plaintiff cites *Blount Bros. Constr. Co. v. United States*, 348 F. 2d 471 (Ct. Cl. 1965) and *Seger v. United States*, 469 F. 2d 292 (Ct. Cl. 1972) in support of its argument that summary judgment was inappropriate. We find these cases inapposite. The contract in the instant case provides that plaintiff's subcontractor may not assert a claim against the defendant. The subcontractor may not do indirectly through plaintiff what it could not do directly by suit against the defendant.

DEFENDANT'S APPEAL

The defendant's appeal is moot upon the affirmation of summary judgment in its favor.

Affirmed.

Judges WEBB and HILL concur.

RAYMOND R. MEDLIN v. SEENA L. MEDLIN

No. 8220DC1108

(Filed 18 October 1983)

1. Divorce and Alimony § 21.3— no specific finding of ability to comply with alimony order—implicit in findings

Although there was not an explicit finding of present ability to comply or to take reasonable measures to enable plaintiff to comply with an order of

alimony, that plaintiff had the ability to comply, or to deal with his assets so as to enable him to comply, and had willfully failed or refused to do so, was implicit in findings which dealt with his assets.

2. **Divorce and Alimony § 19.4— modification of alimony—failure to show changed circumstances**

Plaintiff failed to carry his burden of proving that his present overall circumstances, compared with those circumstances present at the time of the original alimony award, entitled him to a reduction in payment.

APPEAL by plaintiff from *Honeycutt, Judge.* Order entered 4 June 1982 in District Court, UNION County. Heard in the Court of Appeals 19 September 1983.

In a consent order dated 10 January 1980 the court found that defendant was a dependent spouse and ordered plaintiff, *inter alia,* to pay her $200 per month as permanent alimony. On 22 April 1982 defendant moved that plaintiff be required to show cause why he should not be held in contempt for arrearages. On 18 May 1982 plaintiff moved for an order reducing the payments on grounds of inability to pay resulting from decreased income.

The court found as facts that plaintiff had made no payments in 1982 and was $1,000 in arrears; that he was the sole proprietor of a business; that he had grossed approximately $3,000 during 1982; that he had listed his business for sale for $35,000; that he had recently obtained a $17,000 loan; and that he owned a 1977 Dodge van, a 1972 Chevrolet, and a 1965 Ford. It concluded from these findings that plaintiff had sufficient assets to pay alimony as ordered and was in contempt for failure to do so. It further concluded that he had made an insufficient showing of a change in circumstances to merit reduced payments. It thereupon ordered him confined for contempt and denied his motion for reduction.

From this order, plaintiff appeals.

Griffin, Caldwell, Helder & Steelman, P.A., by Sanford L. Steelman, Jr., for plaintiff appellant.

Joe P. McCollum, Jr., for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff contends the findings are insufficient to show willful failure to comply, and that the court thus erred in holding him in

contempt. He argues that they do not show that he "is able to comply . . . or . . . to take reasonable measures that would enable him to comply," G.S. 5A-21(a)(3), and that they thus do not support the order.

As noted, the court found that plaintiff was the sole proprietor of a business; had grossed approximately $3,000, or $600 per month, during the first five months of 1982; had listed the business for sale for $35,000; and owned three motor vehicles. These findings are supported by competent evidence, and thus are reviewable only for sufficiency to warrant the judgment. *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E. 2d 129, 139 (1978); *Jones v. Jones*, 52 N.C. App. 104, 111, 278 S.E. 2d 260, 265 (1981).

That plaintiff had the ability to comply, or to deal with his assets so as to enable him to comply, and had willfully failed or refused to do so, is implicit in the above findings. His arrearages totalled only $1,000, and the findings established that he "had resources upon which to call" with a value in excess of that amount. *See Reece v. Reece*, 58 N.C. App. 404, 407, 293 S.E. 2d 662, 664 (1982). While an explicit finding of present ability to comply or to take reasonable measures to enable compliance, and of willful failure or refusal to do so, would have been preferable, the conclusion from the findings made that plaintiff "has sufficient assets to pay alimony as ordered" adequately serves the purpose. It thus suffices to warrant the order of contempt. *See Daugherty v. Daugherty*, 62 N.C. App. 318, 320, 302 S.E. 2d 664, 665 (1983) (absence of finding as to ability immaterial where evidence plainly shows capacity to comply).

[2] Plaintiff contends the court erred in denying his reduction motion. An order for alimony may be modified or vacated at any time upon a showing of changed circumstances. G.S. 50-16.9(a). The change must be substantial, however, and the moving party has the burden of proving that the award is either inadequate or unduly burdensome. *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E. 2d 921, 926 (1980); *see also Gill v. Gill*, 29 N.C. App. 20, 21, 222 S.E. 2d 754, 755 (1976).

A conclusion of a substantial change in circumstances based solely on a change in income is inadequate and erroneous. *Britt, supra.* The extant overall circumstances of the parties must be compared with those at the time of the award to determine

whether a substantial change has occurred. *Britt, supra,* 49 N.C. App. at 474, 271 S.E. 2d at 928.

> The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree.

Annot., 18 A.L.R. 2d 10, 43 (1951), *quoted with approval in Britt, supra,* 49 N.C. App. at 472, 271 S.E. 2d at 927.

The original order and the reduction motion showed plaintiff's income at the time of the original award as $150 per week. Plaintiff relies on the contrasting evidence here that his income in 1982 was only a small sum drawn from the business to reimburse personal expenses and pay a personal account.

Under the standard set forth in *Britt,* a finding of changed circumstances based on this evidence alone would have been error. Plaintiff did not carry his burden of proving that his present overall circumstances, compared with his circumstances at the time of the award, entitled him to a reduction in payments. The court thus could refuse to modify the order. *Britt, supra.*

Plaintiff finally contends the findings and conclusions are not supported by the evidence, and that the court erred in failing to make certain other findings and resultant conclusions. The material findings are supported by competent evidence. The court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment. *Lea Co. v. Board of Transportation,* 57 N.C. App. 392, 405, 291 S.E. 2d 844, 852, *disc. rev. granted,* 306 N.C. 557, 294 S.E. 2d 371 (1982); *In re Custody of Stancil,* 10 N.C. App. 545, 549, 179 S.E. 2d 844, 847 (1971). The facts which plaintiff contends the court should have found were not material to support its judgment, and the court did not err in failing to find them.

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

WILLIAM EDWARD FINK v. STALLINGS 601 SALES, INC., AND CITICORP PERSON-TO-PERSON FINANCIAL CENTER, INC., AND NORTH RIVER INSURANCE COMPANY

No. 8219DC1165

(Filed 18 October 1983)

Automobiles and Other Vehicles § 5— inventory financing on vehicles—financial institution not purchaser—no recovery on surety bond

A financial institution which provided inventory financing to a motor vehicle dealer and which had a security interest in a motor home in the dealer's inventory was not a "purchaser" of the motor home within the purview of G.S. 20-288(e) and thus was not entitled to recover under the motor vehicle dealer's surety bond when the motor home was sold by the dealer and the amount owed by the dealer was not remitted to the financial institution.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 2 August 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 27 September 1983.

Defendant Citicorp appeals from the dismissal of its crossclaim against co-defendant North River Insurance Company. On 14 December 1979 plaintiff bought a 1979 Honey motor home from defendant Stallings 601 Sales, Inc., a licensed motor vehicle dealer. He paid the full purchase price of $11,900, but did not at that time receive a certificate of title.

At the time of this purchase, defendant Citicorp provided Stallings with general inventory financing. Pursuant to the financing agreement, Citicorp held some security interest in the inventory of the Stallings dealership, including the 1979 motor home in question. Citicorp continued to hold the certificate of title for the motor home, although it was issued in the name of Stallings 601 Sales, Inc. The balance owed by Stallings to Citicorp on the motor home was $11,245.50. Stallings neither reported the sale of the motor home to Citicorp, nor paid Citicorp the balance due on the vehicle.

Plaintiff filed a complaint against Citicorp, seeking to compel delivery of the certificate of title. In the alternative, plaintiff sought monetary damages from Stallings and North River Insurance Company, the surety on Stallings' motor vehicle dealer's bond. Citicorp crossclaimed against Stallings and North River to

indemnify it if plaintiff recovered from Citicorp. North River crossclaimed against Stallings for indemnity.

Summary judgment was entered in favor of plaintiff against Citicorp for possession of the certificate of title, and plaintiff filed a voluntary dismissal as to the remaining defendants. Citicorp and North River filed voluntary dismissals of their crossclaims against Stallings. Citicorp's crossclaim against North River was dismissed and is the subject of this appeal.

Williams, Boger, Grady, Davis and Tuttle, by Samuel F. Davis, Jr., for defendant-appellant.

Golding, Crews, Meekins, Gordon & Gray, by Ned A. Stiles, for defendant-appellee.

ARNOLD, Judge.

Defendant Citicorp contends it is a "purchaser" under G.S. 20-288(e) and thereby entitled to indemnity from North River Insurance Company, the surety on Stallings' motor vehicle dealer's bond, for recovery of the $11,245.50 balance due from Stallings on the 1979 Honey motor home.

The statute in question provides in part:

> Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. G.S. 20-288(e).

It is clear that only *purchasers* of motor vehicles may recover under a motor vehicle surety bond. *Triplett v. James*, 45 N.C. App. 96, 262 S.E. 2d 374 (1980), *disc. rev. den.*, 300 N.C. 202, 269 S.E. 2d 621 (1980). Furthermore, where words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is indicated. *Lafayette Transp. Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973).

The common meaning of "purchaser," as defined in Webster's Third New International Dictionary (1968), is "one that acquires property for a consideration (as of money)." Although Citicorp did have an interest in the 1979 motor home, it cannot be said that it

acquired the vehicle. Citicorp never took possession of the motor home. It was never issued a certificate of title in its own name. Registration cards and license plates were never issued to Citicorp. All Citicorp had was a security interest. We hold that Citicorp is not a "purchaser" under the common and ordinary meaning of the word, and is, therefore, not entitled to recover under G.S. 20-288.

Affirmed.

Judges PHILLIPS and EAGLES concur.

DESSIE CANIPE CHAMPION v. JACK DELANO CHAMPION

No. 8225DC1015

(Filed 18 October 1983)

1. **Divorce and Alimony § 24.5— support—change of circumstances increasing amount**

The findings of fact amply supported a court's conclusion that a substantial change of circumstances had occurred meriting an increase in child support payments.

2. **Divorce and Alimony § 24.4— child support—garnishment of wages**

Garnishment in child support cases is not punitive as its only function is to aid in the collection of debts and willfulness on the debtor's part is no prerequisite to it. G.S. 50-13.4(f). G.S. 110-136(b) which requires a copy of the petition to garnish to be served on the responsible parent's employer in advance of the hearing is for the benefit of the employer, and failure to give notice was not prejudicial to defendant.

APPEAL by defendant from *Crotty, Judge*. Judgment entered 1 July 1982 in District Court, BURKE County. Heard in the Court of Appeals 25 August 1983.

In this divorce and custody action, the decree was entered in September, 1977. By order entered in January, 1978, custody of their three children, then 10, 8 and 7 years old, was given to plaintiff and defendant was ordered to pay $150 per month for their support. In March, 1982, by a motion in the cause, plaintiff alleged that defendant had been repeatedly tardy in making the payments ordered, was then in arrears, the monthly payments

should be increased because the cost of supporting the children had substantially increased during the four years since the initial order was entered, and the monies due her thereafter from the defendant should be garnisheed from the retirement benefits he receives each month from the United States Navy. After hearing the testimony of the parties and making various findings and conclusions, the court entered judgment increasing defendant's monthly payments to $200, requiring the Navy to deduct $200 from defendant's benefits each month and forward it to plaintiff, giving plaintiff "exclusive custody" of the three children, and requiring defendant to pay plaintiff's attorney $300.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, by C. Scott Whisnant, for plaintiff appellee.

John H. McMurray and Martha McMurray for defendant appellant.

PHILLIPS, Judge.

Since the defendant did not except to any of the court's findings of fact, but only to certain of the court's conclusions of law and orders, the scope of this appeal is quite narrow; and it is rendered more narrow still by the fact that the evidence presented during the hearing on plaintiff's motion was not brought forward in the record. Thus, the correctness of the findings and whether they are supported by evidence have been eliminated from our consideration. The findings, carefully and conscientiously made, apparently, amply support the court's conclusions of law and resultant judgment, the provisions of which contain no legal error. Therefore the judgment appealed from is affirmed.

[1] Though the defendant contends that the court erred in concluding that a substantial change of circumstances had occurred meriting an increase in the support payments required of him, the court's findings show otherwise. In meticulous detail, the court found that a number of the costs of supporting the children had increased during the intervening four years; not only because of inflation, about which everyone knows, but also because the needs of the three children understandably increased with the passing years as they changed from little girls into young ladies. Furthermore, the monthly support payments for the children have not really increased yet and won't for some time, since under the

terms of the judgment $50 out of each $200 payment must be applied to defendant's arrearage and his debt to plaintiff's attorney until those obligations, totalling $1,050, are paid.

Defendant also contends that the trial court erred in awarding plaintiff the "exclusive" custody of the three children and in failing to provide for his visitation rights. If we interpreted the order as depriving the defendant of the visitation rights that he enjoyed under the previous order, we would agree, since no finding to support any change in that arrangement was made. But we do not so construe the order. In the previous order, though plaintiff was given custody of the children, defendant was accorded definite visitation rights and since visitation is not even mentioned in this judgment the continuance of those rights is presumed. Which no doubt is what the court intended, since the only reference to custody, or any aspect of it, in the findings was that "[p]laintiff is a fit and proper person to have *continued* exclusive care, custody and control of the three minor children. . . ." (Emphasis supplied.) In all events, our holding is that the defendant's visitation rights have not been changed or curtailed by any provision of the judgment appealed from.

[2] Defendant's final assignment of error relates to the garnishment of $200 from the benefits he receives each month from the Navy. First, he contends that it was error to order garnishment in the absence of a finding that his failure to pay promptly each month as ordered was "wilful." But, unlike civil contempt, garnishment in child support cases is not punitive; its only function is to aid in the collection of debts and wilfulness on the debtor's part is no prerequisite to it. G.S. 50-13.4(f); G.S. 110-136. He also argues that it was error to garnish the Navy without having first served a copy of the petition for garnishment on the Navy as required by G.S. 110-136(b). Though that statute does require a copy of the petition to be served on the responsible parent's employer in advance of the hearing thereon, and plaintiff concedes that this was not done, we are of the opinion this was not prejudicial to the *defendant.* The notice required is for the benefit of the employer, rather than the debtor, and can be waived by the party entitled to it. *Story v. Story,* 27 N.C. App. 349, 219 S.E. 2d 245 (1975). The Navy waived the notice it was entitled to by complying with the garnishment order. That it did so is not legally prejudicial to

the defendant, who, as a delinquent debtor, has been a fit subject for garnishment for several years.

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA POWER & LIGHT COMPANY (APPLICANT); U. S. DEPARTMENT OF DEFENSE; FEDERAL PAPER BOARD COMPANY, INC.; IDEAL BASIC INDUSTRIES; MONSANTO N. C.; UNION CARBIDE CORP.; WEYERHAEUSER CO.; AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION v. THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION; AND KUDZU ALLIANCE

No. 8210UC858

(Filed 18 October 1983)

Electricity § 3; Utilities Commission § 38— electric rates—use of fuel costs established in fuel clause proceeding—failure to find reasonableness

The Utilities Commission erred in using fuel costs established in a fuel clause proceeding under G.S. 62-134(e) as the fuel cost component for a power company in a general rate case without determining the reasonableness of the test year fuel expenses.

APPEAL by intervenors, the Public Staff-North Carolina Utilities Commission and Kudzu Alliance, from an order entered by the North Carolina Utilities Commission on 12 February 1982. Heard in the Court of Appeals 7 June 1983.

This case involves an application for a rate increase by Carolina Power and Light Company (hereinafter CP&L) filed with the North Carolina Utilities Commission on 15 May 1981. The application requested a 16.37 percent increase to produce additional annual revenue of approximately $151,432,000. In an order issued 12 June 1981, the Commission declared the application a general rate case pursuant to N.C. Gen. Stat. Sec. 62-137 and set the test period as the twelve months ending 31 December 1980. The following ten parties intervened: the Public Staff, the Kudzu Alliance, the Department of Defense, the North Carolina Textile Manufacturers Association, Inc., the Conservation Council of

North Carolina, Federal Paper Board Company, Ideal Basic Industries, Monsanto of North Carolina, Inc., Union Carbide Corporation, and Weyerhaeuser Company.

On 21 August 1981 CP&L filed revised testimony including information on revenues, expenses, investments and pro forma adjustments for a twelve month period ending 31 May 1981. The updating indicated that CP&L's cost of providing service had increased approximately $10,244,000 from 31 December 1980 to 31 May 1981. The Public Staff moved to strike the new data or in the alternative to delay the hearings, but the motion was denied. The Public Staff and the North Carolina Textile Manufacturers, also filed motions to consolidate a pending fuel clause proceeding with the general rate case. These motions were denied as well.

Public hearings took place from 12 October 1981 through 5 November 1981. On 12 October 1981 the Public Staff filed a motion requesting ten days to prepare cross examination. The Commission deferred ruling on the motion, but later denied the motion when it was renewed by the Public Staff on 5 November 1981. The Public Staff then waived cross examination because it allegedly had insufficient time to prepare.

The Commission granted a $119,197,000 increase to CP&L, which was 79 percent of its original request, by an order issued on 15 December 1981. The Commission issued its final order on 12 February 1982 affirming the 15 December 1981 order and setting out the grounds for the findings made therein. From the Commission's final order, the intervenors, Public Staff and Kudzu Alliance, appealed.

Hunton & Williams, by Robert C. Howison, Jr. and Edgar M. Roach, Jr. and Richard E. Jones and Robert W. Kaylor for Carolina Power and Light Company, applicant, appellee.

Theodore C. Brown, Jr., Karen E. Long and Antoinette R. Wike for the Public Staff-North Carolina Utilities Commission, intervenor, appellant.

Edelstein and Payne, by M. Travis Payne for Kudzu Alliance, intervenor, appellant.

HEDRICK, Judge.

The appellants, Public Staff and Kudzu Alliance, contend that the Commission erred by acting arbitrarily, capriciously and outside its statutory authority in granting a rate increase without determining reasonable test year fuel expenses pursuant to N.C. Gen. Stat. Sec. 62-133(b)(3). N.C. Gen. Stat. Sec. 62-133(b)(3) directs the Commission to "[a]scertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation." In its Finding of Fact No. 16 the Commission stated:

> The fuel cost component which should be included in the rates approved in this proceeding is the base fuel cost approved in Docket No. E-2, Sub 434, the most recent proceeding under G.S. 62-134(e).

The appellants contend that fuel cost determined pursuant to a proceeding under N.C. Gen. Stat. Sec. 62-134(e) (repealed 1981) should not be used as a substitute for determining reasonable fuel costs in a general rate case because N.C. Gen. Stat. Sec. 62-134(e) provides for an expedited proceeding which does not account for overall system efficiency in deriving the reasonable cost of fuel during the test year. We agree.

The Supreme Court in *State ex rel. Utilities Comm. v. N. C. Textile Mfrs. Assoc.*, 309 N.C. 238, 306 S.E. 2d 113 (1983) held that it was improper to adopt fuel costs established in the next preceding fuel cost adjustment proceeding as the fuel cost component used in establishing the general rate. In a general rate case the reasonable operating expense of the utility must be determined by the Commission. These expenses include the cost of fuel and purchased power.

Therefore, we must reverse the order of the Utilities Commission and remand this cause for such further proceedings as may be necessary in light of recent Supreme Court decisions.

Reversed and remanded.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DANIEL COPELAND

No. 831SC75

(Filed 18 October 1983)

Searches and Seizures § 19— illegible application and affidavit—deviation from statute not substantial

There was not a substantial deviation of the requirements of G.S. 15A-252 where the application and affidavit attached to a search warrant were illegible since (1) the warrant was legible and there was no question as to the area being searched, (2) if the defendant desired to challenge the validity of the affidavit and application there was little difficulty in using the originals on file with the court, and (3) there was no evidence that the violation was willful. G.S. 15A-974.

APPEAL by defendant from *Smith, Judge.* Judgment entered 15 November 1982 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 29 September 1983.

Defendant was indicted for possession of Lysergic Acid Diethylamide, a Schedule I controlled substance. He filed motions to suppress evidence seized during a search of his premises pursuant to a search warrant, and to suppress any statement made by the defendant during the search. The evidence showed that the application and affidavits attached to the copy of the search warrant were illegible. The court overruled the motions to suppress and the defendant pled guilty after informing the court of his intention to appeal.

The defendant appealed from the imposition of a sentence.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Twiford and Derrick, by Jack H. Derrick, for defendant appellant.

WEBB, Judge.

The defendant argues that it was error to admit evidence seized as a result of the search because the search was conducted in such a way that there was a substantial violation of G.S. 15A-252. The defendant contends the evidence should be excluded under G.S. 15A-974(2). G.S. 15A-252 requires that a copy of the

search warrant must be left with the person searched. The defendant argues that since the application and affidavit attached to the search warrant were illegible, a copy of the search warrant was not left with him as required by G.S. 15A-252. G.S. 15A-974 provides:

> Upon timely motion, evidence must be suppressed if:
>
> . . . .
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful;
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.

In determining whether the search was a substantial violation of G.S. 15A-252, we are guided by *State v. Fruitt*, 35 N.C. App. 177, 241 S.E. 2d 125 (1978). In that case, the searching officer did not leave a copy of an inventory of seized property or a copy of the warrant on the premises after he had conducted the search. He gave such copies to the defendant at a later time when he arrested him. This Court held this was not a substantial violation of the Chapter.

In this case we do not believe the deviation of the officer from the requirement of G.S. 15A-252 was substantial. The interest violated would be the invasion of the defendant's privacy not in conformity with G.S. 15A-252. We believe this was minimal. The warrant was legible and there was no question as to the area being searched. If the defendant desired to challenge the validity of the affidavit and application there would be little difficulty in using the originals on file with the court. There is no evidence that the violation was wilful and we do not believe the exclusion of the evidence in this case will tend to deter future violations. We believe some deviations by accident in the serving of search warrants will occur in future cases as it did in this case whatever

result we reach. The defendant's first assignment of error is overruled.

The defendant also assigns error to the admission in evidence of certain statements he made to the officers at the time of the search. The defendant contends these statements were the "fruit of a poisonous tree" and should have been excluded. *See State v. McDaniel*, 274 N.C. 574, 164 S.E. 2d 469 (1968). Since we have held the search did not substantially deviate from the requirement of G.S. 15A-252, we do not believe there was a "poisonous tree." This assignment of error is overruled.

Affirmed.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. JERRY DAVID STRANGE

No. 8326SC35

(Filed 18 October 1983)

Criminal Law § 138— voluntary manslaughter—aggravating factor—use of stolen pistol

In imposing a sentence for voluntary manslaughter by shooting the victim with a pistol, the trial court erred in finding as an aggravating factor that the offense was committed with a stolen pistol since the court had to use evidence that defendant shot deceased in order to find that the offense was effected by the pistol, and the court thus used the same evidence to find a part of the aggravating factor as was used to prove an element of the offense in violation of G.S. 15A-1340.4(a)(1).

Judge HILL dissenting.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 26 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1983.

The defendant was convicted of voluntary manslaughter. The evidence showed he had stolen a pistol on the morning of the homicide, which pistol he used to kill the deceased. There was also evidence that the defendant had previously been found guilty of temporary larceny of an automobile. The court found as aggravating factors that (1) "the defendant has a prior conviction or

convictions for criminal offenses punishable by more than 60 days confinement" and (2) "the offense committed herein was effected by means of a stolen .38 caliber pistol, which the defendant had acquired by breaking into a motor vehicle on or about November 19, 1981."

The court found the aggravating factors outweighed the mitigating factors and imposed a sentence in excess of the presumptive sentence. The defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Peter H. Gerns, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the finding of factors in aggravation of the offense. We believe this assignment of error has merit. G.S. 15A-1340.4(a)(1) provides: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." The court found as one aggravating factor that the offense was committed with a stolen pistol. In this case, to prove that the defendant killed the deceased, an element of manslaughter, it was necessary to use the evidence that the defendant shot the deceased. While the fact that the pistol was stolen is not an element of manslaughter, a part of the aggravating factor found by the court is that the offense was effected by means of this pistol. To find it was effected by this pistol the court had to use evidence that the defendant shot the deceased. We believe the court thus used the same evidence to find a part of the aggravating factor as was used to prove an element of the offense. The court is proscribed from doing this.

The aggravating factor that the defendant had a prior conviction for a criminal offense punishable by more than 60 days confinement was supported by the evidence. The defendant argues at length that the court imposed too lengthy a sentence in light of finding certain mitigating factors and the defendant's showing as to his good character. These are matters he may argue at the next sentencing hearing.

For the reasons stated in this opinion we reverse and remand for a new sentencing hearing.

Reversed and remanded.

Judge HEDRICK concurs.

Judge HILL dissenting.

In my opinion, the trial judge properly considered as an aggravating factor in sentencing, the crime of stealing the pistol used to commit the offense of manslaughter. Had the defendant previously been convicted for the larceny, the court could have considered the prior crime as one punishable by more than 60 days confinement. Since the evidence is uncontradicted, I believe the trial judge was correct in using it as an aggravating factor. I vote no error.

STATE OF NORTH CAROLINA v. ROBERT RAY GREENE

No. 8310SC46

(Filed 18 October 1983)

Larceny § 7.2— misdemeanor larceny—insufficient evidence

The evidence was insufficient in a prosecution for misdemeanor larceny for the case to have been submitted to the jury where employees from two different stores failed to testify that they saw defendant take anything from either store, and where neither employee testified that anything was missing from either store after the defendant had been in the stores.

Judge HILL dissenting.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 26 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 27 September 1983.

The defendant was charged in two separate warrants with misdemeanor larceny. He was convicted on both charges in the District Court and appealed to the Superior Court. The two cases were consolidated for trial in Superior Court. The evidence showed that on the night of 19 April 1982 the defendant was observed by Ms. Blanche Steinbeck, a night cashier in Eckerd's store in Holly Park. The defendant was at the magazine rack with his hand reaching toward a shelf where radios and other items were kept. She saw the defend-

ant go into an area of the store where cosmetics were kept. Ms. Steinbeck called the police when she saw the defendant go into the cosmetics area of the store. The defendant left the store shortly thereafter. The defendant was pulling at his shirt when he left the store.

James McConnell, the night manager of the A&P store, testified that earlier on the same night he saw the defendant at the meat counter of the A&P store. The defendant was handling meat but left the store before Mr. McConnell could call the police. The defendant's shirttail was "hanging outside his slacks and was bulged." The defendant did not pass through the checkout register as he left the store. Mr. McConnell saw him enter a brown or tan automobile.

A police officer saw the defendant enter an automobile after leaving Eckerd's store. He stopped the automobile. He found in the automobile three packages of meat which had A&P labels. The defendant had on his person cosmetics, jewelry, necklaces, cologne, hair care products, other cosmetics, and a radio, all of which were identified as coming from the Eckerd's store. Mr. McConnell identified the meat as having come from the A&P store.

The jury found the defendant guilty on both charges and he appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

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

WEBB, Judge.

The defendant assigns error to the overruling of his motion to dismiss both charges. We believe this assignment of error has merit. We do not believe that in either case there was sufficient evidence that personal property was stolen for the cases to be submitted to the jury. Neither Ms. Steinbeck nor Mr. McConnell testified that she or he saw the defendant take anything from either store. Neither testified that anything was missing from either store after the defendant had been in them.

We do not believe the doctrine of possession of recently stolen goods has any application. *See State v. Voncannon*, 302 N.C. 619, 276 S.E. 2d 370 (1981). There was not sufficient evidence that the goods in the defendant's possession were stolen for the doctrine to apply. The fact that they came from Eckerd's and the A&P store and the defendant had not purchased them is not sufficient evidence for the jury to find they had been stolen.

We hold it was error not to grant the defendant's motion to dismiss the charges in both cases.

Reversed.

Judge HEDRICK concurs.

Judge HILL dissenting.

I dissent. In my opinion the evidence involves more than the question of recent possession. There is present evidence from which the jury could infer the defendant had stolen the merchandise. The trial judge properly submitted the case to the jury. I vote no error.

STATE OF NORTH CAROLINA v. EDWARD LEON MILLER

No. 8321SC74

(Filed 18 October 1983)

Criminal Law § 138— aggravating factor in sentencing—sentence necessary to deter others

In imposing a sentence greater than the presumptive term, the trial court erred in finding as an aggravating factor that the sentence was necessary to deter others from committing the same crime.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 2 November 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 September 1983.

Defendant entered a plea of guilty to the sale of cocaine. A sentencing hearing was conducted after which the court found the following aggravating factor: "[t]he sentence is necessary to deter

others from committing the same crime." The court found no mitigating factors even though the defendant offered evidence, to which the State stipulated, that he had no prior criminal record. Upon finding that the factors in aggravation outweighed the factors in mitigation the court imposed a sentence, greater than the presumptive term, of six years. Pursuant to N.C. Gen. Stat. Sec. 15A-1444(a1) defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Powell and Yeager, by Harrell Powell, Jr. and David E. Cresenzo, for the defendant, appellant.

HEDRICK, Judge.

Defendant first assigns as error the trial court's finding as an aggravating factor that the sentence is necessary to deter others from committing the same crime. In *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983), the Supreme Court held that this could not be an aggravating factor because it presumably was one of the bases for determining the presumptive sentence and was within the "exclusive realm of the legislature." The Supreme Court further held the finding to be an improper aggravating factor because it fails to relate to "the character or conduct of the offender." *Id.* at 180, 301 S.E. 2d at 78. Therefore, we are compelled to find that the trial court erred in its findings of factors in aggravation.

"[I]n every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

Defendant further contends the trial court erred by failing to find factors in mitigation. Since there must be a new sentencing hearing we need not discuss this assignment of error.

Remanded for resentencing.

Judges WEBB and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 OCTOBER 1983

BLACKMAN v. WILKINS No. 838SC419	Wayne (82CVS1280)	Affirmed
DAVIS OIL v. SOUTHLAND CORP. No. 8222SC1187	Iredell (80CVS957) (80CVS956)	Dismissed
FRANCIS v. FRANCIS No. 8318DC470	Guilford (82CVD3065)	Affirmed
GRINGLE v. EPPS No. 8214SC267	Durham (78CVS1617)	Affirmed
HODGES v. WEST No. 838SC338	Lenoir (81SP80)	Dismissed
KELLY v. WILKINS No. 838SC284	Wayne (82CVS534)	Affirmed
KIRKS v. KIRKS No. 8310DC278	Wake (78CVD1458)	Affirmed
NIMIA v. UNC ASHEVILLE No. 8328SC337	Buncombe (82CVS0069)	Dismissed
ROBINSON v. COMR. MOTOR VEH. No. 8320SC310	Moore (81CVS716	Affirmed
SHANNON v. VAUGHN No. 8325SC321	Catawba (82CVS1177)	Affirmed
SHOLAR v. HOUSER No. 8312DC299	Cumberland (81CVD496) (81CVD497)	Affirmed
SMITH v. SMITH No. 837DC465	Wilson (82CVD625)	Affirmed
STATE v. BLANKENSHIP No. 8329SC440	Henderson (82CRS920) (82CRS921)	No Error
STATE v. BOWMAN No. 8325SC424	Caldwell (82CRS5047)	No Error
STATE v. BRAY No. 8224SC1252	Yancey (81CRS1097)	No Error
STATE v. CALDWELL No. 8330SC487	Haywood (82CRS4949)	Remanded

STATE v. CHISHOLM No. 838SC330	Wayne (82CRS9611) (82CRS9611-A)	No Error
STATE v. CLAY No. 828SC1216	Wayne (81CRS16890) (81CRS16891) (81CRS16886) (81CRS16885)	No Error
STATE v. COHEN No. 831SC483	Perquimans (82CRS792)	No Error
STATE v. COOPER No. 832SC262	Washington (81CRS1601)	No Error
STATE v. CROCKETT No. 8221SC1345	Forsyth (82CRS2385) (82CRS36066)	No Error
STATE v. DAVIS No. 836SC441	Northampton (82CRS4213)	No Error
STATE v. EVANS No. 834SC12	Sampson (82CRS4521)	No Error
STATE v. HARRIS No. 8328SC361	Buncombe (82CRS12495) (82CRS12503)	No Error
STATE v. LANE No. 838SC57	Wayne (82CRS5466)	No Error
STATE v. McCLURE No. 8325SC243	Caldwell (82CRS2675)	No Error
STATE v. McKINNON No. 8216SC1240	Robeson (72CR460)	No Error
STATE v. MARLOW No. 834SC405	Duplin (82CRS5685) (82CRS5686)	No Error
STATE v. NORMAN No. 8315SC292	Alamance (82CRS4763)	No Error
STATE v. OLDS No. 832SC260	Tyrrell (78CRS126)	No Error
STATE v. OSBORNE No. 8319SC471	Rowan (82CRS4141)	No Error
STATE v. PICKENS No. 8328SC264	Buncombe (81CRS7075)	No Error
STATE v. SHELTON No. 832SC44	Hyde (81CRS203)	No Error

STATE v. SPACEK No. 8319SC344	Randolph (82CRS2852)	Affirmed
STATE v. STANLEY No. 8322SC298	Davie (82CRS3726, Co. of Hearing) Rowan (80CRS8657, Co. of Origination)	Affirmed
STATE v. TALLEY No. 8326SC328	Mecklenburg (82CRS12983)	No Error
STATE v. TAYLOR No. 839SC280	Person (80CRS4144)	Affirmed
STATE v. THOMPSON No. 838SC452	Wayne (82CRS12242)	No Error
STATE v. WILEY No. 8326SC382	Mecklenburg (82CRS33826)	No Error
STATE v. YOUNG No. 832SC579	Washington (82CRS1393)	No Error
SURRY COUNTY v. ALLEN No. 8217SC1110	Surry (80CVS575)	No Error

CITY OF RALEIGH v. PHYLLIS BOWEN RILEY

No. 8210SC1008

(Filed 1 November 1983)

1. **Eminent Domain § 7.1— attempt to delete road from State highway system—findings supported by evidence**

In a condemnation proceeding, a finding by the trial court that the deletion of a road from the State highway system by the Board of Transportation "was premised upon the city's assertion that the requested deletions were the result of 'annexation or changing of municipal corporate limits,'" was supported by the evidence.

2. **Eminent Domain § 7.1; Highways and Cartways § 4; Judgments § 35.1— condemnation action—prior judgment as res judicata—city road as part of State highway system**

In a condemnation proceeding, a prior judgment which found that the city was required to comply with G.S. 136-66.3 and reach an agreement with the state before proceeding with a condemnation project was *res judicata* with respect to the present action since no appeal was taken from the dismissal of that action and its validity was not challenged.

3. **Eminent Domain § 7.1; Highways and Cartways § 4; Judgments § 35.1— condemnation proceedings—res judicata effect of prior judgment limited**

The prior judgment in a condemnation proceeding was *res judicata* only to the extent that the city road continued to be a part of the State highway system within a municipality. A prior judgment found the city's attempt to delete the city road from the State highway system to be ineffectual; however, obtaining a deletion remains a viable alternative to reaching an agreement with the Department of Transportation pursuant to G.S. 136-66.3 after the entry of the prior judgment.

4. **Eminent Domain § 7.1— condemnation proceeding—improper procedure in obtaining deletion of city road from State highway system—abuse of discretion properly found**

The trial court properly found the city abused its discretion when it, whether by design or neglect, failed to properly execute its duty under G.S. 136-66.1 and G.S. 136-66.2 since the information provided the State Board of Transportation concerning the deletion of a road in the city from the State highway system was either erroneous or insufficient.

APPEAL by plaintiff and cross-appeal by defendant from *Battle, Judge.* Judgment entered 5 May 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1983.

This is a civil action wherein plaintiff seeks to condemn the property of defendant pursuant to acquisition of the rights-of-way for the construction of a road.

The following summary and drawings[1] are helpful to an understanding of the case: The project, with respect to which the rights-of-way are sought in this case, is known as the Oberlin-Ferndell Connector. Oberlin Road runs roughly north-south between Hillsborough Street and Glenwood Avenue, which both run roughly east-west at the point of intersection with Oberlin Road. The project involves a one block segment of Oberlin Road between Hillsborough Street to the south and Clark Avenue to the north. Clark Avenue also runs east-west. The project calls for the relocation of the southern terminus of Oberlin Road one block to the west of where it currently intersects Hillsborough Street. The proposed southern terminus of Oberlin will be directly opposite the northern terminus of Pullen Road, which runs north-south. The present southern terminus of Oberlin Road is not directly across from an intersecting road, requiring north-south traffic to travel for one block on Hillsborough Street and make a left turn across two lanes of oncoming traffic in order to make the transition from Oberlin Road to Pullen Road and vice-versa. The southern terminus of Pullen Road and the northern terminus of Oberlin Road are both means of access to major state and interstate routes.

Ferndell Lane is a one-half block north-south dead end street that intersects Hillsborough Street directly across from the northern terminus of Pullen Road. In the project, Oberlin Road would be relocated so as to run from its present intersection with Clark Avenue to where Ferndell Lane dead ends and then colinearly with Ferndell Lane to its intersection with Hillsborough. The project will necessarily entail some degree of realignment of the one block segment of Oberlin Road. As proposed, the realignment would involve an unequal bisection of defendant's 52,000 square foot lot, leaving two lots on the east and west sides of the proposed road of approximately 14,000 and 22,000 square feet, respectively, and taking approximately 16,000 square feet for the rights-of-way.

The project is designed to facilitate the traffic flow on the Oberlin Road Pullen Road north-south corridor between Glenwood Avenue and Western Boulevard, both major east-west corridors

1. The drawings were prepared by the Court of Appeals on the basis of facts appearing in the record on appeal.

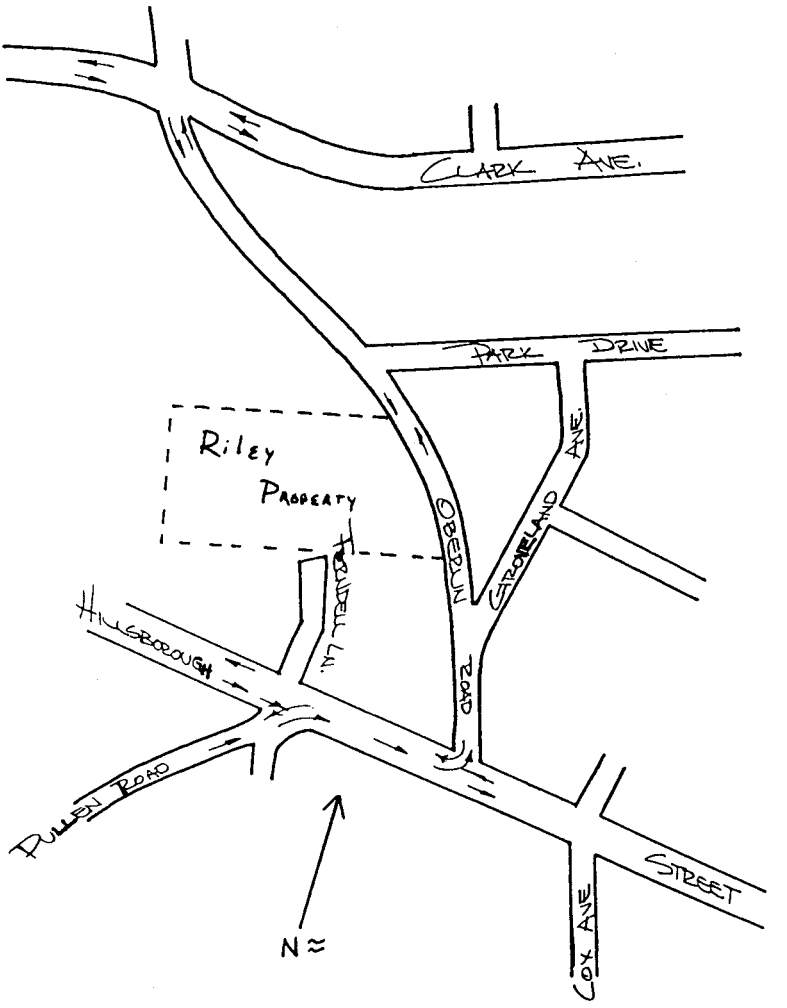

Figure 1: Existing Street Pattern

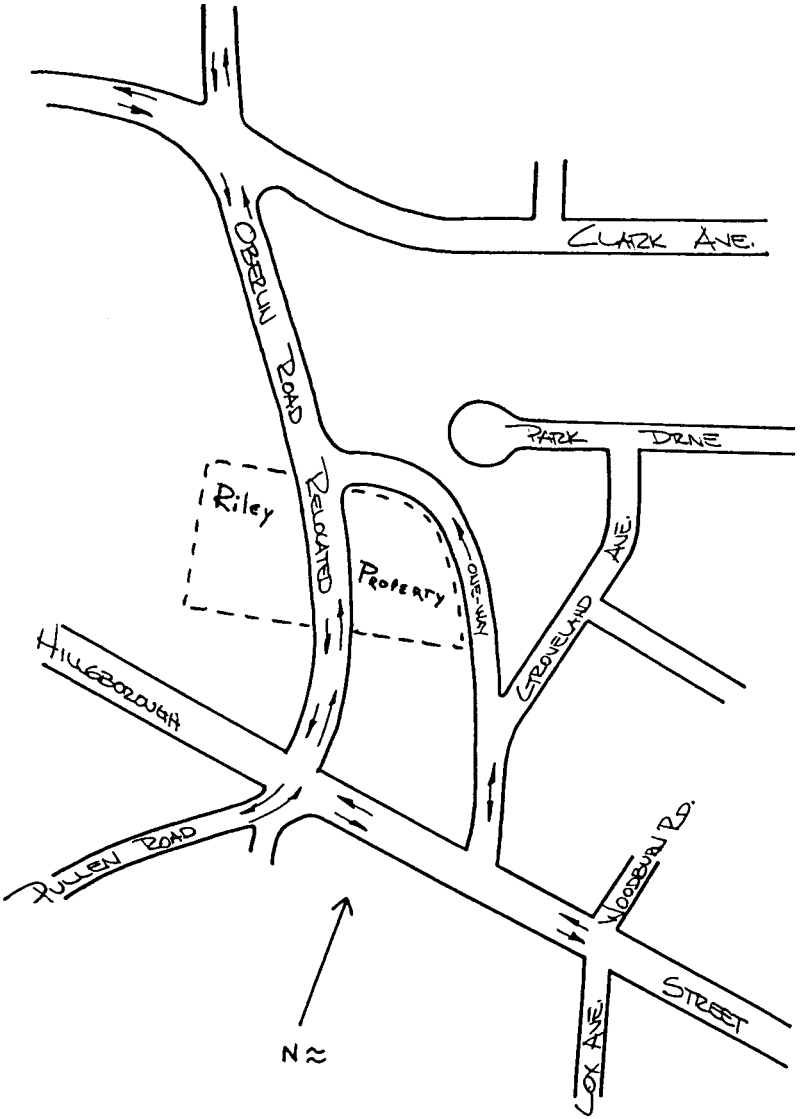

Figure 2: Proposed Street Pattern

that connect to major state and interstate highways as well as to downtown Raleigh's business section and state government complex. The Oberlin-Pullen corridor is adjacent to the Cameron Village Shopping Center and North Carolina State University, the state's largest university. Because of its character as a major north-south traffic corridor, Oberlin Road is included in the State highway system pursuant to G.S. 136-66.1(1), regarding the character of municipal roads included in the State highway system.

On 10 July 1978, plaintiff filed a condemnation action against defendant, seeking to condemn her property and acquire the rights-of-way necessary for the Oberlin-Ferndell project. Defendant answered and moved to dismiss on the grounds that plaintiff had failed to comply with G.S. 136-66.3, requiring the Department of Transportation and the municipality to reach an agreement before acquiring the rights-of-way for construction or improvement projects on State highway system roads within municipalities. In June of 1979, in response to defendant's motion, the city asked the State Board of Transportation to remove the one-block segment of Oberlin Road between Clark Avenue and Hillsborough Street from the State highway system. On 8 June 1979, the Board granted the request, effective 30 June 1979. Minutes from the meeting of the Board of Transportation show that the Administrator of State Highways stated that the deletion was based on annexation by the city.

The matter came for trial on 29 July 1980. On the basis of the facts and evidence summarized above, the court made the following pertinent conclusions of law:

> 3. That on July 10, 1978, the date of the commencement of this action, Oberlin Road was a part of the State Highway System and, accordingly, the Plaintiff, City of Raleigh, by the provisions of G.S. 136-66.3 was required to reach agreement with the Department of Transportation before acquiring right-of-way for the relocation of Oberlin Road and construction of the Oberlin-Ferndale [sic] Connector, the project for which the Defendant's property is sought to be condemned.
>
> 4. That the Department of Transportation, in the absence of the agreement required by G.S. 136-66.3, retained the au-

thority to acquire right-of-way for Oberlin Road, a State Highway System street.

5. That the Plaintiff, City of Raleigh, sought to delete Oberlin Road from the State Highway System and the Department of Transportation purportedly deleted such segment of Oberlin Road from the State Highway System; however, such action by the Department of Transportation did not occur until June 8, 1979, approximately one year after the filing of this action and more than six months after the Defendant moved to dismiss for failure to comply with the provisions of G.S. 136-66.3.

Based on the foregoing conclusions, the trial court granted the defendant's motion to dismiss.

On 20 January 1981, the Raleigh City Council adopted a resolution calling for the condemnation of defendant's land pursuant to the above-described Oberlin-Ferndell connector project. The present action was initiated on 4 May 1981 when the city filed an action, pursuant to G.S. 136-103, seeking to condemn defendant's property.

Preliminary work on the construction phase of the Oberlin-Ferndell connector project had begun on 2 June 1981. On 17 July 1981, defendant answered and moved for a temporary restraining order and for preliminary and permanent injunctions. The temporary restraining order was granted and, on 12 August 1981, the trial court issued a preliminary injunction requiring plaintiff to cease work on the project pending the outcome of the trial on the merits. In its answer, defendant also moved to dismiss the action on the same grounds as the first action: the city's failure to comply with G.S. 136-66.3.

The matter came on for a non-jury trial in April, 1982. Plaintiff and defendant presented evidence and testimony and the court viewed defendant's property. On 5 May 1982, the court entered judgment, again dismissing plaintiff's action for failure to comply with G.S. 136-66.3. The court made extensive findings of fact, summarizing the procedural and factual history of the controversy as described above and finding in addition:

10. As a result of the Answer of the Defendant, the Raleigh City Council adopted a resolution on May 1, 1979, requesting the State Department of Transportation to delete from the

> State Highway System that portion of Oberlin Road between Clark Avenue and Hillsborough Street (Oberlin Road has been a part of the State Highway System since 1965). This request was sent by the City of Raleigh to the Department of Transportation along with a number of other requests for the deletion of streets. The request was granted by the State Board of Transportation on June 8, 1979, effective June 30, 1979, and was premised upon the City's assertion that the requested deletions were the result of "annexation or changing of Municipal Corporate Limits." Of course, the segment of Oberlin Road between Hillsborough Street and Clark Avenue was not in proximity to any City of Raleigh annexation nor was it impacted in any manner by "Changing Municipal Corporate Limits." In fact, the action of the City of Raleigh in seeking deletion of that segment of Oberlin Road lying between Hillsborough Street and Clark Avenue from the State Highway System was an attempt by the City of Raleigh to avoid the requirements of G.S. 136-66.3, and the defense raised by the Defendant in the pending condemnation case. No rational basis exists or existed for the deletion of this segment of Oberlin Road from the State Highway System. The deletion of this approximate one block area violates the spirit and intent of G.S. 136-66.1.
>
> . . . .
>
> 12. . . . The attempt by the City of Raleigh to delete the one block area in question is in fact a nullity because the removal was not based on any facts that would justify the removal under the provisions of G.S. 136-66.1 and G.S. 136-66.2.

The court also found that the judgment of 5 December 1980, dismissing the first action, constituted the law of the case.

Based on its findings, the court concluded: (1) That the decision in the prior action was binding in the instant proceeding and that the city had failed to comply with it, in that it had failed to reach an agreement with the Department of Transportation as required by G.S. 136-66.3. (2) That the attempted deletion was null and void because the city had not furnished proper information to the Department of Transportation in making the request and that no valid basis existed for the deletion. (3) That the Department of Transportation was responsible for any maintenance, or improve-

ment, or construction on Oberlin Road. (4) That the city must reach an agreement with the Department of Transportation pursuant to G.S. 136-66.3 prior to undertaking the Oberlin-Ferndell project and that, because it had failed to do so, it was not entitled to maintain the present action. (5) That the attempted deletion of Oberlin Road from the State highway system was the city's only abuse of discretion and was not sufficient to warrant the issuance of a permanent injunction.

From this judgment, plaintiff appealed and defendant cross-appealed.

Associate City Attorney Francis P. Rasberry, for plaintiff appellant and cross-appellee.

Hunter, Wharton & Howell, by W. Brian Howell, for defendant appellee and cross-appellant.

JOHNSON, Judge.

I

[1] Most of the material facts in this case are not in dispute and have been stipulated to by the parties. On appeal, however, plaintiff excepts to and assigns as error the finding by the trial court that the deletion of Oberlin Road from the State highway system by the Board of Transportation "was premised upon the city's assertion that the requested deletions were the result of 'annexation or changing of municipal corporate limits.'" The city contends that this finding is not supported in the record by competent, substantial and material evidence. Our review of the record on appeal shows this contention to be without merit. The following stipulation appears in the record:

> 28. *June 8, 1979.* The North Carolina State Board of Transportation voted to remove Oberlin Road from Hillsborough Street to Clark Avenue from the State Highway System. Board minutes indicate that Administrator Rose stated that the deletions acted upon were the result of annexation and changing municipal corporate limits.

Also in the record is the testimony in narrative form of James Blackburn, Transportation Director for plaintiff City of Raleigh and an expert in the field of transportation. Upon direct examina-

tion by defendant, Mr. Blackburn testified as an adverse witness as follows:

> Oberlin is a State designated highway at this point from Clark Avenue north to Wade Avenue. And the inclusion of a municipal highway in the state system does indicate it's important both as an integral part of the State traffic network as well as a municipal collector.
>
> . . . .
>
> And in the process of the submission that was made to the State of North Carolina [the city] indicated that there were a number of deletions being requested as a result of changing municipal boundaries. This deletion was not the result of changing municipal boundaries, so that statement was incorrect, and it was not the result of an annexation, so that statement also was incorrect. . . .

It is well established in North Carolina that the trial court's findings of fact in a non-jury trial are conclusive on appeal if supported by any competent evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E. 2d 503, *cert. denied*, 285 N.C. 85, 203 S.E. 2d 57 (1974). Here, plaintiff attempts to discount the evidentiary value of the stipulation and testimony by referring to them as "scraps" of "inconsequential" and "circumstantial" evidence. Regardless of plaintiff's characterization of it, the evidence in the record is uncontradicted. Furthermore, plaintiff has failed to show how the evidence is incompetent, immaterial, or insubstantial. We, therefore, overrule plaintiff's contention and hold that the trial court's finding of fact is supported by the evidence.

II

The remaining questions in this appeal deal with the application of the law to the established facts. In this respect, plaintiff excepts to and assigns as error certain of the court's conclusions of law on the grounds that they are not supported by the findings of fact. Specifically, plaintiff argues (1) that the trial court's conclusions with respect to the city's legal rights and obligations are based on incorrect interpretations of the law, and (2) that, in any event, the facts do not support the court's conclusions that the plaintiff did not act in conformity with the law. Therefore, plain-

tiff contends the trial court incorrectly granted defendant's motion to dismiss.

Defendant contends that the trial court correctly applied the law to the facts found and that the conclusions drawn warranted the judgment of dismissal. Defendant also argues that the trial court correctly concluded that the effect of the 5 December 1980 judgment was to require the city to comply with G.S. 136-66.3 and reach an agreement with the Department of Transportation and that this was the *only* means then available to the city for proceeding with the Oberlin-Ferndell project.

a.

The arguments of both parties present for our review the single question of whether the facts support the conclusions of law.

[2] We first consider the legal effect of the 5 December 1980 judgment dismissing plaintiff's initial action. The trial court in the instant proceeding concluded that the prior judgment was *res judicata* with respect to the present action and that the city was required thereby to comply with G.S. 136-66.3 and reach an agreement with the state before proceeding with the Oberlin-Ferndell project. Plaintiff does not contest the *res judicata* effect of the prior judgment, but maintains that it is misapplied in the present context. We do not agree.

General Statute 136-66.3(a) reads as follows:

> When any one or more street construction or improvement projects are proposed on the State highway system in and around a municipality, the Department of Transportation and the municipal governing body shall reach agreement on their respective responsibilities for the acquisition and cost of rights of way necessary for such project or projects.

The court in the prior judgment concluded that G.S. 136-66.3 applied in that action because, at the time the action was commenced, the segment of Oberlin Road involved was part of the State highway system. That prior judgment found and concluded that the purported deletion of Oberlin Road from the State highway system was ineffectual with respect to that action. No appeal was taken from the dismissal of that action and its validity

is not being challenged here. Therefore, it is *res judicata.* Assuming, then, that the 5 December 1980 judgment correctly concluded that Oberlin Road remained in the State highway system, the further requirement that the city reach an agreement with the Department of Transportation before proceeding with any work on the Oberlin-Ferndell project was the correct application of the law. *But see Armbrister v. City of Norman,* 344 P. 2d 665 (Okla. 1959) (statute authorizing agreement between city and state does not require such an agreement where improvements to a state highway system street within a municipality are funded entirely by the city). Since the city had not entered into an agreement with the state prior to initiating the first condemnation action, on the basis of the statute, that action was properly dismissed.

b.

[3] We next consider plaintiff's exceptions to the trial court's conclusions of law that the prior judgment, in addition to dismissing the first condemnation action, had the further effect of precluding the city from choosing alternatives other than reaching a formal agreement with the Department of Transportation pursuant to G.S. 136-66.3 before proceeding with the Oberlin-Ferndell project. This may indeed be the practical effect of the prior judgment, as defendant contends. However, our interpretation of that judgment and review of the record in this appeal discloses no factual or legal foundation for either the trial court's conclusion or defendant's contention. While the prior judgment is *res judicata,* we interpret it as controlling *only* in the event and to the extent that Oberlin Road continued to be a part of the State highway system within a municipality. Insofar as the trial court's conclusions of law in the present action are inconsistent with that interpretation, they are incorrect and plaintiff's assignments of error with respect to them are well taken.

We note also that G.S. 136-66.3, by its own terms, applies to "construction or improvement projects . . . proposed on the State highway system in and around municipalities." It does not apply to streets within municipalities that are not part of the State highway system or that have been properly deleted therefrom. This is consistent with plaintiff's contention that obtaining a deletion was a viable alternative to reaching an agreement with the Department of Transportation, pursuant to G.S. 136-66.3. This

alternative remained available to the city after the entry of the prior judgment. A contrary holding would simply lack legal or logical support. *See generally* Annot., 144 A.L.R. 307 (1943); 63 C.J.S., Municipal Corporations, § 1044.

III

[4] The city excepts to and assigns as error those portions of the findings of fact and conclusions of law that hold that its actions in obtaining the deletion of the one block segment of Oberlin Road from the State highway system were improper and constituted an abuse of discretion. The city contends that its request for the deletion was a routine procedure undertaken in good faith as an alternative to an agreement with the Department of Transportation. We have already determined that the court correctly found from the evidence that the deletion was premised on annexation. We now consider whether this finding of fact warrants the conclusions of law that the city's actions in obtaining the deletion were improper.

We note at the outset that the statutes are not explicit with regard to the proper procedure for obtaining the deletion of municipal roads from the State highway system. Our research has disclosed no administrative regulations on this point and no directly applicable authority has been cited by either party. We therefore look to the language of the various statutes.

General Statute 136-66.1, dealing with the division of responsibility for streets within municipalities, reads in pertinent part, as follows:

> (1) The State Highway System.—The State highway system inside the corporate limits of municipalities shall consist of a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities.... [T]he respective responsibilities of the Department of Transportation and the municipalities for the acquisition and cost of rights-of-way for State highway system street improvement projects shall be determined by mutual agreement between the Department of Transportation and each municipality.

General Statute 136-66.2, dealing with the development of a coordinated street system, reads as follows:

> (a) Each municipality, with the cooperation of the Department of Transportation, shall develop a comprehensive plan for a street system that will serve present and anticipated volumes of vehicular traffic in and around the municipality. . . .
>
> (b) . . . As a part of the plan, the governing body of the municipality and the Department of Transportation shall reach an agreement as to which of the existing and proposed streets and highways included in the plan will be a part of the State highway system and which street will be a part of the municipal street system.

The pertinent language of G.S. 136-66.3 had been quoted above.

When read together, these statutes indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the *function* served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their *geographical location* outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the state system and incorporating it into a municipal system will vary according to the reasons why it was in the state system to begin with. *See generally,* Annot., 144 A.L.R. 307, *supra.*

The evidence here shows that the one block segment of Oberlin Road between Hillsborough Street and Clark Avenue was included in a list of other streets with respect to which the City of Raleigh was seeking deletion from the State highway system because they were in areas that had recently been annexed or otherwise been made part of the city. Since 1965, Oberlin Road has been part of the State highway system. It was included

therein at the request of the city presumably because it bears the functional characteristics specified in G.S. 136-66.1. Indeed, the Oberlin-Ferndell project is designed to improve the functional efficiency of the Oberlin-Pullen north-south traffic corridor.

However, the fact that Oberlin Road was functionally distinct from the other streets and roads with respect to which deletion was sought was nowhere noted in the request for deletion made to the Board of Transportation or on the list of roads that were the subject of the request. The Board acted on the requested deletions on the mistaken premise that the roads listed in the request were in areas that had been annexed. Clearly, on the basis of these facts, the deletion of Oberlin Road was based on erroneous information.

The city points out that the law presumes that a public official or governing body will discharge its duty in a regular manner and act within its delegated authority. *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972); *In re Housing Authority*, 233 N.C. 649, 65 S.E. 2d 761 (1951). The law also presumes that the public official will act in good faith. *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E. 2d 101 (1962). These presumptions favoring the propriety of official acts may be overcome by evidence of irregularity or failure to perform an official duty properly. *In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974). Where, as here, the act involves an exercise of discretion, the courts will not interfere with an official action unless there is a clear showing of an abuse of discretion. *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439 (1971); *see generally* 10 Strong's N.C. Index 3d, Public Officers, §§ 8, 8.1 (1977); 3 McQuillan, Municipal Corps. 3d, § 12.126 (1982).

The city maintains that the requested deletion of Oberlin Road from the State highway system was a routine matter undertaken in good faith. Yet, as made, the request completely ignores the important functional distinction between Oberlin Road and the other roads on the list, all of which were in areas that had recently been made part of the city. For the reasons set forth above, this functional distinction, provided for by law, warrants consideration when requests are made at least so that the deletions, if granted, will be premised on the proper grounds.

Since the city's request for the deletion of Oberlin Road from the State highway system was a discretionary act, the city is presumed to have acted in good faith. *In re Annexation Ordinance, supra.* Good faith in this context required the city to furnish to the Board of Transportation sufficient information to allow it to make a proper decision. The facts, however, show that the information provided was either erroneous or insufficient. Whether by design or neglect, the city has failed to properly execute its duty under the law and has thereby manifestly abused its discretion. The trial court's conclusions in this regard are correct and plaintiff's assignments of error are overruled. Except insofar as modified above, the judgment appealed from is affirmed.

IV

Because we have affirmed the judgment of the trial court and have found no error prejudicial to defendant, we need not consider any of the arguments brought forward in defendant's cross-appeal. Rule 10(d), N.C. Rules App. Proc. (Cum. Supp., 1981).

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. SOLOMAN BROWN

No. 8221SC1226

(Filed 1 November 1983)

1. Narcotics § 4— manufacture of cocaine—sufficient evidence of defendant's guilt

The State's evidence was sufficient to support conviction of defendant for manufacturing cocaine where it tended to show that officers searched an apartment then occupied by defendant and two other persons; the officers found on a table in the apartment two plastic packages containing a white powdery substance determined to be cocaine and an array of items used to package and distribute cocaine, including plastic baggies cut in a certain manner, wire ties, cellophane tape, packs of rolling paper, sheets of aluminum foil, a single edge razor blade, and containers of rice and another chemical used to absorb moisture; defendant was only six to eight inches from the table when officers entered the apartment; although the apartment was leased by defendant's brother and no one actually lived there, defendant had a key to the apartment; and each time officers had observed defendant during an investigation which had lasted for some time, he was at the apartment.

2. Criminal Law § 173— opening door to evidence

When, in a prosecution for the manufacture of cocaine, defendant elicited testimony on direct examination of his parole officer that defendant had been on parole for two years and was still on parole, he "opened the door" to the State's cross-examination of the parole officer concerning the conviction for which defendant was on parole, and the trial court properly denied defendant's motion for mistrial made when the parole officer responded that defendant was on parole for possession and sale of heroin. G.S. 15A-1061.

Judge BECTON dissenting.

APPEAL by defendant from *Wood (William Z.), Judge.* Judgment entered 12 March 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 2 September 1983.

Attorney General Edmisten by Special Deputy Attorney General David S. Crump for the State.

Yokley and Teeter by D. Blake Yokley for defendant appellant.

BRASWELL, Judge.

The defendant was convicted under G.S. 90-95(a)(1) for manufacturing cocaine, a Schedule II controlled substance. The questions presented for review concern: (1) whether the evidence was sufficient to establish the possession and the manufacture of cocaine by the defendant; and (2) whether the defendant's motion for a mistrial was properly denied even though the jury was allowed to hear testimony concerning the defendant's previous drug conviction. We have carefully considered each assignment of error and conclude that there was sufficient evidence to support the conviction and that the motion for a mistrial was properly denied.

The evidence for the State tended to show that on 10 September 1981 Detective Jerry Pitman and three other policemen went to Apartment C on 1634 Chestnut Street with a search warrant issued for this apartment in the name of the defendant. They entered the apartment after announcing at the door that they were police officers and that they had a search warrant. Detective Pitman observed Olin Carter in the living room, Nathaniel Small behind the bar, and the defendant in an adjacent room. Detective Pitman immediately crossed the apart-

ment into the room where the defendant was standing. As Pitman entered the room, the defendant, standing six to eight inches from a table, turned towards him.

According to the testimony of Detective Pitman, the following items were on the table or in a box on the table: an open brown paper envelope which contained two plastic packages of a white powdery substance determined by toxicologist, Garland Nelson, to be cocaine; several sandwich-type baggies cut in a manner for use in the packaging and distribution of controlled substances; plastic bags which contained flakes of a green vegetable substance; wire ties used to secure the plastic bags; one roll of cellophane tape which can be used to prevent the plastic bags once filled from unrolling; three packs of rolling paper; two containers of rice and another container of a chemical used to absorb moisture in order to keep powdery controlled substances a higher quality; four sheets of aluminum foil which is commonly utilized as the packaging agent for smaller quantities of powdery controlled substances; a single edge razor blade which is used to chop the powder into a finer substance; and finally a two-inch plastic straw, tapered at one end, which is used to ingest cocaine through the nose. The entire testimony of Detective Pitman was corroborated by the other police officers called.

The defendant was arrested and searched. On his person there was a key to the apartment and over seventeen hundred dollars, but no controlled substances. The other two individuals present were also arrested. A pat-down search to secure the scene revealed in plain view that Small was in possession of marijuana. A routine records check of Carter revealed an outstanding warrant on him for giving worthless checks. Through the search incident to his arrest, Carter was also found in possession of marijuana.

Testimony from the State revealed that the apartment is used as a "drink house," a place used only for parties where alcoholic beverages are served. No person actually lives there, not even the apartment lessee, Lucious Brown, the defendant's brother.

Evidence for the defendant attempted to show that the defendant was not in control of the premises or in possession of the drugs seized. Nathaniel Small testified that the defendant was

by the bar with him when the police entered and not by the table with the drugs. Lucious Brown stated that the defendant did not help pay the expenses of the apartment nor did he ever give him a key to the apartment. Finally, Jay Waller, the defendant's parole officer, was called by the defendant to establish that his residence for the past two years had not been the apartment in question. In view of the fact that Waller, on direct examination, stated that the defendant had been on parole for two years, the State, on cross-examination, asked Waller for what was the defendant on parole. Over the defendant's objection, Waller stated that he was on parole for the sale of the controlled substance heroin and two counts of possession of heroin.

The defendant's motion for a mistrial was denied and he was subsequently found guilty by a jury of manufacturing cocaine.

[1] The defendant's first and third assignments of error question whether the evidence was sufficient to support a conviction for the manufacture of cocaine. The State standard determining whether there is sufficient evidence to support a criminal conviction requires that there must be "substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980). Substantial evidence has been held as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E. 2d at 169. The federal standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), states that the appropriate standard of review of a claim of insufficient evidence to support a criminal conviction is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. We must apply both standards.

The defendant was convicted of manufacturing a controlled substance. According to G.S. 90-87(15), the term "manufacture" means "the production, preparation, propagation, compounding . . . packaging or repackaging of the substance." As the facts indicate, the applicable portion of this statute includes "packaging and repackaging." *See generally, State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *disc. rev. denied*, 298 N.C. 302 (1979). There is substantial evidence that cocaine was in fact being "manufactured." Detective Pitman and the other officers found on the table in the apartment an array of items all used as a means to

package and distribute cocaine, from the plastic baggies to the tinfoil, from the cellophane tape to the wire ties. We hold that a rational trier of fact had sufficient evidence to convict one of manufacturing cocaine. The question in this case then becomes who was the manufacturer, and this question can be answered by determining who was in actual or constructive possession of the cocaine and the manufacturing materials. Although the defendant was not convicted of a separate offense of possession of a controlled substance, his conviction of manufacturing cocaine necessarily depends on his possession of the controlled substance.

There was no evidence at trial by any of the police officers that the defendant was in physical possession of the items on the table. Basically, the testimony places the defendant inside the house and very close to the table. Detective Pitman stated that when he entered the room that the defendant was six to eight inches from the table and that the cocaine found in the brown envelope was a foot from his hand. Thus, the establishment of possession, and in turn, the basis for the manufacturing conviction, rests on his constructive possession of the cocaine and the other packaging devices.

The general rule states that "[c]onstructive possession exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it." *State v. Atkinson*, 33 N.C. App. 247, 251, 234 S.E. 2d 770, 773 (1977). We hold that the defendant, standing in close proximity to the table and being the only person in the room, had the capability of exercising control over the cocaine. There was sufficient evidence before the jury in which the intent of the defendant could be inferred from the circumstances. Detective Pitman testified in detail that all of the items found on the table with the cocaine were in some way used to package and distribute controlled substances. In *State v. Long*, 58 N.C. App. 467, 475, 294 S.E. 2d 4, 10 (1982), the court added that "[a]n accused has possession of narcotics within the meaning of the law when he has the power and intent to control their disposition or use or when the evidence places him in such close juxtaposition to them that a jury could conclude that they were in his possession." Surely, the evidence provided places the defendant in such a position that even though he was not physically in custody of the cocaine or

the other items, a jury could conclude that he was nevertheless constructively in possession of them.

In *State v. Harvey*, 281 N.C. 1, 13, 187 S.E. 2d 706, 714 (1972), the court held that the defendant's motion to dismiss was correctly overruled when "the State's evidence placed defendant within three or four feet of the marijuana within his home. No one else was in the room. This evidence supports a reasonable inference that the marijuana was in defendant's possession." In the present case the defendant was also alone in the room and within a closer distance to the controlled substance. The fact that the defendant in our case was not the lessee of the apartment or that other persons also had access to the contraband does not exonerate the defendant because exclusive possession of the contraband on the premises where the contraband is found is not required. *State v. Roseboro*, 55 N.C. App. 205, 209, 284 S.E. 2d 725, 727 (1981), *disc. rev. denied*, 305 N.C. 155, 289 S.E. 2d 566 (1982); *State v. Atkinson, supra*, at 251, 234 S.E. 2d at 773. "[W]here possession of the premises is nonexclusive, constructive possession of the contraband by the accused may not be inferred without other incriminating circumstances." *Id.* Other incriminating evidence which shows the extent of the defendant's control over the premises includes the testimony that the defendant had been under investigation for some time, that each time he was observed by the police he was seen at 1634 Chestnut Street, the apartment where the cocaine was found, and that the defendant had a key on his key ring to this apartment. Therefore, there was substantial evidence before the jury indicating the defendant's constructive possession of the cocaine and the other items used for manufacturing the controlled substance. With possession established, there was substantial evidence to justify rational triers of fact to find the defendant guilty of manufacturing cocaine beyond a reasonable doubt.

[2] The defendant words his second question presented for review as follows: "Whether the trial court should have granted a mistrial on the grounds that testimony was allowed before the jury by defendant's probation officer of defendant's previous conviction when defendant had not taken the stand or put his character in issue?" We answer no in the context of the way the question and answer were given under the doctrine of evidence known as opening the door.

At trial, the defendant called Jay Waller, his parole officer, for the purpose of establishing that his address was not 1634 Chestnut Street. On direct examination, Mr. Waller stated that the defendant lived at 3901 Logan Lane, and related that "[a]t the present time, I'm seeing him once every three months. That's the current supervision level he's under. And he's been on parole now approximately two years. And I would, I don't know the exact number, but I have seen him several times at that address." On cross-examination the following exchange occurred.

Q. Is he still under parole with you?

A. Yes, sir.

Q. What for?

[DEFENSE COUNSEL]: Objection.

COURT: Overruled.

* * * *

COURT: I'm not going to let him go into any other case except the one he's on parole for.

* * * *

Q. Mr. Waller, What's he on parole for?

A. He is on parole for sale of the controlled substance heroin and two counts of possession of the controlled substance heroin.

The defendant asked for the answer to be stricken, then moved for a mistrial. Both motions were denied.

According to G.S. 15A-1061, a mistrial should be declared "upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." Basically, the determination whether the evidence causes substantial or irreparable prejudice to the defendant's case is within the discretion of the trial judge. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). The scope of our review therefore is limited to whether in denying the motion for a mistrial there has been an abuse of judicial discretion.

When evidence which would have been excluded under one rule of admissibility is nevertheless made admissible and competent under a different and overriding rule, the rules ought first to be examined. When a defendant has neither taken the stand and testified nor independently placed his character in evidence through other witnesses, it is recognized to be prejudicial and reversible error to allow the State to introduce evidence of any prior convictions of the defendant. In that context we do not recognize it as either impeachment evidence or as being within the scope of cross-examination of other witnesses to allow knowledge of any prior criminal record to be heard. However, North Carolina has long recognized in trial practice a doctrine known as "opening the door." Some text writers and other jurisdictions call it "curative admissibility." 1 Wigmore, Evidence 3d, § 15, Curative Admissibility. In a note commenting upon the rules of curative admissibility, *Evidence—Curative Admissibility*, 35 Mich. L. Rev. 636, 639 (1937), the author defines our phrase: "Another is the familiar doctrine of 'opening the door'; it is said that if one party without objection first introduces certain testimony the door is opened and he cannot later complain of the other party's similar evidence." The author further comments that the reason the courts do admit rebutting evidence is because "the emphasis" is switched and is placed "on the original party's action in offering the evidence, by which he waived future objection to that class of evidence." *Id.* at 639. The theory, as gleaned from *Kelley v. Hudson*, 407 S.W. 2d 553, 556 (Mo. 1966), is that "[t]he party who opens up an improper subject is held to be estopped to object to its further development [citation omitted] or to have waived his right to do so." The Indiana Supreme Court said it this way: "If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened." *Perkins v. Hayward*, 124 Ind. 445, 449, 24 N.E. 1033, 1034 (1890). In Iowa, the court gave as its rationale for the doctrine: "This was clearly a continuation of the subject introduced by the defendant, and objection cannot now be raised by the same party to the competency of the evidence." *Artz v. The C., R.I. & P.R.R. Co.*, 44 Io. 284, 286 (1876). *Wigmore, supra*, at 309, sums up the controlling principles for having a curative admissibility doctrine, by declaring, "the emphasis is placed upon the original party's voluntary action in offering the evidence by which he virtually waived future objection to that class of facts."

In the case before us it was the defense counsel himself on direct examination of his own witness who elicited the testimony that the defendant was in fact on parole and that he had been on parole for two years. There was no motion by defense counsel to strike the answer as being unresponsive, or otherwise objectionable. Likewise, the defense counsel made no objection or motion to strike to the State's going into this same subject matter when the district attorney asked, "Is he still under parole with you," and received a "yes" answer. We hold that in this context the defense counsel "opened the door" to the facts surrounding the defendant's parole, and the State could properly pursue a subject voluntarily introduced by the defense and which subject then fell within the scope of cross-examination once the door had been opened. As said in *Sisler v. Shaffer*, 43 W. Va. 769, 771, 28 S.E. 721, 721 (1897), "[S]trange cattle having wandered through a gap made by himself, he cannot complain." *See Johnson v. Massengill*, 280 N.C. 376, 383, 186 S.E. 2d 168, 174 (1972). *See also State v. Parker*, 45 N.C. App. 276, 262 S.E. 2d 686 (1980) (on scope of cross-examination).

In *State v. Neely*, 4 N.C. App. 475, 477, 166 S.E. 2d 878, 879 (1969), the defense counsel asked a State's witness on cross-examination if he was scared of the defendants. The witness answered, "Yeh. If anybody had a record like them, you'd be scared of them too." The defendant's motion to strike was denied even though the defense counsel had not intended to put the defendant's character into issue and the defendant's criminal record, usually inadmissible, was before the jury. The court declared that "[t]he question asked by defense counsel was calculated to elicit the very response which was given. [The witness] had a right to explain his answer and defense counsel 'opened the door' for such an explanation." *Id.* In the case at bar, the defense counsel purposely called Waller to establish the defendant's residence. This witness testified freely concerning the defendant's parole with no admonishment from defense counsel. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E. 2d 439, 441 (1981). Once the defense witness had begun discussing the defendant's

parole, the State could properly ask for what the defendant was on parole. To call the defendant's parole officer in the first place may have been ill-advised trial strategy, but the "[d]efendant cannot now successfully contend that the trial judge committed prejudicial error because he did not, *ex mero motu*, object to experienced counsel's plan of trial." *State v. Waddell*, 289 N.C. 19, 25, 220 S.E. 2d 293, 298 (1975), *modified*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1210 (1976). *See also State v. Chatman*, 308 N.C. 169, 177, 301 S.E. 2d 71, 76 (1983).

As in *Waddell*, the defense counsel, in calling Waller, invited the alleged error "by eliciting evidence . . . which he might have rightfully excluded if the same evidence had been offered by the State." *State v. Waddell, supra.* It is important to note that the trial judge only admitted testimony concerning the conviction for which the defendant was on parole and no other evidence pertaining to his character or criminal record was allowed. Thus, the defendant was harmed only to the extent that he himself opened the door to the subject matter of his parole. Because the defendant opened the door to this particular conviction, this invited error could not be grounds for a mistrial. In any event, a motion for a mistrial will be granted when the defendant has suffered "substantial and irreparable prejudice," G.S. 15A-1061, and "[a] defendant is not prejudiced . . . by error resulting from his own conduct." G.S. 15A-1443(c). We hold that the trial judge did not abuse his discretion in denying the defendant's motion for a mistrial.

In summary, we hold that there was substantial evidence present to allow a rational trier of fact beyond a reasonable doubt to convict the defendant of manufacturing cocaine. Secondly, because the defendant opened the door to the subject of his parole, no error was committed by the admission of the answer of his being on parole for a drug conviction.

No error.

Judge JOHNSON concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that defendant's motion for mistrial should have been granted, I dissent.

The majority's reliance on the following two legal propositions to uphold the trial court's denial of defendant's motion for mistrial is misplaced: (1) "Defendant cannot invalidate a trial by introducing evidence or by eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State." *State v. Waddell*, 289 N.C. 19, 25, 220 S.E. 2d 293, 298 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976) (*See also, State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983); *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); and *State v. Neely*, 4 N.C. App. 475, 166 S.E. 2d 878 (1969).); and (2) "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E. 2d 439, 441 (1981).

Courts should look first to the facts of a particular case before applying broad propositions of law which themselves are exceptions to the general rule that incompetent evidence should not be placed before the jury. In this case, the prejudicial information which the defendant sought to exclude—that he was "on parole for the sale of the controlled substance heroin and two counts of possession of controlled substance heroin"—was elicited by the State, not by defense counsel. Significantly, it was defense counsel in *State v. Waddell*, *Johnson v. Massengill*, and *State v. Neely*, who, while cross-examining the witness, got a response which "he might have rightfully excluded if the same evidence had been offered by the" other side. *State v. Waddell*, 289 N.C. at 25, 220 S.E. 2d at 298. Therefore, the North Carolina cases cited by the majority are inapposite and do not warrant application of an "open door" or invited error policy.

Further, although defense counsel, for reasons I have yet to discern, called defendant's parole officer "for the purpose of establishing that his address was not 1634 Chestnut Street," ante p. 7, no part of the parole officer's testimony needed to be explained or rebutted. What explanation or rebuttal is necessary to the parole officer's testimony that defendant lives at 3901 Logan Lane and that he, the parole officer, has seen the defendant several times at that address during the approximately two years defendant has been on parole? The State was not prejudiced by

this testimony; in fact, this testimony more likely than not helped the State more than it helped defendant. This case, therefore, is distinguishable from *State v. Albert* and from *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980) in which the defendants' direct examination testimony gave the jury the "false impression that the [S]tate had refused to accept his offer to submit to a polygraph examination." 301 N.C. at 436, 272 S.E. 2d at 146. As our Supreme Court said in *State v. Albert*:

> Here, defendant on direct examination had testified that he told the officers he would be willing to take a lie detector test. This testimony, unexplained, could well lead the jury to believe that the State had refused to give defendant such a test, or that defendant had taken the test with favorable results which the State had suppressed. *Under such circumstances*, the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.

303 N.C. at 177, 277 S.E. 2d at 441 (emphasis added).

The circumstances in this case are clearly different from the circumstances in *Small* and *Albert*. They are also different from the circumstances facing "text writers and other jurisdictions," ante p. 9: the State's evidence in this case was not of the same "class" or "similar"; it was not "rebutting evidence"; and testimony that a witness knows where defendant lives because the witness is defendant's parole officer is not "an improper subject."

Was the denial of defendant's motion for a mistrial prejudicial? Yes. Significantly, no controlled substances were found on defendant's person, although drugs were found on the persons of two other people in the apartment. This case involves constructive possession of controlled substances found in an uninhabited apartment in which defendant had no possessory interest. Moreover, there was a hotly contested dispute between police officers and defendant's witness concerning how close defendant was to the table upon which the drugs had been placed. The police officers testified that defendant was standing six to eight inches from the table. Defendant's witness testified that defendant was not in the room in which the drugs were found. Thus, evidence that defendant was on parole, not for minor or non-drug-related

offenses, but for sale of heroin and two counts of possession of heroin, was highly prejudicial in this controlled substance case. I, therefore, vote for a new trial.

IN THE MATTER OF PAUL S. GORSKI, ET AL. v. NORTH CAROLINA SYMPHONY SOCIETY, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8210SC478

(Filed 1 November 1983)

Administrative Law § 8; Master and Servant § 111— review of administrative decision by superior court—scope of review exceeded

In reviewing the decision of the Employment Security Commission, the superior court was functioning as an appellate court; therefore, it erred in determining unemployment compensation claims on grounds neither raised nor relied on in the proceedings appealed from.

Judge BECTON dissenting.

APPEAL by defendants from *Farmer, Judge.* Order entered 29 January 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 15 March 1983.

This case involves the unemployment compensation claims of sixty-two recent employees of the North Carolina Symphony Society, who were employed pursuant to a master contract between the Symphony and the claimants' union. The contract extended through the 1982-83 concert season, and on April 12, 1981, the Symphony notified the union, as the contract permitted, that the contract was being terminated as of April 26, 1981 because of the Symphony's inability to obtain necessary operating funds. Thereafter, the appellees filed claims for unemployment compensation with the defendant Commission, and after due notice their claims were heard by a Deputy Commissioner, who, on July 17, 1981, entered an order denying the claims. In doing so, the Deputy Commissioner concluded that the claimants had failed to show by the greater weight of the evidence that they had been available for other "permanent fulltime employment while filing claims for unemployment benefits." The grounds for this conclusion included findings that the claimants expected to resume their jobs

with the Symphony, which was raising funds, scheduling concerts for the next season, and negotiating a new contract with the union, as usual; they had been seeking only part-time and temporary employment in the Research Triangle area, and their seeming search for permanent full time employment as symphony musicians or teachers of music was not a real search for employment, since job opportunities in those fields are almost nonexistent.

Upon claimants' appeal to the Superior Court being heard, it was found that the appellees "were involved in a group temporary layoff," under certain regulations adopted by the Commission, and an order was entered directing the Commission to pay benefits for the first four weeks of the layoff, and to determine whether under the regulations actual registration for work was required of appellees as of the first day of the fifth consecutive week of their total unemployment. From this order both the Commission and the Symphony appealed.

Judith E. Kincaid for plaintiff appellees.

Poyner, Geraghty, Hartsfield & Townsend, by Marvin D. Musselwhite, Jr. and Cecil W. Harrison, Jr., for defendant appellant North Carolina Symphony Society, Inc.

V. Henry Gransee, Jr. and Donald R. Teeter for defendant appellant Employment Security Commission of North Carolina.

PHILLIPS, Judge.

In undertaking to decide these claims on grounds neither raised nor relied on in the proceedings appealed from, the Superior Court violated the fundamental rule that an appeal has to follow the trial. *Grissom v. N. C. Department of Revenue*, 34 N.C. App. 381, 238 S.E. 2d 311 (1977), *disc. rev. denied*, 294 N.C. 183, 241 S.E. 2d 517 (1978). The course of these claims had been inexorably set in the proceedings appealed from; it could not be changed thereafter. The basis for the claims as filed was not that the claimants had been temporarily laid off, but that their employment with the Symphony had been terminated and they were seeking other permanent full time employment. The evidentiary hearing before the Deputy Commissioner, in accord with the notice to which none of the parties objected, was devoted to only the following issue: "Whether the claimants' [sic] are able to,

available for, and actively seeking work without undue restriction or limitation." The forty-eight appellees who presented evidence all attempted to show to the Commission's satisfaction that their employment with the Symphony was over and they were available for permanent employment elsewhere, as the law governing benefits requires; none contended that they were temporarily laid off and not available for permanent employment. The appellants, on the other hand, undertook to show that the appellees did not meet the "available for work" standard established by G.S. 96-13(a)(3), since they expected to continue working for the Symphony, which was already preparing for the next concert season, and their efforts to obtain employment were so limited that they could not be successful. The Commission's decision, following the course the case had taken, was based on eleven findings of fact and numerous conclusions of law, all relating to the one issue raised; and in appealing therefrom, appellees stated for their only grounds that various of the findings were unsupported by evidence, and the conclusions of law that they were not genuinely attached to the work force and available for permanent full time work because of their continuing attachment to the Symphony and the limited market for their job skills were erroneous. Having gone that far on the course selected, the case could not be put on a different course by the Superior Court.

In reviewing the decision of the Employment Security Commission, the Superior Court was functioning as an appellate court. As such, its office was limited to determining two things: first, whether there was evidence before the Commission to support its findings of fact, and, second, whether the facts so found sustain the conclusions of law and resultant decision. G.S. 96-15(h)-(i); *In re Enoch*, 36 N.C. App. 255, 243 S.E. 2d 388 (1978). It had no authority to make new findings, *Employment Security Commission v. Paul's Young Men's Shop, Inc.*, 32 N.C. App. 23, 231 S.E. 2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977), but was bound by all findings and conclusions properly made. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941).

To what extent, if any, the Superior Court undertook to review the decision of the Commission in the manner required, the record does not show. Since our own review of the record convinces us that the Commission's findings of fact are all supported by evidence and sustain the conclusions and decision made, rather

than remand the matter for further proceedings, to the delay, inconvenience, and expense of the parties, we herewith vacate the order appealed from and remand to the Employment Security Commission for the reinstatement of its decision.

Vacated and remanded.

Judge ARNOLD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

In reviewing a decision of the Employment Security Commission, the superior court must "(1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982); *Employment Security Comm. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950). I do not believe that the facts found in this case sustain the Commission's conclusions of law and decision. Believing further that the "group temporary layoff" issue was properly before the superior court and that the superior court properly executed its appellate function, I dissent.

N.C. Gen. Stat. § 96-15(i) (1981 & Supp. 1981), which establishes the procedure for an appeal from the Commission to the Superior Court of Wake County, provides that the appealing party must file a statement of the grounds upon which review is sought and the particulars in which it is claimed that the Commission erred. The statute further provides: "In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support them, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."

In their notice of appeal, claimants contended that the Commission's conclusions of law, that claimants were not genuinely attached to the labor force and available for permanent full-time employment because of (a) their continuing attachment to the Symphony and (b) the limited market for their job skills and ex-

perience, were erroneous. Their notice of appeal also raised constitutional issues. Questions of law were thus presented to the superior court.

Under N.C. Gen. Stat. § 96-13(a) (1981 & Supp. 1981), an unemployed individual, to be eligible for benefits, must satisfy the Commission that (1) he has registered to work and thereafter has continued to report to the employment office; (2) he has made a claim for benefits; and (3) he is able to work and is available for work. The requirements of this statute have been amplified, however, by administrative regulations.

Pursuant to the authority granted by N.C. Gen. Stat. § 96-4(a) (1981 & Supp. 1981), the Commission has made rules and regulations to administer the Employment Security Act. One of these regulations administering G.S. § 96-13 is Employment Security Comm. Reg. 10.16 (1981), which provides for a "constructive registration for work" in a group temporary layoff situation, which is defined in Employment Security Comm. Reg. 1.15 (1981) as a "temporary layoff involving twenty (20) or more workers." A temporary layoff is defined in Employment Security Comm. Reg. 1.24 (1981) as a "period of unemployment ocurring [sic] when one or more workers, because of lack of work during a payroll week as established by the employer, are partially or totally unemployed but are retained on the payroll and are considered by the employer to be continuing employees." The significance of the group temporary layoff regulation is that the employee does not have to prove that he is available for work in the sense of permanent full-time employment elsewhere. The employee is automatically entitled to benefits for the four-week period provided in Employment Security Comm. Reg. 10.16 as long as he files his claim in accordance with the regulations, which claimants have done here.

We now review the Commission's findings. The Commission's findings of fact show that claimants were laid off. The claimants were tenured. A substantial majority of the claimants had already signed individual binders for employment with the Symphony for the 1981-82 season at the time they were "laid off." Their season was shortened by five weeks, during which they received no pay, because of the Symphony's money problems. They were given assurances by the Symphony that they would be employed for the next season and that the Symphony's financial problems would be

solved. The Commission also found that (1) claimants continued to receive full benefits during this period (the disability insurance, life insurance, major medical group insurance, instrument insurance, retirement benefits and workers' compensation insurance were continued without interruption); (2) a substantial majority of the claimants had performed in benefit concerts during this period as "Musicians of the North Carolina Symphony," with the proceeds going to the Symphony to be disbursed to the musicians; and (3) the Symphony intended to have the same musicians, insofar as possible, for the next season.

These findings, suggesting that the claimants were still on the payroll although not being paid, support the following conclusion made by the Commission: "Based on the foregoing facts, it must be concluded that the claimants herein were, in effect, laid off their jobs for the final five weeks of the 1980-81 Symphony Season due to a lack of work available resulting from insufficient funding." At that point, the Commission could have more specifically concluded, as did the superior court, that claimants were temporarily laid off *in accordance with the Commission's regulations.* Instead, the Commission unnecessarily discussed claimants' availability for work with other employers on a permanent full-time basis. The Commission then, in its only other conclusions of law, stated:

> Based on the foregoing facts and legal authorities it is concluded that the claimants herein have not met their burden of showing by the greater weight of the evidence that they have been available for permanent fulltime employment while filing claims for unemployment benefits
>
> . . . .
>
> Secondly, it is concluded that the claimants are not genuinely attached to the labor force and are, therefore, not available for permanent fulltime suitable employment because there is a virtually nonexistent market in the area of their residence and an extremely limited market nationwide for the claimants' job skills and experience.

These latter conclusions, although arguably supported by the evidence and specific findings of fact, are not necessary since, under the group temporary layoff regulations, an employee does

not initially have to prove that he is available for permanent full-time employment. The Commission's latter two conclusions of law, therefore, were not supported by *relevant* findings of fact. Since the superior court had the authority to decide the question of law, it had the authority to decide if the facts found supported the "resulting decision." I agree with the superior court that the relevant facts found support only one conclusion—that claimants were "group temporary layoff" employees.

Unlike the majority, I am not convinced that claimants have "changed their theory" to the prejudice of any party. Indeed, as stated by claimants in their brief:

> It is, by contrast, the Symphony and the Commission which have altered their theories. The Symphony's brief itself reveals the effort to argue both sides of the issue: on the one hand the Symphony admits that its goal at the Commission hearing was to show that the Appellees 'had an implied right to continued employment (with the Symphony) and, thus, were not genuinely attached to the labor force' [Brief of Appellant Symphony]; on the other hand, the Symphony argues that it 'was unsure about its future in June of 1981. Despite the hopes and best intentions of the management of the appellant Symphony, no one could say with absolute certainty in June of 1981 that the 1981-82 Symphony Season would be a reality or, that if the season did take place, whether the length of the season (and the size of the orchestra) would be subject to drastic reduction. Under such circumstances, it would have been absurd for the appellant Symphony to invoke the "group temporary lay-off" classification.' [Brief of Appellant Symphony.]

The Symphony should be estopped from denying that claimants were "group temporary lay-off" employees. In the notice of hearing given to the parties, the Commission (not the claimants) limited the evidence at the hearing to two questions: (1) claimants' separation from employment, and (2) whether claimants are able to, available for, and actively seeking work without undue restriction. Claimants thus tailored their evidence to meet these limitations by attempting to show that they were available for and seeking permanent full-time employment elsewhere. Of course, the Commission may have limited the evidence at the

hearing because the Symphony never notified the Commission, pursuant to Employment Security Comm. Reg. 9-10 (1981), that a group temporary lay-off was planned. Had the Symphony done so, this litigation may not have ensued, since claimants' entitlement to unemployment benefits would have been established. Although the Symphony did not give the notice required by Employment Security Comm. Reg. 9-10, the evidence it presented at the hearing triggered the Commission's group temporary lay-off regulations. At the hearing, the Symphony sought to show that claimants were not truly available for work elsewhere and that they were still employed by the Symphony. The Symphony is thus estopped from denying that claimants fit into the group temporary lay-off category.

I vote to affirm the superior court's order.

STATE OF NORTH CAROLINA v. NATHANIEL COLLINS

No. 8218SC1017

(Filed 1 November 1983)

1. **Homicide § 28.8— instructions on accident or misadventure**

The trial court's instructions in a second degree murder case could not have misled the jury to believe that the defense of accident or misadventure applied only to involuntary manslaughter.

2. **Homicide § 28.5— defense of another—insufficient evidence**

The evidence in a second degree murder case did not require the trial court to instruct on the defense that defendant killed his wife's lover while defending his wife from attack where defendant testified that he broke into the motel room occupied by his wife and her lover when he heard his wife say, "No, no, don't do that," that he saw his wife and her lover run into the bathroom and saw a gun pointed at him through a partially open door, that a struggle for the gun ensued and shots were fired which struck both the wife and her lover, that he "couldn't say" whether he thought his wife was in danger after she and her lover ran into the bathroom, and that defendant did nothing to aid his wife after the shooting.

3. **Homicide § 27.1— discovered adultery—heat of passion—sufficiency of instructions**

The trial court's instruction that adequate provocation "may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition" encompassed discovered adultery, the only possible heat of passion basis raised by the evidence, and the trial court did

not err in failing specifically to refer in the instructions to discovered adultery as an adequate provocation.

4. **Criminal Law § 84— determination of legality of seizure unnecessary**

In this prosecution for murder and felonious assault, it was unnecessary to determine the legality of the seizure of a pair of bloodstained jeans in a warrantless search of defendant's home where the State was unable to tie the jeans to the crimes, and where defendant was admittedly in the room in which the victims were shot and was in close proximity to the bleeding victims.

5. **Criminal Law § 43.2— admissibility of photographs**

A witness's testimony that, except for some trees which had been removed, photographs showing an area between a motel parking lot and a highway fairly depicted the area on the date of the crimes provided a sufficient basis for admission of the photographs to illustrate testimony that defendant could not have seen his wife's car in the motel parking lot while he was driving along the highway, especially since the removal of the trees increased the visibility of the parking lot from the highway.

APPEAL by defendant from *Seay, Judge.* Judgments entered 22 May 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 March 1983.

Defendant was charged with second-degree murder of his wife's lover, Calvin Freeman, assault with a deadly weapon with intent to kill, inflicting serious bodily injury upon his wife, Barbara Collins, and breaking and entering a motel room with intent to commit the felony of murder therein. After a jury trial, he was convicted of each charge.

The State's evidence tended to show the following: Unbeknownst to the defendant, apparently, his wife Barbara Collins was having an affair with Calvin Freeman, who worked where she did. Mr. and Mrs. Collins, who lived in High Point, had had various differences during the months preceding the incidents involved herein, and just the day before had talked about separating. Around 8 o'clock on the morning of May 25, 1981 (Memorial Day), Mrs. Collins received a phone call at home from Freeman, who asked her to meet him in Room 310 of the Airport Hilton Inn later in the day, and told her where the room key was hidden. She answered the telephone in the kitchen, but there was an extension in the bedroom where the defendant appeared to be sleeping. After showering, dressing, and going several other places, Mrs. Collins picked up the room key and went to the motel room around noon. She removed all her clothing except for her

bra and panties and was sipping some white wine she had purchased when Freeman arrived at approximately 1:15 p.m. with some beer. He stripped to his boxer shorts, and a short time later the couple heard a knock on the door, but upon looking through the peephole saw no one. Within seconds, the room door was splintered by the defendant, who chased the two lovers into the bathroom and shot them both with a pistol.

A short while later, a Hilton Inn employee, noticing the busted room door, found both Barbara Collins and Calvin Freeman on the floor injured. She had two bullet wounds to her head and was still alive; he had a bullet wound in the back and another in the back of the neck and was dead. Mrs. Collins was taken to the hospital, where she underwent emergency surgery for her injuries. She told her doctors and some deputy sheriffs that the defendant was the one who shot her. Later that afternoon, sheriff's deputies converged on the defendant's home, but he was not there, and after making a warrantless search, they seized a pair of bloodstained blue jeans. Several hours later, after conferring with his brother and his attorney, the defendant voluntarily surrendered to the Guilford County Sheriff's Department.

Defendant testified to the following: He slept until 9 or 10 o'clock the morning involved and decided to work in the yard, since it was a holiday. During the afternoon, needing more grass seed, he was on his way from their home in High Point to a seed store in Greensboro that had been recommended to him when he saw his wife's car parked at the Airport Hilton. He stopped at the motel and went in to look for her. Not finding her in the lobby or restaurant, he inquired at the front desk and was told that Mr. Freeman was registered in Room 310. Upon arriving at the room door, he heard his wife say, "no, no, don't do that," knocked on the door without receiving an answer, and thinking that she was being hurt, burst through the door. He saw her and Freeman run into the bathroom, and upon following them, saw a gun pointed at him through the partially open door. A struggle over the gun ensued, shots were fired, and then defendant "blacked out." His memory was not regained until he got back to High Point later that afternoon.

Rebuttal testimony and demonstrative evidence was presented tending to show that the defendant could not have seen

his wife's car from the highway he claimed to have been traveling on.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone, III, for the State.

McNairy, Clifford & Clendenin, by Locke T. Clifford and Michael R. Nash, and Robert S. Cahoon, for defendant appellant.

PHILLIPS, Judge.

Though defendant's appeal is subject to dismissal because his brief did not link the various points argued to his assignments of error, as required by Rule 28(b)(3) of Rules of Appellate Procedure, making it necessary, in each instance, for us to check the entire collection of assignments, of which there is a great number, because of the gravity of the case we choose to dispose of it on the merits. In doing so, however, it is not necessary to discuss all of defendant's many contentions of error, none of which have merit.

[1] Defendant's hopes for an acquittal were largely based upon the defense of accident or misadventure—not because the evidence so clearly or strongly supported that defense, however, but because the nature and extent of the evidence marshalled against him left him with little else to rely upon. In instructing the jury concerning the death of Calvin Freeman and defendant's indictment for second-degree murder, the court also charged on the subordinate offenses of voluntary manslaughter and involuntary manslaughter. Immediately after instructing the jury on second-degree murder, voluntary manslaughter, and involuntary manslaughter, in that order, the court charged on accident and misadventure. Defendant contends that the sequence and content of the instructions led the jury to believe that his defense of accident or misadventure applied only to the offense of involuntary manslaughter. The instruction was as follows:

> Now, members of the jury, the defendant contends and the State denies that the defendant in this instance acted in such a way that the deceased, Calvin Freeman, died by accident or by misadventure, and if Calvin Freeman died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, Nathaniel Collins, the defendant Collins would not be guilty.

> The burden of proving accident is not on the defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

We think it most unlikely that the jury was confused by this instruction. It contains no implication that the defense of accident or misadventure was limited in application; instead, it states quite plainly that the defense denied that defendant had committed "any crime" at all. The instruction as a whole can only mean, we think, that if Calvin Freeman died without any wrongful purpose or criminal negligence on defendant's part, the defendant was not guilty of any crime in connection therewith. No doubt the jury would have so understood it, even if the instruction had stood alone; that they had just been told earlier in the charge that each of the crimes that defendant was being tried for involved wrongful purpose or criminal negligence could not have caused the jury to believe otherwise. In cases very similar to this one the instruction has been approved as both legally sufficient and non-confusing. *State v. Walker*, 31 N.C. App. 199, 228 S.E. 2d 772 (1976); *State v. McLamb*, 20 N.C. App. 164, 200 S.E. 2d 838 (1973).

Defendant also contends that he was erroneously deprived of the benefit of two other defenses that were available to him—that defendant killed Freeman while defending his wife from attack, and that the killing occurred in the "heat of passion" upon adequate provocation—by the trial judge either failing to charge or by charging inadequately or incorrectly. Though the defenses were somewhat contradictory to each other, as well as to the defense of accident and misadventure, if they were raised by the evidence, the defendant was entitled to have them charged on if he so desired. Consistency, though usually an advantageous course in litigation, is generally not required of those being tried for crime. 22 C.J.S. *Criminal Law* § 54.

[2] But the evidence did not give rise to the defending another defense, and the trial judge did not err in refusing to charge on it. *State v. Shepherd*, 220 N.C. 377, 17 S.E. 2d 469 (1941). Although defendant testified that he busted into the motel room because his wife sounded frightened, the rest of his testimony on the matter was that: After he got in the room, his wife and Freeman ran into the bathroom, a gun was pointed at him

through a crack in the door, someone said, "Shoot the S.O.B.," and he began struggling for the gun; and that he "couldn't say" whether he thought his wife was in danger after she and Freeman ran into the bathroom. Had the defendant aided his wife in any way, even after the shooting, his contention at trial and now that he was rescuing her from danger would be more colorable; but he left the premises with her lying on the floor wounded and bleeding.

[3] The judge did instruct on "heat of passion," however, defendant's objection being that discovered adultery was not specifically referred to therein as an adequate provocation. In giving this instruction, the judge said: "Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition. . . ." In our view, this instruction encompassed adultery, the only possible heat of passion basis raised by the evidence, and, no doubt, was so understood by the jury. Indeed, it may not have been necessary to charge on heat of passion at all, since there was scarcely any evidence as to defendant's heat of passion *after* seeing indications of adultery upon entering the motel room, the only time a legally sanctioned heat of passion could have developed. His testimony concerning the developments that occurred after he entered the room was about struggling for the gun and trying to avoid being shot; being overcome by anger was not mentioned. In all events, the court's failure to charge more pointedly on heat of passion did defendant no legal detriment.

[4] In a warrantless search of defendant's house, shortly after the crime when there was good reason to think that he was concealed therein with a gun, the police found a pair of bloodstained blue jeans lying on the bed, which were exhibited during the trial. Though defendant's motion to suppress, denied by the court, raises some interesting search and seizure questions, they are immaterial to the appeal and need not be discussed, since the State was unable to tie the jeans to the crime, and defendant was admittedly in the bloodstained room in close proximity to the bleeding victims. If defendant's presence at the scene of the homicide had been disputed, the exhibit certainly could have prejudicially affected the verdict and we would determine whether the search and seizure complied with Fourth Amendment requirements; but under the circumstances that existed the

exhibit could not have affected the verdict, prejudicially or otherwise, and determining whether the search and seizure was valid would avail nothing.

[5] If defendant's explanation as to how he happened to stop by the Airport Hilton and find his wife and Freeman in Room 310 seemed at all plausible to the jury, which is unlikely, the State's rebuttal evidence probably made it seem less so. Deputy Sheriff Willis, who participated in the initial investigation of the crime and saw Mrs. Collins' car in the lot shortly after the victims were discovered, testified that: It was more than 400 feet from the road to the edge of the parking lot; the parking lot was lower than the road and surrounded by a chain link fence; at the time involved the view from the road of the part of the lot where her car was parked was obstructed at different points by either a service station, a wooded area, a steak house, or a small church building. He also testified that a few months after the shooting all the trees in the wooded area between the service station and the steak house were cut down, but the stumps were still there, and except for that change the entire area looked substantially as it did almost exactly a year earlier when Freeman was killed. Over defendant's objection, several photographs of the motel parking lot, taken the day before from different points in the road, were received into evidence to illustrate the witness's testimony. The photographs showed the service station, the stumps in the area where the trees had been, the steak house, the church, and different parts of the chain link fence and parking lot. The principal basis for defendant's objection to admitting the photographs was the changes that occurred in the area between the time when defendant says he saw the car and a year later when the pictures were taken. The witness testified that except for the woods that had covered the space between the service station and the steak house the scene depicted by the photographs fairly illustrated the way the area looked the day the crime was committed. This was basis enough, in our opinion, for the photographs being received as illustrative evidence. Illustrative evidence, being just that, does not have to be exact. 1 Brandis N.C. Evidence § 34 (2d rev. ed. 1982). The changes, not being significant enough to deprive the pictures of their illustrative value, affected the evidence's weight, rather than its admissibility. *State v. Shepherd*, 220 N.C. 377, 17 S.E. 2d 469 (1941). Furthermore, the changes apparently

increased, rather than decreased, the visibility of the parking lot from the road, and thus could not have prejudiced the defendant, who testified that his wife's parked car was visible and recognizable as he drove along the road.

In our opinion, the defendant received a fair trial and was skillfully represented by able counsel. But cases are governed by their circumstances, and the mold of this case was irrevocably cast when defendant voluntarily placed himself in a situation that all but established his guilt as charged; and the mold, if anything, was hardened by the rather unlikely explanation that he gave of his presence and participation.

No error.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. ALLEN W. NEALY AND ROBERT A. SMITH

No. 8314SC53

(Filed 1 November 1983)

1. **Burglary and Unlawful Breakings § 5.5— breaking or entering motor vehicle—sufficiency of evidence**

The evidence was sufficient to support an "entry" into a vehicle where it tended to show that defendant Smith was squatting down and looking up under the hood, which the defendant Nealy was trying to raise, even though there was a chain lock on the hood which prevented it from being raised more than twelve to eighteen inches.

2. **Criminal Law § 158.2— silence of record on conference on jury instructions—presumption that judge acted properly**

Where the record is silent as to whether the trial judge conducted a jury instruction conference as required by Rule 21 of the General Rules of Practice for the Superior and District Courts, it will be presumed that the trial court acted correctly.

3. **Criminal Law § 95— evidence properly admitted for restrictive purpose**

In a prosecution for felonious breaking or entering of a motor vehicle, the trial court properly admitted evidence of a previous theft of a battery from the victim's car for the limited purpose of showing why the victim's car hood was chained down and could only be partially opened.

Judge EAGLES dissenting.

State v. Nealy

APPEAL by defendants from *Godwin, Judge.* Judgment entered 17 August 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 September 1983.

The defendants were tried on a bill of indictment charging them with felonious breaking or entering of a motor vehicle in violation of G.S. 14-56. On 30 March 1982 the defendant Smith was seen in the Carriage House Apartments parking lot squatting down and looking up under the hood of a 1967 Chevrolet which belonged to John Dodd. His half-brother, the defendant Nealy, appeared to be attempting to raise the hood, which had been chained down. Nothing was discovered missing from the vehicle.

Robert Franklin, a detective for the Department of Public Safety and a part-time security person at the apartment complex, testified that at around 11:30 on the night in question he heard a car with a loud muffler drive through the apartment parking lot three times. He looked out of his window and saw the car driven by the defendant back into a parking space. The engine was then turned off, and the car remained parked for approximately three minutes. The driver then restarted the car and pulled forward to the center of the parking lot before parking next to other cars.

Franklin grabbed a service revolver and badge and went downstairs. He walked to his unmarked patrol car and, glancing to his left, saw the defendant at the car owned by John Dodd which was backed into a space so that the hood faced Franklin. He heard a clanging noise, later identified as resulting from the chain lock, and saw that the hood was raised 12 to 18 inches. The defendant Smith was squatting down, looking up under the hood, which the defendant Nealy was attempting to raise. Franklin then drove his car to the end of the lot and parked, blocking the entrance. He walked back toward the defendants who, after seeing him approaching them, left Dodd's car and walked slowly toward their own vehicle. As they began to climb into their car, Franklin yelled that he was a police officer and ordered them and two passengers in the car to lie face down on the pavement. He then placed them under arrest.

At the close of all the evidence, the defendants' motion for a directed verdict was denied. The jury found both defendants guilty of felonious breaking or entering a motor vehicle. The de-

fendant Nealy was sentenced to two years imprisonment as a regular youthful offender. The defendant Smith was sentenced to a two-year term, suspended for three years, as a committed youthful offender. He was fined $100 and placed on three years probation on the condition that he serve an active prison term of six months. Both defendants gave notice of appeal in open court on 17 August 1982.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

John M. Bourlon and Richard C. Boyd for defendant-appellants.

ARNOLD, Judge.

[1] The defendants contend that there was no evidence of an "entry" into the vehicle in question, thus making improper the trial court's instruction to the jury that they could infer a larcenous intent from an unlawful breaking or entering. The mere fact that a chain lock prevented the hood from opening beyond 12-18 inches, however, does not preclude a finding that there was an entry. In fact, this Court has found an entry where the defendant was seen standing at the open door of a van with the upper part of his body leaning inside the vehicle. *State v. Sneed*, 38 N.C. App. 230, 247 S.E. 2d 658 (1978).

In *Sneed*, the Court quoted from Black's Law Dictionary as follows: "In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense." 38 N.C. App. at 231, 274 S.E. 2d at 659.

Although there is no testimony that either defendant was actually seen with a portion of his body under the hood of Dodd's car, Officer Franklin's testimony that the defendant Smith was squatting down and looking up under the hood, which the defendant Nealy was trying to raise, leads to the obvious conclusion that there was an entry. Certainly, when one raises the hood of a car he must first extend some portion of his hand beneath the hood to release the hood latch. We, therefore, find no error in the court's instruction.

Similarly, we reject the defendants' contention that the trial court erred in instructing the jury on what constitutes an entry. As noted previously, there was sufficient evidence of an entry, and the judge's instruction that "(t)he movement of a hand from the outside of an automobile opened hood to a position under the open hood would be an entering" was not error.

The defendants also contend that it was prejudicial error for the trial judge to comment before the jury that the defendants' lawyers had objected to the State's request to give additional instructions on intent. We disagree. While it may have been better practice to have simply noted the objections in the record, the defendants have failed to establish how they might have been prejudiced by the court's remarks. In no way do the judge's comments convey to the jury the "impression of judicial leaning." *See State v. Staley*, 292 N.C. 160, 166, 232 S.E. 2d 680, 684-85 (1977).

[2] It is further contended by the defendants that the trial judge violated Rule 21 of the General Rules of Practice for the Superior and District Courts by failing to hold a conference on jury instructions. There has been some question as to whether such a conference must be held at trial as a matter of right or whether it must only be held upon the request of one of the parties. The question was recently answered, however, by the Supreme Court of North Carolina in *State v. Bennett*, 308 N.C. 530, --- S.E. 2d --- (1983). In that case, the Court stated, "If either party to the trial desires a *recorded* instruction conference, G.S. 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, G.S. 15A-1231(b) is silent and General Rule 21 supplements the statute by requiring the trial court to hold an *unrecorded* conference." 308 N.C. at 534, --- S.E. 2d at ---.

Although the defendants now contend that the trial judge erred in failing to hold a conference on jury instructions, there is nothing in the record to indicate that any such conference, whether recorded or unrecorded, was held. Where the record is silent as to whether a conference was in fact held, the defendant must hold himself accountable.

> The defendant, as appellant, has the duty under Rule 11 to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to Rule 11(a) acknowledging the

> trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to Rule 11(c).

Id. Where the record is silent, it will be presumed that the trial court acted correctly. *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982).

[3] Finally, the defendants contend that the court erred in failing to rule on their motion in limine to exclude testimony concerning the previous theft of the battery from Dodd's car. Although the trial judge reserved his final ruling on the motion, he did state that evidence of the theft would be admissible for the limited purpose of showing why the hood was chained down and could be only partially opened. The State made no effort to show that either of the defendants was in any way responsible for the prior theft, but introduced the evidence merely to explain why the hood was not fully raised, as was permitted by the judge.

We have examined the defendants' remaining assignments of error and have found in them no merit.

No error.

Judge WELLS concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I would reverse the convictions. The statute under which defendants were convicted is intended to proscribe the breaking or entering of compartments of a motor vehicle in which property is customarily carried, i.e., the passenger compartment and the trunk area.

The evidence here at most established that defendants were looking in and were tampering with the automobile's hood which they could not raise because of a recently installed chain lock mechanism which prevented its being opened beyond a few inches.

The statute under which these defendants could have been properly charged is G.S. 20-107 which prohibits and punishes tampering with motor vehicles.

JOHN SHISHKO AND BELLE SHISHKO v. JOHN M. WHITLEY, SR. AND GROVER D. ELLIS, SR. AND HOLLY RIDGE AIRPORT, INC.

No. 824DC742

(Filed 1 November 1983)

Injunctions § 12.2— motion to dissolve preliminary injunction—no jurisdiction to decide merits

The trial court has no jurisdiction to determine the merits of a case and grant permanent injunctive relief in a hearing on a motion to dissolve a standing preliminary injunction.

APPEAL by plaintiffs from *Martin (James N.), Judge.* Judgment entered 3 March 1982 in District Court, ONSLOW County. Heard in the Court of Appeals 13 May 1983.

The following is a summary of the pertinent facts and procedural history of this case, insofar as it can be determined from the record on appeal: plaintiffs initiated legal proceedings in this matter on 3 October 1980 by filing a complaint seeking a permanent injunction and a motion seeking a temporary restraining order against defendants Ellis and Whitley. The complaint and the motion asked the court to issue appropriate orders restraining and enjoining defendants from interfering with plaintiffs' use of a driveway or path. This driveway ran between plaintiffs' home and property and a state maintained road. It lay across defendants' intervening land, on which defendants had constructed an airstrip for light aircraft. Plaintiffs alleged that this driveway provided the only means of access from their property to the state road and that it had been in existence for more than 100 years and in continuous use by plaintiffs and their predecessors in title for more than 20 years. Plaintiffs alleged that defendants had obstructed the driveway and interfered with plaintiffs' use of it.

In addition to the injunctive relief, plaintiffs alleged and sought compensatory and punitive damages. The court issued the

temporary restraining order and scheduled a hearing on the motion for a permanent injunction on 13 October 1980.

On or about 10 October 1980, defendants filed countermotions for a temporary restraining order and a preliminary injunction preventing plaintiffs from crossing defendants' land. In support of their motions, defendants alleged that plaintiffs' driveway ran across the airstrip in an extremely dangerous place and that plaintiffs' use of the driveway had already caused two aborted landings. Defendants further alleged that plaintiffs had access to state roads by means other than across defendants' property. Defendants also filed a motion to dissolve the 3 October 1980 temporary restraining order on various procedural grounds and on the grounds that plaintiffs had access to a state road across their own property. Although it does not directly appear in the record, defendants apparently filed a timely answer, denying the material allegations of the complaint and making a counterclaim. The material allegations of the counterclaim apparently were denied in plaintiffs' response, which is included in the record, dated 28 April 1981.

From the allegations in a later motion and from the transcript of hearing in the record, we gather that the hearing on the motions was postponed and the temporary restraining order continued by consent until 8 May 1981.

After a hearing on the motions, the trial court granted defendants' motion for a preliminary injunction, also apparently denying plaintiffs' motion and dissolving the 3 October 1980 temporary restraining order. Further hearing on defendants' motion for a preliminary injunction was set for 26 May 1981 and plaintiffs were directed to amend their complaint to include Holly Ridge Airport, Inc., as a necessary party defendant. Plaintiffs filed a motion to amend their complaint on 13 May 1981.

What transpired at the 26 May 1981 hearing is not clear, no order or judgment or transcript of the proceeding appearing in the record. Apparently, plaintiffs did not properly amend their complaint and the preliminary injunction was allowed to remain in effect. On 26 May 1981, plaintiffs gave notice of appeal from the court's order of 8 May 1981, but this appeal was never perfected.

Thereafter, on 8 June 1981, defendants filed an answer to the amended complaint and a motion to dismiss for failure to comply with the 8 May 1981 order. On 15 June 1981, according to an allegation in a later motion, defendants made a request for an entry of default judgment against plaintiffs. On 16 July 1981, defendants filed motions for summary judgment and to dismiss for failure to prosecute the action. No immediate action was taken on these motions. All of the above occurred in District Court.

Plaintiffs filed an amended complaint in Superior Court on 28 December 1981, purportedly in compliance with the 8 May 1981 order. On 5 January 1982, plaintiffs filed motions to dissolve the 8 May 1981 preliminary injunction and for entry of a preliminary injunction against defendants. Defendants replied and moved to strike the motions on the grounds that the issues raised by them had been heard and determined on 8 May 1981. The Superior Court, Bruce, Judge, entered an order on 21 January 1982 finding that it had no jurisdiction to hear the motions and directing that the case be sent back to District Court.

On 19 February 1982, plaintiffs filed another amended complaint, incorporating Holly Ridge Airport, Inc., into the material allegations. The matter came for hearing on the pending motion to dissolve at the 1 March 1982 Session of District Court. Plaintiffs and defendants presented evidence and testimony.

Judgment for defendants was announced in open court at the close of the hearing. The court permanently enjoined plaintiffs from crossing over defendants' land. Plaintiffs gave notice of appeal at this time. On 11 March 1982, written judgment was entered finding that plaintiffs had failed to show "any express, implied or presumptive easement," and that their crossing defendants' land constituted a trespass and a hazard. On 12 March 1982, after judgment had been entered and signed, defendants filed their answer to the amended complaint of 19 February 1982. Plaintiffs appealed.

Popkin and Coxe, by Samuel S. Popkin, for plaintiff appellants.

Bailey, Raynor & Erwin, by Frank W. Erwin, for defendant appellees.

JOHNSON, Judge.

We concede at the outset that much of the long and complex procedural history of this case, summarized in pertinent part above, is unnecessary to a determination of the merits of this case. However, the record on appeal is so incomplete in certain respects that the merits are difficult to reach and a fair consideration of them nearly impossible. The record is complete enough, however, to show that the trial court had no jurisdiction to enter the judgment appealed from.

The judgment, as entered orally and in writing, purports to be a final judgment in all respects: it makes findings of fact and draws conclusions of law as to the merits of the case and enters the relief prayed for, a permanent injunction.

That the judgment purports to be final is apparent from the nature of the relief granted. A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case. As such, the court has no authority to issue a permanent injunction in an interlocutory proceeding. *See Smith v. Rockingham*, 268 N.C. 697, 151 S.E. 2d 568 (1966) (improper for a judge to enter a permanent injunction in a pretrial conference). Accordingly, it is error for a court to issue a permanent injunction at a hearing to show cause why a temporary injunction or restraining order should not be continued. *MacRae & Co. v. Shew*, 220 N.C. 516, 17 S.E. 2d 664 (1941); *Register v. Griffin*, 6 N.C. App. 572, 170 S.E. 2d 520 (1969). "The judge hearing the order to show cause why the injunction should not be continued to the hearing had no jurisdiction to hear and determine the controversy on its merits. . . ." *Patterson v. Hosiery Mills*, 214 N.C. 806, 810, 200 S.E. 906, 908 (1939).

These cases stand for the proposition that the trial court has no jurisdiction to consider and determine the merits of a case and grant permanent injunctive relief in the context of a hearing to determine whether a temporary injunction or restraining order should continue in effect. In such situations, the only question properly considered is whether the order should be continued. *MacRae v. Shew, supra; Register v. Griffin, supra; see generally* 7 Strong's N.C. Index 3d, Injunctions, §§ 12.1, 12.2 (1977 and Supp. 1983); *but see In re Savings and Loan Assoc.*, 53 N.C. App. 326, 280 S.E. 2d 748, *disc. rev. denied*, 304 N.C. 588, 291 S.E. 2d 148

(1981) (judgment on the merits in a hearing on a motion to show cause not error where issue decided was solely one of law).

For the court below to consider the merits of the present case in the procedural context then existing was just as improper as in the situations in the cases cited *supra*. Although our research has disclosed no case that is directly on point, it follows logically that the jurisdictional constraints which determined the outcome in the above cases apply equally and for the same reasons where, as here, the court is considering a motion to dissolve a standing preliminary injunction. The preliminary injunction, like the temporary restraining order, is interlocutory and the question presented by the motion to dissolve is whether the injunction should continue in effect. In such cases, the court has no jurisdiction to proceed to the merits of the case, and jurisdiction may not be conferred by consent of the parties. *See MacRae v. Shew, supra.*

The record on appeal in this case does sufficiently indicate, by its inclusions as well as its omissions, that the hearing in question was not a hearing on the merits, but rather a hearing on the plaintiffs' motion to dissolve the 26 May 1981 preliminary injunction: (1) in their pleadings, both parties requested a jury trial as to all the issues involved but the hearing was before the judge and there is no indication that either party waived its right to a jury trial; (2) there is no indication that this matter was ever calendared for a trial on the merits in District Court at the 1 March 1981 Session; and (3) the amended complaint was not filed until after the hearing and after judgment had been entered and signed; defendant never having waived his right to file an answer. In their briefs, the parties proceed on entirely different perceptions of what the hearing was supposed to be. Plaintiff proceeds on the premise that the court had continued the preliminary injunction while defendant assumes that final judgment had been entered and a permanent injunction issued. Finally, and most convincingly, the transcript of the hearing affirmatively discloses that neither the parties nor the court clearly intended to proceed on the merits of the case or to determine finally the rights of the parties as regards this controversy. At the close of the hearing, the following colloquy took place between counsel for the parties and the trial judge:

COURT: [after summarizing the evidence] . . . I must issue a *permanent injunction* against the plaintiffs to not go on the defendants' property. I know I can feel for both sides, but I think this is the law and what I have to uphold, and that is what I am going to do.

MR. POPKIN: Judge, was that a motion for a *permanent injunction* that we were hearing?

COURT: I think your motion was to dissolve the *restraining order* that I issued, and what I'm saying is I'm not dissolving it, which means the injunction is there. I mean it's a matter of semantics really, I suppose.

MR. POPKIN: I wasn't aware that Mr. Erwin was asking for that, I thought he was just asking to keep the *preliminary injunction* in effect.

COURT: I'll word it differently then. What I'm saying is this, the injunction that I previously entered in May is to remain in effect.

MR. ERWIN: Thank you.

MR. POPKIN: Thank you.

(Mr. Popkin conferred with his clients.)

MR. POPKIN: Your Honor, in the case I know the Court has granted the *preliminary injunction* against the Shishkos, but what type of security is the Court going to require of the defendants?

COURT: What sort of security of what nature?

MR. POPKIN: Pursuant to Rule 65 can I—

MR. ERWIN: May we approach the bench?

COURT: Yes, sir.

(Counsel and the Court conferred at the bench.)

COURT: This is a *permanent injunction*, in other words I'm telling you people to stay off somebody else's property, pure and simple, period, so no security is required for that. None is necessary, none is required.

MR. POPKIN: We would like to note our appeal from your Order.

[Emphasis added.]

Inasmuch as the trial court here had no jurisdiction to enter the judgment appealed from, that judgment must be vacated with the result that the preliminary injunction remains in effect until this matter is properly heard and considered on its merits. Further, neither this opinion nor the proceeding below is *res judicata* with respect to any of the substantive issues that might be raised on a subsequent proceeding. *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E. 2d 703 (1967).

Vacated and remanded.

Judges HILL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHARLES SIDNEY LANGLEY

No. 837SC104

(Filed 1 November 1983)

1. **Arson and Other Burnings § 4.1— burning of building used in trade or business—sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss an indictment for burning a building used in a trade or business even though all of the businesses in a shopping center were temporarily closed after a fire which happened a week before the fire for which defendant was charged since the closing of the doors to the public after a fire does not in and of itself take a business premises outside the operation of G.S. 14-62.

2. **Arson and Other Burnings § 4.1— burning of personal property—sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss the indictments for burning the personal property of two store owners where the testimony from the owners and the fire investigators indicated that while the first fire, which happened a week before the fire for which defendant was charged, was devastating in its effect on the two businesses, there was, nevertheless, property of value left in both businesses after the first fire, which was still present in those businesses at the time of the second fire.

3. Arson and Other Burnings § 3; Searches and Seizures § 1— search of fire scene without warrant—evidence properly admitted

While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises, and the fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises.

APPEAL by defendant from *Winberry, J.* Judgment entered 30 August 1982 in NASH County Superior Court. Heard in the Court of Appeals 17 October 1983.

Defendant was charged in five separate indictments for conspiring to burn and burning personal property of others and burning of a building used for trade or business, on 18 January 1982.

At trial the state's evidence tended to show the following events and circumstances. In January, 1982 defendant owned Tape City Shopping Center, which contained four separate businesses located in one building: True West, a western clothing store, owned and operated by defendant; and Tape City, a tape recording store; Brown's Country Lounge, a restaurant and bar; and Wigs-R-Us, a hair piece and wig store, all businesses owned by others. On 11 January 1982, the shopping center was damaged by fire. On 18 January the shopping center was again damaged by fire, resulting in its total destruction. Defendant was convicted of the conspiracy charge, the charge of burning a building used in carrying on a trade or business, burning the personal property of Julius Rose, and burning the personal property of William Addleman.

From judgments and sentences entered on the verdicts, defendant has appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Blackburn and Gammon, by James L. Blackburn, for defendant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court should have granted his motion to dismiss the indict-

ments for burning a building used in a trade or business and for conspiracy, for insufficient evidence. Upon such a motion,

> . . . all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

State v. Witherspoon, 293 N.C. 321, 237 S.E. 2d 822 (1977). *See also State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980); *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

Defendant hinges his argument on the quality of the state's evidence as to the use of the building when it was burned on 18 January, contending that the earlier 11 January fire had rendered the building useless. Without burdening this opinion with a recitation of the evidence in detail, we simply hold that the state's evidence did show that on 18 January 1982, the shopping center still housed businesses which were, in one way or another, still functioning as such. More particularly, we hold that the closing of the doors to the public after a fire does not in and of itself take a business premises outside the operation of the G.S. § 14-62.[1] While all of the businesses in the shopping center were temporarily closed after the 11 January fire, they nevertheless remained as businesses through 18 January and the building in which they were located was "a building . . . used" in carrying on a business on 18 January 1982. This assignment is overruled.

[2] In his next assignment, defendant contends that the trial court should have granted his motion to dismiss the indictments for burning the personal property of Julius Rose and William Addleman.[2] More precisely, defendant argues that all of the personal

1. G.S. § 14-62. If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class E felon.

2. G.S. § 14-66. If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares,

property located in the tape and wig stores was destroyed in the first fire. The evidence, when viewed in the light most favorable to the state, was otherwise. Testimony from the owner and fire investigators indicated that while the first fire was devastating in its effect on the two businesses, there was, nevertheless, property of value left in both businesses after the first fire, which was still present in those businesses at the time of the second fire. This assignment is overruled.

In another assignment of error, defendant argues that the trial court erred in instructing the jury that the specific intent of defendant to injure or prejudice Rose and Addleman could be inferred from the evidence. The portion of the trial court's instruction, to which defendant objected, was as follows:

> The act of burning the personal property of Julius Rose (William Addleman) . . . would be a specific intent to injure or prejudice Julius Rose (William Addleman). This intent may be inferred from the nature of the act and the manner in which it is done.

Defendant does not argue with the wording of the instruction, but contends there was no evidence to support it. Our disposition of defendant's second assignment of error is also dispositive of this assignment, and this assignment is overruled.

[3] In his next assignment of error, defendant argues that the trial court erred in allowing the products of an illegal search into evidence. Following the fire, Nash County Fire Marshal, Wilford Evans, conducted an investigation into the origin and causes of the fire. Defendant contends that such investigation amounted to a warrantless search and that the fruits of the investigation should have been suppressed. Specific evidence defendant sought to have suppressed was the discovery by firemen of accelerants on the premises. The heart of defendant's argument seems to be that at the time the accelerants were found, the fire was sufficiently under control to remove any exigency of circumstance which might justify or validate a warrantless search. We reject

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merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be punished as a Class H felon.

this argument, and hold that while firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises, and that the fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises. *See Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978). *See generally* 3 La Fave, *Search and Seizure* § 10.4 (1978 & 1983 Supp.). This assignment is overruled.

No error.

Chief Judge VAUGHN and Judge JOHNSON concur.

JOEL T. CHEATHAM, INC. v. THOMAS M. HALL

No. 829SC1253

(Filed 1 November 1983)

1. **Brokers and Factors § 6— exclusive right to sell agreement—no modification by correspondence from owner**

   Where an exclusive listing and right to sell agreement with a real estate broker reserved the owner's right to sell the property to an existing potential buyer for 30 days, correspondence in which the owner attempted to extend his right to sell to the potential buyer for an additional three months did not modify the agreement and deprive the broker of his right to commissions for the owner's sale of the property to the potential buyer after the original 30-day period had expired.

2. **Brokers and Factors § 6— exclusive right to sell agreement—broker not procuring cause of sale—right to commission**

   Defendant owner was liable for the payment of a real estate broker's commission under an exclusive right to sell agreement where defendant sold the property to a third party during the term of the agreement and the broker was not the procuring cause of the sale.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 11 August 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 20 October 1983.

In this action plaintiff seeks to recover a brokerage commission allegedly due under a contract between plaintiff and defendant for the sale of land belonging to defendant. The contract is dated 21 January 1981, is entitled "EXCLUSIVE LISTING AGREEMENT," and contains the following pertinent provisions:

> In consideration of your agreeing to list the above-described property for sale, and in further consideration of your services and efforts to find a purchaser, you are hereby granted the exclusive right, for a period of 4 month(s) from date, to sell the said property for the price of $325,000.00 and on terms of all cash to me or upon such other terms and conditions as may be agreed upon.
>
> If the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within 3 months thereafter, to any party with whom you or your representatives have negotiated, and whose name has been disclosed to me, I agree to pay you a professional brokerage fee of 5% of the gross sales price.

The following are the undisputed material facts in the pleadings and affidavits filed pursuant to plaintiff's motion for summary judgment. At the time defendant entered into the contract in question, he reserved the right to sell the property for thirty days to two existing potential buyers from a prior exclusive listing agreement with a different broker. The term of the prior exclusive listing agreement ended 5 January 1981, and the thirty day period from the execution of the contract in question came to an end 20 February 1981. On 3 February 1981, plaintiff received copies of correspondence in which defendant attempted to extend the three month carry-over period from the prior exclusive listing with the different broker in regard to a Mr. Ernst Dannenberg, one of the existing potential buyers.

On 16 March 1981, defendant and his wife entered into a contract for the sale of the property to Mr. Ernst Dannenberg for $280,000.00. Plaintiff sued defendant to recover a $14,000.00 commission allegedly due it under its exclusive listing contract of 21 January 1981.

Plaintiff's motion for summary judgment was granted.

Zollicoffer & Zollicoffer, by Nicholas Long, Jr., for plaintiff-appellee.

Allsbrook, Benton, Knott, Cranford & Whitaker, by L. McNeil Chestnut, for defendant-appellant.

HILL, Judge.

The sole issue is whether the trial court erred in granting plaintiff's motion for summary judgment. We find that summary judgment was properly granted.

Upon motion a summary judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). In ruling on a motion for summary judgment, the court should not decide issues of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971).

Applying these basic tenets to the case under review, we address defendant's contention that summary judgment was improperly granted. This contention is based on there being two material facts in issue: whether defendant properly reserved two prospective buyers from the terms of the second listing contract, and whether defendant is liable for payment of a broker's commission under an exclusive right to sell agreement where defendant sells property to a third party during the term of the agreement and the broker is not the procuring cause of the sale.

[1] (1) Did defendant properly reserve two prospective buyers from the terms of the listing contract in question?

It is undisputed that the listing contract reserved the right to sell the property to two existing potential buyers for thirty days. However, this thirty-day period expired 20 February 1981,

some three weeks prior to the date of defendant's contract to sell the property to Mr. Dannenberg. Nor do the copies of correspondence plaintiff received in which defendant attempted to extend the prior exclusive listing in regard to Mr. Dannenberg constitute a modification of the contract in question. To be effective as a modification, the subsequent agreement must possess all the elements necessary to form a contract. *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972); 17 Am. Jur. 2d, Contracts, § 469, p. 939. The evidence is void of any mutual agreement or consideration to support a modification of the original contract. Therefore, as to defendant's first contention, there was no triable issue of fact.

[2] (2) Did the construction of an exclusive right to sell agreement, under which defendant sells property to a third party and the broker is not the procuring cause of the sale, constitute a genuine issue of material fact?

Exclusive listing agreements are of two types: "exclusive agency," interpreted as prohibiting the owner from selling the property through the agency of another broker during the listing period, but the owner may sell the property through his own efforts; and an "exclusive right to sell," prohibiting the owner from selling both personally and through another broker, without incurring liability for a commission to the original broker. *Beasley-Kelso Associates v. Tenney*, 30 N.C. App. 708, 228 S.E. 2d 620, *disc. rev. denied*, 291 N.C. 323, 230 S.E. 2d 675 (1976); *Insurance & Realty, Inc. v. Harmon*, 20 N.C. App. 39, 200 S.E. 2d 443 (1973); R. Lee, North Carolina Law of Agency and Partnership, § 38, p. 54 (3d ed. 1967).

In *Insurance & Realty, Inc. v. Harmon, supra*, this court considered the same wording of the form contract in question used by the plaintiff. The court concluded that the wording, "[i]f the property is sold or exchanged by you, by me, or by any other party . . .," granted an "exclusive right to sell." In accordance with cases of other jurisdictions, in the event the owner breaches this type of agreement, he is liable for the commission which would have accrued if the broker had obtained a purchaser during the period of the listing. The broker need not show that he could have performed by tendering an acceptable buyer, or that he was the procuring cause of the sale. The owner may breach the agree-

ment by arranging a sale in violation of the agreement or by action which renders the broker's performance impossible. See *Carlsen v. Zane*, 261 Cal. App. 2d 399, 67 Cal. Rptr. 747 (1968); see also Annot., 88 A.L.R. 2d 936 (1963) for more cases so holding.

In the case under review, the sale of the property clearly fell within the term of plaintiff's 21 January 1981 exclusive right to sell agreement. Therefore, the trial judge correctly determined as a matter of law that

> the Exclusive Listing Agreement between Plaintiff and Defendant conveyed to Plaintiff the exclusive right to sell the 291-acre farm in Washington County, North Carolina for a period from January 21, 1981 until May 22, 1981 and specifically negatived the right of the owner/defendant to sell the property either in competition with the broker/plaintiff or through another broker during the term of the Contract without being liable for payment of the commission to the Plaintiff as provided in the Contract . . . .

We conclude that plaintiff was entitled to judgment as a matter of law. The summary judgment appealed from is

Affirmed.

Judges ARNOLD and BRASWELL concur.

W. H. DAIL PLUMBING, INC. v. ROGER BAKER AND ASSOCIATES, INC., AND J. GORDON FISHER AND WIFE, SHIRLEY C. FISHER

No. 8215SC1219

(Filed 1 November 1983)

Laborers' and Materialmen's Liens § 8— enforcement of blanket lien against one unit of multi-unit condominium project inequitable

The trial court erred by entry of summary judgment allowing plaintiff to enforce the full amount of a blanket lien against a single unit in a multi-unit condominium project. Each unit should be liable only for its proportionate share based upon the materials and labor furnished to that unit, and its proportionate share of labor and materials furnished the common area, under the contract that is the subject of a lien.

Dail Plumbing v. Roger Baker & Assoc.

APPEAL by defendants J. Gordon Fisher and Shirley C. Fisher from *Clark (Giles R.), Judge.* Judgment entered 23 August 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 October 1983.

This is a civil action wherein the plaintiff filed a claim of lien against the Estes Park Office Condominium project (hereinafter Project) in the sum of $13,718.16. Plaintiff then brought suit against Roger Baker and Associates, Inc. (hereinafter Baker) and J. Gordon Fisher and wife Shirley C. Fisher seeking to enforce the lien.

The evidence tended to show the following: Dail and Baker entered into a contract whereby Dail agreed to furnish all plumbing equipment, material and labor for Baker's project at a contract price of $39,500. Acting pursuant to the contract, Dail installed a sewage system, a roof drainage system, a water cooler, service sinks and a water heating system that would serve all the units of the project. Dail also installed bathroom facilities in each project unit that were integrated with the project's system.

Baker agreed to pay Dail on a monthly basis for wages and materials expended on the project. Baker paid all amounts due through 12 August 1981; however, it failed to pay $2,500 due on 25 August 1981, $11,000 due on 29 September 1981, and $218.61 due on 29 September 1981, leaving an unpaid balance of $13,718.61.

On 10 September 1981, pursuant to a properly recorded declaration of unit ownership, Baker conveyed Unit 104 of the project to the Fishers. A claim of lien was filed on 28 December 1981, and a suit seeking a judgment to enforce the lien was filed on 5 March 1982. Baker declared bankruptcy. Dail, after completing discovery, moved for summary judgment against the Fishers, seeking to have its claim of lien declared a lien against defendants' single unit in the total amount of $13,719.61.

Dail submitted affidavits outlining the work it had performed and alleging that the work was performed in a workmanlike and satisfactory manner. The affidavits further alleged that Dail was still owed $13,718.61 under the contract between Dail and Baker. The Fishers submitted counter affidavits alleging that Dail had been substantially paid for the work performed on Unit 104 of the

project, and that the unpaid balance represented work performed to benefit the entire project as well as Dail's profit under the contract.

After considering the pleadings, discovery, and affidavits, the trial court entered an order granting summary judgment which in pertinent part provides:

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that W. H. Dail Plumbing, Inc., has a lien against the right, title, and interest of J. Gordon Fisher and wife, Shirley C. Fisher, in Unit 104 and their undivided interest in the common areas and facilities of the Estes Office Park . . . and the lien shall be in the amount of $13,719.61, with interest thereon at the legal rate from and after October 10, 1981, to the date of satisfaction of this lien, and Unit 104 and its share of undivided interest in the common areas and facilities shall be sold and the proceeds applied to satisfy this lien; . . .
>
> . . .

From that judgment the Fishers appealed.

Boxley, Bolton & Garber, by Ronald H. Garber, for the plaintiff, appellee.

Mount, White, King, Hutson, Walker & Carden, P.A., by Lillard H. Mount and Daniel E. Garner, for the defendants, appellants.

HEDRICK, Judge.

The issue presented is whether the trial court erred by entry of summary judgment allowing Dail to enforce the full amount of its lien against a single unit in a multi-unit condominium project.

> As a broad general legal principle, it has frequently been held or recognized that a single blanket mechanic's lien upon or against several lots or properties for a total sum due to the claimant for labor or materials furnished thereto by him may not ordinarily, and in the absence at least of some showing of proper apportionment, be enforced against less than all of such tracts or parcels.

Annot. 68 A.L.R. 3d 1300, 1303. This principle has been adopted by several states, including Montana and Florida. The Supreme

Court of Montana in *Hostetter v. Inland Dev. Corp. of Montana*, 172 Mont. 167, 175, 561 P. 2d 1323, 1328 (1977) stated: "[I]t would be inequitable to burden some lesser portion of the liened premises with charges for labor and materials which were not actually furnished to that particular parcel. Consequently, this single lien, proportionately effective against each unit, would only be enforceable against each unit proportionately." The Florida District Court of Appeals, in dealing with the enforcement of a blanket lien against a condominium project stated: "However, the most equitable result would be accomplished by making each condominium unit liable only for its pro rata share based upon its pro rata interest in the condominium property as set forth in the declaration of condominium. . . ." *Southern Colonial Mortg. Co., Inc. v. Medeiros*, 347 So. 2d 736, 739-40 (Fla. Dist. Ct. App. 1977).

An examination of North Carolina law also reveals support for the majority rule. In *Chadbourn v. Williams*, 71 N.C. 444 (1874), plaintiff filed a lien for materials furnished to defendant. The materials were used to construct structures on two lots. The defendant sought to have the lien apportioned between the two parcels. The Supreme Court declined to require apportionment in that particular case, but said:

> If the two lots had been sold or mortgaged to different persons, it might be necessary as between them, and to settle their respective liabilities to contribution, to ascertain as well as could be, the value of the materials used on each lot. . . . In this case as the Association is the assignee of the whole property subject to the plaintiff's lien, it can scarcely be material to distribute the burthen [archaic] between the several lots. If it becomes material, that can hereafter be done.

Id. at 448.

A condominium unit is a separate tract of property, distinct from the other units within the project. *See* N.C. Gen. Stat. Sec. 47A-5. When the condominium units are owned by different parties, the portion of the blanket lien applicable to each separate unit becomes material. It would be grossly inequitable to allow a blanket lien holder to enforce the entire lien against one unit of a multi-unit condominium project. Each unit shall be liable only for its proportionate share based upon the materials and labor fur-

nished to that unit, and its proportionate part of labor and materials furnished the common area, under the contract that is the subject of the lien.

Thus the trial court erred in granting summary judgment for the plaintiff declaring the full amount of the lien to be enforceable against defendants' single unit. While the evidence in the record sufficiently establishes that plaintiff is entitled to have a portion of its claim of lien declared a lien against defendants' single unit, there remains a genuine issue as to what amount of the total claim of lien is to be declared a lien against the Fishers' Unit 104.

For the reasons stated summary judgment declaring the total amount of the claim of lien to be a lien against defendants' Unit 104 is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE MOORE

No. 8318SC4

(Filed 1 November 1983)

1. **Criminal Law § 75.15— admissibility of confession—defendant not under influence of drugs—supporting evidence**

The evidence supported the trial court's determination that defendant was not under the influence of drugs when he confessed and that his confession was voluntary where there was evidence that defendant's stomach was pumped out at a hospital soon after his arrest; the attending physician testified that defendant showed only slight signs of drug use; a deputy sheriff who observed defendant later that night testified that defendant did not appear to be drugged and had no difficulty responding logically to questions; defendant was questioned the next day by two FBI agents who read defendant his *Miranda* warnings and asked defendant if he understood them; defendant replied that he understood; and when the agents began asking questions about a robbery, defendant neither asked for an attorney nor demanded that the interrogation cease and thereafter admitted his involvement in the robbery.

2. Criminal Law § 138— aggravating factor—no necessity for findings as to indigency and counsel

The trial court did not err in considering defendant's prior convictions as an aggravating factor in imposing sentence without making findings that defendant was not indigent at the time of the prior convictions or that he waived or was represented by counsel where defendant neither objected to the introduction of evidence of the prior convictions nor offered evidence that he was indigent and unrepresented by counsel at the time of those convictions.

APPEAL by defendant from *Helms, Judge.* Judgment entered 26 May 1982 in GUILFORD County Superior Court. Heard in the Court of Appeals 22 September 1983.

Defendant was arrested in Robeson County on 6 October 1981 and charged with taking more than $44,000.00 at gunpoint from a High Point branch of Wachovia Bank on 25 September 1981.

After a one-day jury trial, defendant was found guilty of robbery with a firearm and sentenced to 35 years in prison. Bank employees were unable to make positive identifications of defendant, and therefore a statement made by defendant was vital in tying defendant to the robbery. On appeal, defendant argues first that the confession was involuntarily made and secondly, that the trial judge erred in sentencing him to a jail term two and a half times greater than the presumptive term.

Evidence for the defendant tended to show that at the time of his arrest, defendant had been without sleep and had used large amounts of cocaine for the previous eight to ten days. Moments before he was arrested, defendant consumed half an ounce of cocaine to prevent police from seizing the substance. Defendant recalled little of the next several days and could remember neither being advised of his *Miranda* rights, nor making a statement about the bank robbery to FBI agents on 7 October 1981. Two acquaintances of the defendant, who were also inmates of the Robeson County Jail, testified defendant appeared "stoned out of his mind" when he arrived, and did not recognize them for several days. Defendant's brother also testified that defendant was incoherent when they spoke on the telephone on 7 October 1981.

Evidence for the state tended to show that defendant was taken to a hospital soon after his arrest, where his stomach was

pumped. The attending physician, Dr. Dale L. Kile, testified defendant showed only "slight" signs of drug use. After he was treated at the hospital, defendant was taken to the Robeson County Jail, where he was observed about 8 p.m. on 6 October 1981 by deputy sheriff James Freeman. Freeman testified defendant had red eyes but did not appear to be drugged and had no difficulty responding logically to questions. The day after defendant's arrest, 7 October 1981, he was interviewed by two FBI agents, William T. Schatzman and Franklin D. Watts, Jr. The agents read the *Miranda* warnings to defendant from a preprinted form and Schatzman asked defendant if he understood his rights. Defendant replied that he understood and refused to sign a waiver form. When the agents began asking questions about the September bank robbery, defendant neither asked for an attorney nor demanded that the interrogation cease. Defendant then admitted he had been involved in the bank robbery.

At trial, defendant filed a motion to suppress the statement on the grounds that he was under the influence of drugs on 7 October 1981 and the statement was therefore involuntarily made. After a *voir dire* hearing, the trial judge found that defendant was not under the influence of drugs at the time he made the statement, and denied defendant's motion to suppress. From the judgment entered on the verdict, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David R. Blackwell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant.

WELLS, Judge.

[1] Defendant first argues that the trial court erred in admitting the confession made to the FBI agents on 7 October 1981, on the grounds that the confession was not voluntarily made. Defendant concedes that the trial court's finding of fact that defendant was not intoxicated or drugged at the time the statement was made is binding on appeal if supported by competent evidence. *State v. Oxendine*, 303 N.C. 235, 278 S.E. 2d 200 (1981). There was ample evidence to support the trial court's finding that defendant was not under the influence of drugs on 7 October 1981, in the form of

the testimony of the doctor who treated defendant on 6 October 1981, the deputy sheriff and the two FBI agents.

Nevertheless, the fact that defendant made the confession is not conclusive of the question whether the confession was voluntary. Instead, the "totality of the circumstances" must be considered and these circumstances must demonstrate that the confession was voluntary. *See e.g., State v. Temple,* 302 N.C. 1, 273 S.E. 2d 273 (1981); *State v. Stephens,* 300 N.C. 321, 266 S.E. 2d 588 (1980). The burden is upon the state to demonstrate voluntariness by a preponderance of the evidence. *State v. Johnson,* 304 N.C. 680, 285 S.E. 2d 792 (1982). Our appellate courts commonly consider several factors in determining whether a confession was freely given, including: (1) whether the defendant was given his *Miranda* warnings; (2) whether the defendant was threatened; (3) whether the defendant was promised some reward for confessing; and (4) whether the defendant appeared to understand the questions and to answer logically. *See e.g., State v. Vickers,* 306 N.C. 90, 291 S.E. 2d 599 (1982); *State v. Whitt,* 299 N.C. 393, 261 S.E. 2d 914 (1980); *State v. Pagon,* 64 N.C. App. 295, 307 S.E. 2d 381 (1983). Of course, these factors are neither exclusive nor exhaustive and other circumstances may be important in a particular case.

In the case at bar, the trial court in concluding that defendant voluntarily waived his right to remain silent considered evidence that defendant was read his *Miranda* rights and responded logically to questions by the FBI agents, and that there was no indication that defendant was threatened or promised a reward for confessing. The evidence was sufficient to carry the state's burden, and in the absence of any rebutting circumstances tending to indicate defendant's confession was involuntarily made, defendant's assignment of error must be overruled.

[2] Defendant next argues that the trial judge erred in imposing a jail term two and a half times greater than the statutory presumptive of fourteen years. The trial judge based the sentence upon a finding of two aggravating factors and no mitigating factors. Defendant argues that the trial court erred in considering his prior convictions as an aggravating factor, on the grounds that the state did not first demonstrate that defendant was either (1) not indigent at the time of the former convictions or, if in-

digent, that defendant either (2) waived counsel or (3) was represented by counsel. Defendant cites our decision in *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983) as authority for his interpretation of the requirements of the Fair Sentencing Act. Our decision in *Farmer*, however, has been partially overruled by *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). In *Thompson*, our supreme court held that the defendant has the burden of challenging evidence of prior convictions by either an objection or a motion to suppress. *Thompson* also makes it clear that the defendant has the burden of stating the grounds for his objection or motion to suppress, and of proving those grounds. In the case at bar, defendant neither objected to introduction of evidence of prior convictions nor offered evidence that he was indigent and unrepresented by counsel at the time of those convictions.[1]

Defendant's assignment of error must be overruled.

No error.

Judges ARNOLD and EAGLES concur.

METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, A PUBLIC BODY AND BODY POLITIC AND CORPORATE OF THE STATE OF NORTH CAROLINA v. KATHRYN HIPPS TRUEBLOOD, AND HUSBAND, PAUL R. TRUEBLOOD; COUNTY OF BUNCOMBE

No. 8228SC1014

(Filed 1 November 1983)

Eminent Domain § 13.4— eminent domain—compensation—evidence irrelevant and improperly admitted

In a civil action to establish the amount of compensation due respondents as a result of the appropriation by petitioner of an easement over respondents' property, the trial court erred in allowing certain photographs to be submitted as illustrative of testimony since the photographs tended to show damages

1. For offenses committed on or after 1 October 1983, G.S. 15A-980 requires the defendant to bear the burden of both objecting to evidence of prior convictions and of proving that the convictions occurred when defendant was both indigent and unrepresented by counsel.

resulting from petitioner's construction activities after the taking had already occurred and were not relevant to the issue of compensation for the taking of the sewer easement.

APPEAL by petitioner from *Friday, Judge.* Judgment entered 29 March 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 August 1983.

This is a civil action to establish the amount of compensation due respondents as a result of the appropriation by petitioner, pursuant to its power of eminent domain, of an easement over respondents' property.

This action was initiated on 20 January 1981 when petitioner filed a condemnation petition against respondents seeking a sewer easement over respondents' property. On 23 March 1981, an order was entered by the Clerk of Superior Court of Buncombe County, establishing petitioner's right to the requested easement and vesting petitioner with the right to possess and enter upon the easement. Respondents objected to the order on the grounds that the amount of compensation awarded was inadequate. The order and award were confirmed on 28 April 1981 and the matter proceeded to trial in Superior Court.

This case was tried before a jury on the issue of compensation at the 15 February 1982 Session of Superior Court. At trial, respondents introduced into evidence testimony and photographs concerning and depicting various aspects and stages of the construction work then in progress on their property. This evidence was introduced over the general objections of counsel for petitioner. The following excerpts from the transcript as it appears in the record contain the limiting instructions issued by the court with respect to the challenged photographs and also indicate the nature and substance of the challenged testimony:

First photograph (Exhibit L-15):

COURT: Members of the Jury, now, I am going to let this in for the sole purpose of illustrating the heights of the manhole and for no other purpose. You will not consider it for any other purpose. If you find it illustrates the witness's testimony about the height and width of the manhole. [sic].

Second photograph (Exhibit L-21):

[Respondents' witness]: A tremendous amount of rock has been pushed over onto the banks of the creek greatly narrowing the creek.

[Respondents' attorney]: All right, I would like this marked as L-21.

[Respondents' attorney]: I'll show you landowners Exhibit Number 21. Does this fairly and accurately represent the rock that was blasted and pushed over into the creek after the taking by the sewer company?

[Respondents' witness]: Yes, sir.

[Respondents' attorney]: I would like to offer this into evidence for the purpose of illustrating the witness' testimony.

COURT: Well members of the Jury, the Court will allow this in for the purpose of illustrating her testimony about the rock, if you find it does so and for no other purpose.

After the presentation of evidence and testimony by petitioner and respondents, the following issue was submitted to the jury and answered as indicated:

"What sum are the Respondents, Kathryn Hipps Trueblood and husband, Paul R. Trueblood, entitled to recover of the Petitioner the Metropolitan Sewerage District of Buncombe County, North Carolina, as just compensation for the appropriation of an easement in their property for sewer line purposes on January 20, 1981?"

ANSWER: "$20,000.00."

Judgment was entered accordingly on 29 March 1982 and petitioner appealed.

Redmond, Stevens, Loftin and Currie, by Gwynn G. Radeker, for petitioner appellant.

Gudger, Reynolds, Ganley & Stewart, by Joseph C. Reynolds, for respondent appellees.

JOHNSON, Judge.

On appeal, petitioner excepts to and assigns as error the rulings by the court allowing the challenged photographs into evidence and the limiting instructions accompanying their admission. Petitioner also excepts to and assigns as error the admission into evidence of testimony by respondents' witness concerning the construction work and excavation as it was in progress. Petitioner contends that the evidence objected to shows conditions that existed on respondents' property during and after the construction of the sewer line. Petitioner argues that this evidence is irrelevant to the issue of compensation for the appropriation by petitioner of the sewer easement over respondents' property and that it was prejudicial and should therefore have been excluded.

Respondents argue that the photographs objected to were properly admitted for the purpose of illustrating the testimony of the witness. Respondents argue that the petitioner was insulated from any prejudicial effect of the challenged photographs by the court's limiting instructions and by the opportunity to use any discrepancy in the photographs as a basis for cross-examination. Respondents also argue that the admissibility of illustrative evidence is a matter within the discretion of the trial court and that rulings on such matters will not be disturbed on appeal absent a showing of an abuse of discretion. With respect to the challenged testimony, respondents argue that it concerned a relevant personal observation of conditions on their property and was designed to aid the jury in its determination of the amount of damages.

All of the respondents' arguments are premised on the key assumption that the issue, with respect to which the challenged evidence is allegedly relevant, was properly before the court. We hold that it was not.

An appeal to Superior Court from a condemnation proceeding puts the issue of compensation for damages resulting from the taking before the court *de novo*. *Proctor v. Highway Commission*, 230 N.C. 687, 55 S.E. 2d 479 (1949). It is well settled in this state that the proper amount of compensation to be awarded is the difference in the value of the property immediately before and immediately after the taking. *City of Greensboro v. Sparger*, 23 N.C. App. 81, 208 S.E. 2d 230 (1974). Compensation must be determined as of the time of the taking. *Id.; DeBruhl v. Highway Commission*,

247 N.C. 671, 102 S.E. 2d 229 (1958). Occurrences or events that may affect the value of the property subsequent to the taking are not properly considered in an assessment of damages in a condemnation proceeding. *City of Greensboro v. Sparger, supra.*

Here, the challenged testimony is in no way relevant to the issue of compensation as defined above. *Greensboro v. Garrison,* 190 N.C. 577, 130 S.E. 203 (1925), cited by respondents in support of their position, involves a challenge to the opinion testimony of a witness as to the value of property before and after the installation of a sewer line. There, it was the witness' expression of an opinion that was challenged and not, as here, the relevance of testimony to the issue of compensation. A witness' opinion as to the value of land is clearly relevant to the issue of compensation for a taking resulting from a condemnation. However, testimony concerning construction subsequent to the taking and subsequent to the time fixed for determining compensation clearly is not relevant to that issue and respondents' reliance on *Greensboro v. Garrison, supra,* is misplaced.

Similarly, the photographs submitted as illustrative of respondents' witness' testimony are not relevant to the issue of compensation for the taking of the sewer easement. Like the challenged testimony, the photographs tend to show damages resulting from petitioner's construction activities after the taking had already occurred. Such damages may be considered in a further nuisance or trespass action but are not cognizable in the present case. *City of Greensboro v. Sparger, supra.* Moreover, any probative value that the photographs may have had with respect to the proper amount of damages was nullified by the trial court's instructions limiting the application of the evidence only to issues not properly before the court.

We conclude that the challenged evidence was improperly admitted with respect to the issue of just compensation for the taking by condemnation and could have unfairly prejudiced the jury. Having so concluded, we need not address the other argument advanced by petitioner in this appeal. We therefore vacate the verdict and the judgment based thereon and remand the cause for a new trial in accordance with this opinion.

New trial.

Judges WHICHARD and EAGLES concur.

KENNETH DOLBOW, EMPLOYEE v. HOLLAND INDUSTRIAL, INC., EMPLOYER, AND COMMERCIAL UNION INSURANCE COMPANY, CARRIER

No. 8210IC1149

(Filed 1 November 1983)

1. **Master and Servant § 69.1— workers' compensation—temporary total disability—sufficiency of evidence**

The evidence supported a determination by the Industrial Commission that plaintiff mechanic was unable to work as a result of his injury from 21 August 1980 until 11 December 1980 and was entitled to temporary total disability for such period of time where it tended to show that plaintiff was injured on 9 July 1980; he was diagnosed on 21 August 1980 as having torn cartilage in the knee and underwent surgery on 3 September 1980; plaintiff's surgeon certified plaintiff as able to return to a light job on 9 October 1980; and plaintiff's surgeon was of the opinion that plaintiff reached maximum medical improvement on 11 December 1980.

2. **Master and Servant § 47— workers' compensation—temporary total disability—effect of receipt of unemployment compensation**

Plaintiff was not estopped from receiving workers' compensation benefits for temporary total disability because he received unemployment compensation benefits for the same period upon a certification that he was available for work.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 4 August 1982. Heard in the Court of Appeals 23 September 1983.

Smith, Moore, Smith, Schell & Hunter, by Robert A. Wicker and Maureen J. Demarest, for defendant appellants.

No brief filed for plaintiff appellee.

BECTON, Judge.

I

Plaintiff injured his knee in a work-related accident on 9 July 1980. He was awarded compensation (a) for temporary total dis-

ability from 21 August 1980 until 11 December 1980; and (b) for a ten percent permanent partial disability of his left leg for twenty weeks.

The employer and the insurance carrier (defendants) assign error to the deputy commissioner's finding of fact that plaintiff was unable to work as a result of his injury from 21 August 1980 until 11 December 1980, contending that the finding is unsupported by the evidence.

"In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Byers v. N. C. State Highway Comm.*, 275 N.C. 229, 233, 166 S.E. 2d 649, 651-52 (1969). We are hampered in our review of defendants' first contention, however, because defendants have included no transcript or narration of the evidence upon which this Court can fully review this assignment of error. The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the Commission's findings of fact. Rule 9(b)(1) of the North Carolina Rules of Appellate Procedure requires the inclusion in the record of all of the evidence necessary for an understanding of all errors assigned. For failure to comply with the rules, an appeal is subject to dismissal. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

[1] We have, nevertheless, chosen to exercise our discretion and review the merits of this appeal since defendants have attempted to show, by the following three stipulations, that the Commission's findings and conclusions were not supported by the evidence: (1) plaintiff received unemployment compensation benefits from the North Carolina Employment Security Commission from 13 October 1980 until 14 February 1981; (2) plaintiff's surgeon certified plaintiff as able to return to work at a light job on 9 October 1980; and (3) it was plaintiff's surgeon's medical opinion that plaintiff reached maximum medical improvement on 11 December 1980.

These stipulations are not persuasive. As stated by the Commission in its Opinion and Award:

> Evidence concerning the plaintiff's receipt of unemployment compensation was before former Deputy Commissioner Delbridge at the initial hearing in Wilkesboro on July 13, 1981. He found as a fact that the plaintiff was certified by his physician as able to return to light work on October 9, 1980. However, the former Deputy Commissioner also found as a fact that the plaintiff, based upon medical evidence, did not reach maximum medical improvement until December 11, 1980 and that the plaintiff was unable to work as a result of his injury from August 21, 1980 until December 11, 1980.

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E. 2d 272, 274 (1965). Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963).

The deputy commissioner made the following unexcepted findings of fact, which the Commission adopted and made its own. On 9 July 1980, plaintiff, a mechanic, was unloading rods from a truck at the job site when he stepped into a depression, injuring his knee. The next day, plaintiff went to a physician about the pain in his knee. An x-ray of the swollen knee revealed no fracture. Plaintiff was examined again by the same physician on 21 August 1980. Plaintiff still had marked swelling and tenderness of his knee and he lacked 10 percent extension of the knee. This physician felt that plaintiff had torn cartilage in the knee, and referred plaintiff to an orthopedic surgeon for an arthrotomy. Plaintiff was examined by the surgeon on 21 August 1980 and was diagnosed as having a tear in the medial meniscus of the left knee. On 3 September 1980, the surgeon performed an arthroscopy on plaintiff's knee, followed by an arthrotomy and excision of the torn medial meniscus. Plaintiff was discharged from the hospital on 6 September 1980 and was fully ambulatory on crutches. Plaintiff was seen as an outpatient by the surgeon periodically until 11 December 1980. On 9 October 1980, the surgeon certified plaintiff as able to return to work at a light job. It was the surgeon's medical opinion that plaintiff had reached

maximum medical improvement on 11 December 1980 and that plaintiff has a ten percent permanent partial disability of the left lower extremity.

Based upon these findings, and the sole finding to which defendant excepted—that plaintiff was unable to work as a result of his injury on 9 July 1980 from 21 August 1980 until 11 December 1980—the deputy commissioner made the following conclusions of law, which the Commission adopted: that plaintiff sustained an injury arising out of and in the course of his employment; that he was entitled to compensation for temporary total disability at the rate of $160.00 per week from 21 August 1980 to 11 December 1980; and that he was entitled to compensation for 10 percent permanent partial disability of the left lower extremity at the rate of $160.00 per week for twenty weeks. We conclude that the Commission's findings of fact support its conclusions of law and award.

II

[2] Defendants' brief also presents the question whether a workers' compensation claimant is barred from recovering compensation for total disability during the same period he received unemployment benefits upon a certification that he is able to, and available for, work. Defendants argue that a claimant cannot recover both, and that plaintiff's receipt of unemployment bars his claim for workers' compensation.

Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. 4 Larson, *The Law of Workmen's Compensation* § 97.20 (1983). In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment. *See*, N.C. Gen. Stat. §§ 97-10.1; 97-29 through 97-31; 97-33 through 97-35; 97-42; 96-13(a)(3); 96-14; 96-8(10); 96-14(7)-(9); and 96-12(b). Indeed, Professor Larson suggests that the better rule is to disallow duplicate benefits, because the claimant is receiving more than his wage-loss. 4 Larson §§ 97.00-97.20. Professor Larson's suggestion points out not only the hiatus in the law but also the insufficiency of the record before us. We do not know the amount of unemployment benefits

plaintiff received. We do not know if plaintiff's combined unemployment and workers' compensation benefits would exceed his lost wages. The problems of prorating benefits or of determining which benefit controls to the exclusion of the other, are questions best left to the General Assembly. *Id.* at § 97.20.

In this case, plaintiff certified himself as able to work to the Employment Security Commission. This does not mean, however, that he is estopped from recovering workers' compensation benefits. His statement to the Employment Security Commission was not conclusive evidence on the question of disability, and therefore, not binding upon the Industrial Commission. The Industrial Commission had before it the evidence of plaintiff's receipt of unemployment benefits, but gave it little weight, as it found and concluded, based upon medical evidence, that plaintiff was unable to work during part of the period in which plaintiff was receiving unemployment benefits. Based upon the record before us, we cannot say that plaintiff's receipt of unemployment benefits, standing alone, barred him from receiving workers' compensation benefits. Plaintiff's entitlement to any of the unemployment benefits paid is a question for the Employment Security Commission.

The opinion and award of the Industrial Commission is

Affirmed.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. THOMAS G. HART

No. 8310SC101

(Filed 1 November 1983)

Searches and Seizures § 12— warrantless search after interruption in surveillance proper

Under G.S. 15A-401(b), an arrest of defendant was with probable cause and the search of defendant's person was incidental to a lawful arrest and proper where the evidence tended to show that police officers received information from a confidential and reliable informant that defendant would be in Raleigh at one of several specific locations in order to purchase heroin; that an

officer observed defendant engaged in two hand-to-hand transactions where defendant gave money to a known heroin dealer and later received a shiny package from another known heroin dealer; where law enforcement officers followed defendant as he drove from Raleigh to Lillington; where surveillance was discontinued for fifteen minutes while officers from two counties met to discuss the prior transactions and determine their next step; and where, as defendant was leaving Lillington, police officers stopped and arrested defendant for possession of heroin, searched defendant, and found a quantity of heroin on his person.

APPEAL by the State of North Carolina from *Brewer, Judge.* Judgment entered 20 December 1982. Heard in the Court of Appeals 17 October 1983.

The State appealed a trial court order granting defendant's motion to suppress items of evidence seized from his person pursuant to a warrantless arrest and search.

The pertinent facts are: On 28 March 1982, law enforcement officers of Harnett, Cumberland, and Wake Counties met to discuss heroin trafficking in their counties. During this meeting, Raleigh police officers were informed by other law enforcement officers that a confidential and reliable informant had told them that defendant was planning to come to Raleigh to purchase drugs.

On or about 31 March 1982, J. H. Johnson, a Raleigh police officer, received information from a confidential and reliable informant that defendant would be coming to Raleigh within the next couple of days in order to purchase heroin from either or both E. D. Willis and Odell Willis, known heroin dealers. The informant told Officer Johnson that the purchase would occur at one of several specific locations in Raleigh, including the parking lot of the K-Mart on Highway 401 South.

On 2 April 1982, Officer Johnson, who had been surveilling the K-Mart parking lot, observed defendant engage in a hand-to-hand transaction with E. D. Willis, in which defendant transferred personal property appearing to be United States currency to Mr. Willis. Officer Johnson then observed defendant drive his vehicle to another location and engage in another hand-to-hand transaction with Odell Willis, in which defendant received what appeared to be a shiny package.

Law enforcement officers then followed defendant as he drove from Raleigh to Lillington. In Lillington, surveillance was discontinued for fifteen minutes while officers from Wake and Harnett Counties met to discuss the prior transactions and determine their next step. A decision was made to detain and arrest defendant for possession of heroin before he left Lillington, if possible.

During the fifteen-minute interval, defendant went to another person's home in Lillington. As defendant was leaving Lillington, Raleigh and Harnett County police officers stopped and arrested defendant for possession of heroin. Defendant was searched and a quantity of heroin was removed from his person.

The trial court found that law enforcement officers with appropriate jurisdiction had probable cause to arrest defendant for possession of heroin and to conduct an exigent circumstances search of defendant's car before the fifteen-minute hiatus in surveillance, but that after such interval, no probable cause existed for either arrest of defendant or for an exigent circumstances search of defendant or his car. The Court, therefore, granted defendant's motion to suppress items of evidence seized from his person pursuant to such search. The State appealed pursuant to G.S. 15A-979.

Attorney General Edmisten, by Ann Reed, Special Deputy Attorney General, and Doris Holton, Associate Attorney General, for the State.

Dean and Dean, by Joseph W. Dean, for the defendant appellee.

VAUGHN, Chief Judge.

The issue on appeal is whether the trial court erred in concluding that the arrest and subsequent search of defendant were unlawful.

Under G.S. 15A-401(b), an officer may arrest, without a warrant, any person the officer has probable cause to believe has committed a criminal offense in his presence or a felony out of his presence. Under the North Carolina Controlled Substances Act, possession of heroin is a felony. G.S. 90-86, *et seq.*

In the instant case, police officers received information from a confidential and reliable informant that defendant would be in Raleigh at one of several specific locations in order to purchase heroin. Raleigh Police Officer J. H. Johnson observed defendant engage in two hand-to-hand transactions. First, at one of the locations specified, defendant gave money to a known heroin dealer. Later defendant received a shiny package from another known heroin dealer. We agree with the trial court that based on the informant's tip and the officer's personal observations, probable cause existed, under G.S. 15A-401(b) to arrest defendant before surveillance was discontinued. *See State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970); *State v. Ellis*, 50 N.C. App. 181, 272 S.E. 2d 774 (1980).

We disagree with the trial court, however, that probable cause disappeared upon the fifteen-minute hiatus in surveillance. Probable cause justifying an arrest without a warrant is evidence that warrants a reasonably prudent person's belief that a crime was committed and that defendant was the perpetrator. It is not proof of guilt nor prima facie evidence of guilt, but consists of evidence, which, if submitted to a magistrate, would require issuance of an arrest warrant. *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Odom*, 35 N.C. App. 374, 241 S.E. 2d 372 (1978). The evidence of defendant's guilt was the same after the break in surveillance as it was before. Had the evidence been submitted to a magistrate during or after the fifteen-minute interval, an arrest warrant would undoubtedly have followed.

It is elemental that an arresting officer may act on information supplied by others relating that a felony has been committed and describing the suspected felon. *See State v. Roberts, supra, citing Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959). Although the arresting officers in the case at bar may not have had personal knowledge of all the facts justifying arrest, probable cause can be imputed from one officer to others acting at his request. *State v. Tilley*, 44 N.C. App. 313, 260 S.E. 2d 794 (1979). Probable cause to arrest defendant in the instant case was imputed from Officer Johnson to the officers making the arrest.

Since the arrest of defendant was lawful, so too was the subsequent search of defendant's person. A police officer may

search the person of one whom he has lawfully arrested as an incident of such arrest. In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. *State v. Harris, supra; State v. Roberts, supra.* The contraband seized from defendant's person was connected with and competent evidence of the crime charged. Had there been no arrest, we would still find that exigent circumstances existed to justify a warrantless search of defendant and defendant's vehicle. *See State v. Roberts, supra.*

For the reasons stated, we find that the arrest of defendant was with probable cause and that the search of defendant's person was incident to a lawful arrest. The order of the trial court granting defendant's motion to suppress must, therefore, be reversed. The case is remanded for trial on the merits.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

MARGARET B. HOWELL v. ELMER LEE TUNSTALL

No. 8220DC1171

(Filed 1 November 1983)

1. **Rules of Civil Procedure § 60.2— motion to vacate judgment—showing required**

Defendant failed to meet the requirements of G.S. 1A-1, Rule 60(b)(4) for vacating a judgment of divorce from bed and board where he presented no evidence that the judgment is void but only presented evidence that he may have had a genuine defense to the divorce.

2. **Divorce and Alimony § 7— divorce from bed and board—effect of reconciliation while complaint pending**

A reconciliation and cohabitation by the parties while a complaint for divorce from bed and board was pending did not prohibit the court from granting such a divorce based on habitual drunkenness and indignities.

Howell v. Tunstall

APPEAL by defendant from *Honeycutt, Judge.* Order entered 23 July 1982 in District Court, RICHMOND County. Heard in the Court of Appeals 28 September 1983.

Sharpe & Buckner by Richard G. Buckner for plaintiff appellee.

Pittman, Pittman & Dawkins by Donald M. Dawkins for defendant appellant.

BRASWELL, Judge.

The defendant seeks to set aside a judgment of divorce *a mensa et thoro* obtained by his wife. Although the defendant was given notice of the hearing to consider his wife's divorce action, he chose not to appear or to contest it. As fate would have it, on 9 December 1981, the day Margaret Howell was granted a divorce from bed and board from the defendant, she died. We hold that the trial court properly denied the defendant's motion to set aside the divorce judgment.

On 19 February 1981, Margaret Howell filed a complaint seeking exclusive possession of her home free from any interference by the defendant and a divorce from bed and board. By *ex parte* order, the trial court ordered that due to the defendant's drinking habits and the possibility that he might do serious bodily harm to the plaintiff, he would be restrained from entering the plaintiff's residence. On 20 November 1981, nine months after the complaint was filed, the defendant was given notice that the plaintiff would go forward with her action seeking a divorce from bed and board. On 9 December 1981, the trial court ordered that because the defendant habitually abused the use of alcohol and because certain indignities committed by the defendant had rendered her condition intolerable and her life burdensome, the plaintiff should be awarded a divorce from bed and board.

Within six months of Margaret Howell's death on 9 December 1981, the defendant filed a dissent from her will and a claim against her estate. He moved to substitute the co-executors of his former wife's estate as plaintiff in this action and to set aside the divorce from bed and board, declaring the judgment null and void. On 6 July 1982, the trial court denied the defendant's motion to set aside the divorce judgment. The defendant appeals.

The first issue raised in the defendant's brief with corresponding assignments of error asserts that the trial court committed error by sustaining objections to questions asked by the defendant to his witnesses. The objections generally were sustained on the basis that the questions (1) called for a conclusion on the part of the witness or (2) violated G.S. 8-51, the Dead Man's Statute. In carefully examining the record, we find it unnecessary to decide this case based strictly on evidentiary reasons.

The defendant in his motion to set aside the divorce decree states that the judgment is void because the parties had reconciled after the filing of the complaint. We find it unnecessary to decide whether or not the evidence was properly excluded because even if all the evidence had been admitted it would be insufficient to justify setting aside the judgment under G.S. 1A-1, Rule 60(b)(4).

[1] In the motion hearing, the defendant only reargued the merits of whether the divorce from bed and board should have been granted. He had been given an opportunity to be heard on that issue and failed to appear without excuse to express any opposition to the divorce. Rule 60(b)(4) now requires him to bring forward evidence that demonstrates the judgment is void, not evidence that he may have had a genuine defense to the divorce. The defendant has failed to meet the requirements of Rule 60(b)(4) to have the judgment vacated because he cannot show it is void. The district court judge who granted the divorce had authority to hear and determine the subject matter of the action and had jurisdiction over the parties. *Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958); *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974). Rule 60(b)(4) requires that the judgment be void and "a divorce decree, in all respects regular on the face of the judgment roll, is at most *voidable*, not void." *Carpenter v. Carpenter*, 244 N.C. 286, 295, 93 S.E. 2d 617, 625-26 (1956). *See also Stokley v. Stokley*, 30 N.C. App. 351, 227 S.E. 2d 131 (1976).

In any event, the defendant has failed to take specific exceptions to the findings of fact and conclusions of law. By taking a "broadside exception" to all the findings and conclusions in the judgment, our scope of review is limited " 'to the question of whether the findings of fact are sufficient to support the judgment or whether error of law appears on the face of the record.' "

London v. London, 271 N.C. 568, 570, 157 S.E. 2d 90, 91-92 (1967), *citing* 1 Strong's N.C. Index, Appeal and Error, § 21 (1957). We hold the findings are sufficient to support the judgment and no error of law appears on its face.

[2] The second major assignment of error contends that the trial court's decision to deny the motion to set aside the judgment was contrary to North Carolina law. The defendant asserts that a reconciliation between the parties after the complaint is filed bars all acts used as a basis for the complaint to be later used as a basis for the divorce. A divorce from bed and board is a judicial separation. *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E. 2d 790 (1961). Reconciliation while the action is pending is not a defense to a divorce from bed and board, unlike other concepts such as condonation—the forgiveness of a marital offense constituting a ground for divorce. *See Adams v. Adams*, 262 N.C. 556, 138 S.E. 2d 204 (1964). If the parties reconcile and resume cohabitation as man and wife after a divorce from bed and board is granted, the effect of the divorce from bed and board is destroyed. No court action to end such divorce is necessary. 1 R. Lee, N.C. Family Law, § 35 (4th ed. 1979). *See also Freeman v. Belfer*, 173 N.C. 581, 584, 92 S.E. 486, 488 (1917).

The divorce from bed and board was granted on the basis of habitual drunkenness and indignities. The fact that the parties may have cohabitated after the complaint was filed does not prevent a divorce from bed and board on these grounds from being granted. Since the plaintiff died the day the divorce was granted, no reconciliation was possible. Because the defendant had an opportunity to raise a condonation defense at the time the divorce action was heard, he cannot now claim that the judgment is void because of his failure to raise the defense in a timely manner. Therefore, the motion to set aside the judgment was properly denied.

Affirmed.

Judges BECTON and JOHNSON concur.

GUY E. HEFNER v. GUY STAFFORD

No. 8225SC1203

(Filed 1 November 1983)

Appeal and Error § 59; Trespass to Try Title § 4— wrongful timber cutting—evidence of title to land uncontradicted—directed verdict for defendant improper

In an action for wrongful timber cutting under G.S. 1-539.1, the trial court erred in granting a directed verdict for defendant on the basis that plaintiff had failed to establish title in the land where the evidence showed by deed duly recorded that plaintiff was the owner of lot number eleven in block "C" of the Hefner estate property in Snow Creek Cove in Catawba County; that the oral evidence showed that the plaintiff had owned lot number eleven of his father's estate since around 1958; that lot number eleven was where the trees were cut; and that as the owner he was cross-examined as to the monetary valuation of his lot. Although defendant was called as an adverse witness, his testimony did not contest the plaintiff's ownership of the land.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 13 July 1982 in the Superior Court, CATAWBA County. Heard in the Court of Appeals 30 September 1983.

Sigmon, Sigmon and Isenhower by Jesse C. Sigmon, Jr. and Randall Isenhower for plaintiff appellant.

Cagle and Houck by Joe N. Cagle and William J. Houck for defendant appellee.

BRASWELL, Judge.

In an action for wrongful timber cutting under G.S. 1-539.1, the trial court granted defendant's motion for a directed verdict at the close of the plaintiff's evidence. The ground for the dismissal was that plaintiff had failed to prove a *prima facie* case of title to the land in controversy. Plaintiff appeals.

The only issue before us to decide is whether the defendant's motion for a directed verdict was properly granted. The scope of our review is to determine whether the evidence which plaintiff did introduce was sufficient to require submission of the case to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Jones v. Allred*, 64 N.C. App. 462, 307 S.E. 2d 578 (1983); G.S. 1A-1, Rule 50(a).

To focus on the issue we quote from the judgment of the trial court:

> [T]he Defendant moved for a Directed Verdict under Rule 50(a) of the N.C. Rules of Civil Procedure upon the grounds, *inter alia*, that Plaintiff had failed to offer sufficient evidence to establish, *prima facie*, Plaintiff's title to the premises from which the trees were cut; and after consideration of the evidence and in sole reliance upon the opinion in *Woodard v. Marshall*, 14 N.C. App. 67, the Court is of the opinion that Plaintiff failed to offer sufficient evidence to establish, *prima facie*, Plaintiff's title to the premises from which the trees were cut, either by offering a connected chain of title or grant from the State to himself or by adverse possession, and that Defendant's Motion for a Directed Verdict in his favor against the Plaintiff should be granted.

The timber and trees in question were alleged to be hardwood shade trees, and miscellaneous dogwood and sourwood trees on an undeveloped lot in a residential subdivision on Lake Hickory. The plaintiff's evidence established that certain described timber and trees had been cut and tended to show that the cutting was done by the defendant.

The parties stipulated through their counsel that a deed dated 30 April 1958 conveyed certain properties located in Catawba County to Guy E. Hefner, and "that [the] deed may be introduced into evidence for whatever it says." The deed became plaintiff's Exhibit No. 1. It shows that among the several tracts conveyed was a fourth tract, described by metes and bounds, and "being Lot No. 11 in Block 'C' of the Hefner Estate Property, Snow Creek Cove, as shown on a plat thereof . . . dated November 4, 1957."

Guy E. Hefner, the plaintiff, became the first witness. He testified, without any objection, to the following:

Q. Do you own any land, Mr. Hefner?

A. I do.

Q. Where is that land located?

A. Snow Creek Cove, where this particular tract lies.

Q. Is that lot Eleven Block C?

A. Right.

Q. Where is that? Did that property come from the estate of your father?

A. Yes sir.

Q. Is that near the lake?

A. It's on the Snow Creek Lake Hickory. Snow Creek area.

* * * *

Q. How long have you had this land in your name, Mr. Hefner?

A. It's been sometime, I believe in 1950.

Q. By 1958; is that correct?

A. Somewhere along there.

* * * *

Q. Now did you have a conversation with him or did he tell you why he cut trees on your property?

A. He said the lady he contracted the other lots from there told him that his lots run all the way around on a circle, all the way around to where it was a lot cleared off.

Q. Is there a lot cleared off?

A. It's a lot cleared off.

* * * *

Q. And your property runs up to that.

A. No. 11 lies between nine and ten there, and No. 12 is cleared off.

Q. Your lot is No. 11, which joins No. 12.

A. Right.

During the recross examination of Mr. Hefner, after testimony about his discovery that some trees had been cut in No-

vember and December 1978, and after Mr. Hefner had answered "I own that lot" of property in the area, Mr. Hefner was asked his "opinion as to the value of that lot." Further cross-examination revealed a valuation of $13,345.00.

It is basic law that for a plaintiff to recover for unlawful cutting of timber under G.S. 1-539.1 that he must establish his ownership of the land from which the timber was cut. *Woodard v. Marshall*, 14 N.C. App. 67, 69, 187 S.E. 2d 430, 431 (1972). We now review the probative force of the evidence recited above, and review applicable case law to see if it shows ownership in Guy E. Hefner, the plaintiff.

Woodard, in discussing a plaintiff's burden of proof in establishing title, repeated the six methods promulgated by our Supreme Court in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). *Woodard, supra*, at 115, 187 S.E. 2d at 432. Two of the methods listed, such as (1) proving a connected chain of title or grant from the state to himself, and (2) proving adverse possession, are cited by the trial judge in our present case to demonstrate how within the law the plaintiff's evidence fails to show any proof. However, the plaintiff before us relies upon *Freeman v. City of Charlotte*, 273 N.C. 113, 159 S.E. 2d 327 (1968), which also cites *Mobley*. We agree that the plaintiff before us, like the plaintiff in *Freeman*, has failed to prove title by any of the methods approved in *Mobley*. However, here, just as in *Freeman*, the respective plaintiffs testified without objection that they were the owners of the tract in question. Therefore, "[t]he admissibility of this testimony not having been challenged, it must be treated as before the jury with all its probative force." *Id.* at 115, 159 S.E. 2d at 329. As the court did in *Freeman*, we hold that "[t]his evidence was sufficient to warrant the submission of the . . . issue and to support the jury's affirmative answer thereto." *Id.*

At the close of the plaintiff's evidence in the light most favorable to the plaintiff, the evidence shows by deed duly recorded on 22 September 1958 that the plaintiff is the owner of Lot No. 11 in Block "C" of the Hefner Estate Property in Snow Creek Cove in Catawba County. The oral evidence shows that the plaintiff has owned Lot No. 11, Block "C" in Snow Creek Cove of his father's estate in the Lake Hickory area since around 1958,

that Lot No. 11 is where the trees were cut, and that as the owner he was cross-examined as to his monetary valuation of his lot.

The facts before us fail to show any genuine challenge on the issue of ownership. Although the defendant was called as an adverse witness, his testimony did not contest the plaintiff's ownership of the land. The plaintiff's evidence made out a *prima facie* case of ownership through oral evidence coupled with documentary evidence. The plaintiff met his burden of proof.

We hold that the trial court erred when it granted the defendant's motion for a directed verdict. The case must be remanded for a new trial.

New trial.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. THOMAS L. HERBIN

No. 8315SC197

(Filed 1 November 1983)

1. **Criminal Law § 91— delay in arraignment—exclusion from speedy trial period**

The delay between 20 January 1982, when defendant appeared for arraignment without counsel, and 22 March 1982, when defendant and his court-appointed counsel filed a written waiver of arraignment, was properly excluded from the statutory speedy trial period. G.S. 15A-701(b)(1).

2. **Criminal Law § 138— sentencing—aggravating factor—prior convictions—absence of findings as to indigency and counsel**

The trial court did not err in finding defendant's past convictions to be aggravating factors in imposing a sentence without making findings as to defendant's indigency and representation by counsel.

APPEAL by defendant from *Battle, Judge.* Judgment entered 14 July 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 25 October 1983.

Defendant was charged in a proper bill of indictment with armed robbery in violation of N.C. Gen. Stat. Sec. 14-87.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of twenty years, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elaine J. Guth, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the charges on the basis of a violation of the Speedy Trial Act provisions of N.C. Gen. Stat. Sec. 15A-701. N.C. Gen. Stat. Sec. 15A-701(a1) requires the defendant's trial to begin within 120 days from the date of arrest, service with criminal process, waiver of indictment, or indictment, whichever occurs last. N.C. Gen. Stat. Sec. 15A-701(b) lists various time periods which may be excluded when computing the 120 days.

The defendant has the burden of showing that his trial was held beyond the time limits specified in N.C. Gen. Stat. Sec. 15A-701. The State then has the burden of going forward with evidence that a portion of the time is excludable. N.C. Gen. Stat. Sec. 15A-703. The defendant met his burden when he filed motions to dismiss the charges, for violation of the Speedy Trial Act, on 9 April 1982 and on 10 June 1982.

A hearing was conducted on the motions, and an order entered on 10 July 1982. The order contained the following findings of fact and conclusions of law:

> 1. The Alamance County Grand Jury returned a True Bill of Indictment on December 7, 1981, charging the Defendant with the crime of Armed Robbery.
>
> 2. Notice of return of the Indictment was served on Defendant on December 8, 1981, at the hospital at Central Prison.
>
> 3. Defendant was present in Alamance Superior Court on January 20, 1982, for purposes of Arraignment, and advised the Court that he did not wish to have Court-appointed Counsel, that he expected an attorney from Henderson, N.C., to

represent him in the trial of these charges, that he did intend to have Counsel; and the Honorable Maurice Braswell signed an entry in the file that Defendant had been advised of his rights to appointed Counsel and stated that he did not want appointed Counsel but refused to sign a waiver of Counsel. Defendant was not arraigned at this time.

4. Defendant was present in Alamance County Superior Court on February 22, 1982, at which time he again advised the Court he did not have an attorney, but expected that an attorney from Henderson, N.C., would be representing him. After further advice by Judge Braswell, Defendant signed an application for court-appointed Counsel, and Nelson Richardson, Esq., of the Alamance County Bar was appointed to represent Defendant. Again, Defendant was not arraigned at this time.

5. The next regularly-scheduled arraignment session for Alamance Superior Court after February 22, 1982, was on March 22, 1982, at which time the Defendant and his counsel filed a written waiver of arraignment and entered a plea of not guilty.

6. On May 11, 1982, Nelson Richardson, Esq., filed a motion to be allowed to withdraw as Counsel for Defendant, which motion was heard on May 12, 1982, and allowed, the Court then appointed Frederick J. Sternberg, Esq., of the Alamance County Bar to represent Defendant.

7. On May 17, 1982, Defendant through Counsel, moved to have the trial of his case postponed so that Counsel would have time to prepare for trial, and an Order was entered continuing the trial to July 12, 1982 and excluding from the Speedy Trial computation all time between May 13, 1982 and July 12, 1982.

8. That 120 days from December 8, 1981, nothing else appearing would have expired on April 7, 1982; that the 120 days did begin to run on December 8, 1981, the date the notice of return of indictment was served on Defendant.

9. The time from January 20, 1982 until March 22, 1982 should properly be excluded from the running of the Speedy

Trial computation, as "Delay resulting from other proceedings concerning the defendant within the meaning of G.S. 15A-701(b) as construed by the North Carolina Court of Appeals in *State v. Rogers*, 49 N.C. App. 337 (1980), in that the Defendant could not be tried prior to arraignment, and arraignment was delayed as the State was waiting for defendant to secure Counsel for his defense.

10. The period from January 20, 1982 until March 22, 1982, totals 61 days, which when added to the nominal expiration date of April 7, 1982 extends the Speedy Trial expiration date to June 7, 1982, or 26 days beyond the start of the period excluded by the continuance order dated May 17, 1982.

ON THE ABOVE FINDINGS OF FACT, THE COURT CONCLUDES that the Defendant's motion for dismissal for failure to give defendant a speedy trial should be, and it hereby is, denied.

Defendant excepted to finding number 9 and to the conclusion of the court. Defendant concedes, in his brief, that the time from 20 January 1982 until 22 February 1982 was properly excluded, but contends that the period from 22 February 1982 until 22 March 1982 was improperly excluded. Defendant argues that once counsel was appointed to represent him, the 120 day period again began to run. We disagree.

N.C. Gen. Stat. Sec. 15A-701(b)(1) allows the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant. . . . The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until . . . the event causing the delay is finally resolved." The event that caused the delay in defendant's trial was arraignment. The delay commenced on 20 January 1982, when defendant appeared for arraignment without counsel, and the event was not finally resolved until a waiver of arraignment was filed on 22 March 1982. The time period from calendaring of a case for arraignment to the completion of arraignment is properly excluded under N.C. Gen. Stat. Sec. 15A-701(b)(1). *State v. Capps*, 61 N.C. App. 225, 300 S.E. 2d 819 (1983). Therefore, the time from 20 January 1982 until 22 March 1982 was properly excluded. The assignment of error is overruled.

[2] The defendant next seeks review of his sentence, alleging that the trial court improperly found his past convictions to be aggravating factors. Defendant failed to note in the record his exceptions to the trial court's finding of aggravation or to the sentence imposed, but urges review under Rule 2 of the North Carolina Rules of Appellate Procedure. Defendant's argument is based upon the holdings of this Court in *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983), and *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983). The Supreme Court of North Carolina modified the holding of *State v. Thompson*, 60 N.C. App. 679 in an opinion filed 27 September 1983. This modification renders defendant's assignment of error meritless. *See State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

No error.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. ALBERT ALEXANDER JACKSON

No. 8326SC21

(Filed 1 November 1983)

1. **Criminal Law § 74.3— principal's confession competent to explain subsequent contact of police**

In a prosecution for aiding and abetting an armed robbery, the trial court properly allowed an investigating officer to make references to a confession made by one of the two principals during his testimony since the principal's confession constituted the only evidence the investigators had which implicated defendant, and it was therefore competent to explain their subsequent conduct in taking defendant into custody. The principal's confession was also competent to explain the process through which the police obtained defendant's statement admitting knowledge of the crime.

2. **Criminal Law § 9.4— aiding and abetting robbery—sufficiency of evidence**

In a prosecution for aiding and abetting an armed robbery, the trial court properly submitted the case to the jury where the evidence tended to show that defendant admitted the two principals had told him they were going to "rob something"; that when they got into his car, "they decided they would rob Payton's store"; they wanted him to wait around the corner, but he told them he would wait at his uncle's house, and they should come there if they robbed the store; that the principals then came to his uncle's house, got in his

car, said they had robbed the store, and offered him $10.00 to take them to Fairview Homes which he did.

APPEAL by defendant from *Friday, Judge.* Judgment entered 13 August 1982 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 26 September 1983.

Defendant was tried separately as an aider and abettor of an armed robbery. The State's evidence tended to show that he drove the two principals to the scene of the robbery and waited for them a short distance away. After the robbery he drove them home.

Police arrested defendant after they had arrested one of the principals who gave a confession which implicated defendant. Defendant then confessed during custodial interrogation. At trial he denied knowledge of the robbery, although he admitted transporting the two principals.

From a judgment of imprisonment, defendant appeals.

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

Larry Thomas Black for defendant appellant.

WHICHARD, Judge.

[1] Defendant challenges the admission, during the testimony of the investigating officer, of references to a confession made by one of the two principals. He argues that the references constituted inadmissible hearsay.

"If a statement is offered for any purpose other than that of proving the truth of the matter asserted, it is not objectionable as hearsay." *State v. White,* 298 N.C. 430, 437, 259 S.E. 2d 281, 286 (1979); *State v. Irick,* 291 N.C. 480, 497-98, 231 S.E. 2d 833, 844-45 (1977); *see* 1 H. Brandis, North Carolina Evidence § 141 (1982). "The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. White, supra* (content of phone call pinpointing murder victim's car); *State v. Irick, supra* (content of radio dispatches connecting defendant to car used in crime).

Here, the principal's confession constituted the only evidence the investigators had which implicated defendant. It was therefore competent to explain their subsequent conduct in taking him into custody. During custodial interrogation defendant originally denied any knowledge of the robbery. Evidence of the principal's confession thus also was competent to explain the process through which the police obtained defendant's statement admitting knowledge of the crime.

Defendant also argues that admission of this testimony denied him his Sixth Amendment right to confront and cross-examine his accuser, *viz*, the principal whose confession implicated him. He relies primarily on *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

Because the incriminating admissions of the principal were admissible under the well-recognized rule of evidence permitting introduction of statements of one person to explain the subsequent conduct of another to whom the statement was made, "the *Bruton* choice, does not present itself." *State v. Hardy*, 293 N.C. 105, 118, 235 S.E. 2d 828, 836 (1977); *see also State v. Porter*, 303 N.C. 680, 695-97, 281 S.E. 2d 377, 388 (1981). Further, the incriminating principal was not tried jointly with defendant. There is no indication that defendant attempted to secure his presence at trial. *See* G.S. 15A-805 (1978). The State was not, as defendant appears to contend, required to produce the principal for him. We find this contention without merit.

[2] Defendant also contends the court erred in denying his motion to dismiss. We disagree.

After an extensive *voir dire*, the court properly admitted a statement which defendant gave to a police investigator. Defendant therein admitted the following: The two principals had told him "they were going to lick something or rob something." When they got into his car, "they decided they would rob Payton's store." They wanted him to wait around the corner; but he told them he would wait at his uncle's house, and they should come there if they robbed the store. They then came to his uncle's house, got in his car, said they had robbed the store, and offered him ten dollars to take them to Fairview Homes. He took them, and they paid him the money.

This evidence permitted a reasonable inference that defendant shared the criminal intent of the principals and rendered necessary aid to them. It thus sufficed to take the case to the jury on an aiding and abetting theory. *See State v. Barnette*, 304 N.C. 447, 458-59, 284 S.E. 2d 298, 305 (1981). The court fully and properly instructed on aiding and abetting.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

HARRY R. WRIGHT, COOLIDGE MASON, AND MACON COUNTY TAXPAYERS ASSOCIATION, INC., ON BEHALF OF ITS MEMBERS v. COUNTY OF MACON

No. 8330SC595

(Filed 1 November 1983)

1. **Counties § 6; Taxation § 11.1— time for attacking special school bond referendum order**

An action to set aside a special school bond referendum order brought more than 30 days after publication of the bond order was barred by G.S. 159-59 where the action attacked the bond order only on a statutory basis.

2. **Counties § 6; Taxation § 11.1— county manager's application for approval of bond referendum—ratification by county board of commissioners**

A county board of commissioners could properly ratify the county manager's submission of an application to the Local Government Commission for approval of a school bond referendum.

3. **Counties § 6; Taxation § 11.1— school bond referendum order—notice and hearing requirements**

A board of county commissioners complied with the notice and hearing requirements necessary for a valid school bond referendum order and had authority to adopt the order on the same day as the public hearing. G.S. 143-318.12; G.S. 153A-40; G.S. 159-57.

4. **Counties § 6; Taxation § 11.1— school bond referendum order—failure to disclose revaluation**

A school bond referendum order issued in August 1982 was not invalid because of the county's failure to disclose 1983 appraised values from a tax revaluation since the county was required to provide information only on the appraised values from which the last assessed values had been computed, that is, the 1982 appraised values.

Wright v. County of Macon

APPEAL by plaintiffs from *Russell G. Walker, Jr., Judge.* Summary judgment entered 18 March 1983 in Superior Court, JACKSON County. Heard in the Court of Appeals 23 September 1983.

Hunter, Large & Kirby, by William P. Hunter, III, for plaintiff appellants.

Jones, Key, Melvin & Patton, P.A., by Richard S. Jones, Jr., for defendant appellee.

BECTON, Judge.

I

Plaintiffs, concerned citizens and voters of Macon County, instituted this action against the County of Macon (County) on 26 January 1983 to have a $9.6 million special school bond referendum declared void and set aside. On 18 March 1983 the trial court granted the County's motion for summary judgment. The citizens appeal.

II

The $9.6 million school bond referendum originated with a request by the Macon County Board of Education to the Macon County Board of Commissioners for the above sum to do necessary renovations. On 27 July 1982 the County Manager submitted an application to the Local Government Commission for approval of the proposed bond issue. At its regular meeting on 2 August 1982, the Board of Commissioners unanimously passed a resolution authorizing the filing of the 27 July 1982 application with the Local Government Commission. At the same meeting, the Board of Commissioners introduced a bond order authorizing the $9.6 million in school bonds and set the public hearing on the bond order for 16 August 1982 at 9:00 a.m. The introduced bond order and notice of the public hearing were published in the local newspaper on 6 August 1982. Notice that the Board would reconvene its 2 August 1982 adjourned regular meeting at the same time as the public hearing was posted in the courthouse on 13 August 1982. On 16 August 1982 the full Board of Commissioners held the public hearing on the bond order. That same day, at its adjourned regular meeting, the Board of Commissioners adopted

the order and passed a resolution calling a special bond referendum. The adopted bond order was published in the local newspaper on 20 August 1982.

The voters of Macon County approved the school bond referendum on 2 November 1982 by a wide margin.

III

[1] An action to set aside a bond order, on the ground that the order is invalid, must be brought within 30 days after publication of the adopted bond order. N.C. Gen. Stat. § 159-59 (1982). In *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939), our Supreme Court interpreted the 1927 version of G.S. § 159-59 to bar statutory, but not constitutional, attacks on a bond order after 30 days.

In this case the adopted bond order was published on 20 August 1982. G.S. § 159-59, the statute limiting actions to set aside a bond order, bars the citizens' action since their complaint (filed 26 January 1983) attacks only the statutory requirements of a valid bond order. Plaintiffs allege that the County failed: (a) to file a valid application to the Local Government Commission for approval of the proposed bond issue as required by N.C. Gen. Stat. § 159-51 (1982); (b) to adopt the bond order and pass the resolution calling a referendum at a properly constituted meeting; (c) to release information on the appraised value of property subject to taxation; and (d) to file a true statement of the county debt as required by N.C. Gen. Stat. § 159-55(a)(4) (1982). As the following discussion shows, these assertions by plaintiffs rest solely on statutory grounds and are without merit.

[2] Plaintiffs first contend that the application to the Local Government Commission was unauthorized and, therefore, invalid under G.S. § 159-51. However, the Board of Commissioners ratified the County Manager's filing in its resolution dated 2 August 1982. When a person with limited or no authority purports to act as agent in doing an unauthorized act, the supposed principal, upon discovery of the facts, may ratify the agent's act, thereby giving it the same effect as if it had been authorized. *Patterson v. Lynch, Inc.*, 266 N.C. 489, 146 S.E. 2d 390 (1966). Plaintiffs' first argument fails.

[3] Plaintiffs next assert that the Board of Commissioners did not adopt the bond order at a properly constituted meeting. We find adequate notice of both the public hearing and the adjourned regular meeting under N.C. Gen. Stat. § 143-318.12 (1983) and § 153A-40 (1983). Pursuant to N.C. Gen. Stat. § 159-57 (1982), the Board of Commissioners had the authority to adopt the order on the same day as the public hearing. The Board complied with the notice and hearing requirements necessary to a valid bond order.

[4] Plaintiffs' third argument rests upon an interpretation of G.S. § 159-55(a)(4). Plaintiffs attack the validity of the bond referendum based on the County's failure to disclose a 1983 tax revaluation. Under G.S. § 159-55(a)(4), the County was not required to divulge the *1983* appraised values. G.S. § 159-55 sets out the information the County must provide after the bond order has been introduced, but before the public hearing. The Legislature has not required any further information releases prior to the bond referendum. The County must include the "appraised value of property subject to taxation" under G.S. § 159-55(a)(4). The statute defines "the appraised value" as "the value from which the *assessed value last fixed* for taxation by the issuing unit was computed." (Emphasis added.) The County, to comply with G.S. § 159-55(a)(4) in August 1982, only needed to provide the appraised values from which the last assessed values had been computed, the 1982 appraised values. The assessed values for the 1983 appraised values were not computed until after January 1983; therefore, disclosure of the 1983 appraised values was not required for the August 1982 public hearing. The citizens do not dispute that the County did supply the 1982 figures. The County fulfilled the statutory requirements.

Plaintiffs' fourth argument, the County's failure to file a true statement of the County debt, was contingent upon a finding that the County should have supplied the 1983 appraised values. We need not address it further.

Because plaintiffs' claims are (1) barred by G.S. § 159-59, and (2) without merit, the trial court's grant of defendant's motion for summary judgment is

Affirmed.

Judges JOHNSON and BRASWELL concur.

In re Patrick v. Cone Mills Corp.

IN THE MATTER OF: DAISY PATRICK, 4110 DONEGAL DRIVE, GREENSBORO, NORTH CAROLINA 27406, CLAIMANT-APPELLANT v. CONE MILLS CORPORATION, WHITE OAK PLANT, 2420 FAIRVIEW DRIVE, GREENSBORO, NORTH CAROLINA 27405, EMPLOYER-APPELLEE, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, DOCKET NO. 82(C)0627, APPELLEE

No. 8218SC1272

(Filed 1 November 1983)

Master and Servant § 111.1— unemployment compensation—findings of Employment Security Commission not supported by evidence

There was no competent evidence in the record to support a finding by the Employment Security Commission that claimant was "fighting" on the job in violation of one of the company rules, and the Commission erred in so finding. G.S. 96-4(m) and (p).

APPEAL by claimant from *Walker (Hal), Judge.* Judgment entered 16 August 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 October 1983.

In this action Daisy Patrick, claimant-appellant, seeks review of the decision of the Employment Security Commission that she is not entitled to unemployment benefits. The record discloses the following:

Ms. Patrick was discharged from her job as a weaver at the Cone Mills Corporation White Oak Plant on 18 September 1981. Her subsequent claim for unemployment benefits was denied by the claim adjudicator based on his finding that reason for Ms. Patrick's discharge was "fighting on company premises," which constitutes work-related misconduct. Claimant appealed the decision and a hearing was held by an appeals referee on 20 October 1981 pursuant to N.C. Gen. Stat. Sec. 96-15(c).

At the hearing two witnesses testified: Gary Siliski, Assistant Personnel Manager for Cone Mills, and Ms. Patrick. Mr. Siliski testified that he investigated the incident for which Ms. Patrick was discharged, and that he took statements from four witnesses as well as from Ms. Patrick and the other participant in the alleged fight, Wilma Slade. Mr. Siliski read into the record the statement of Ms. Slade, but refused to read the statement of one of the witnesses when Ms. Patrick asked him to do so. The appeals referee then ruled that the statement of Ms. Slade would

be disregarded. Claimant's testimony at the hearing was that Ms. Slade attacked her with a knife and that she attempted to defend herself with her purse. She denied that she had been "fighting."

On 23 October 1981 the appeals referee ruled that Ms. Patrick was not entitled to unemployment benefits, basing his decision on his finding that claimant "was fighting on company property with another employee . . . contrary to company rules." The appeals referee held that this violation of company rules amounted to "misconduct connected with the work" under applicable law.

Ms. Patrick appealed the decision of the appeals referee to the Employment Security Commission. The Commission reviewed the record and adopted the decision of the appeals referee as its own. Claimant appealed the Commission's decision to the Superior Court. From a judgment affirming the decision of the Commission, claimant appealed.

Central Carolina Legal Services, Inc., by Margaret DuB. Avery and Robert S. Payne, for claimant, appellant.

Thelma M. Hill, Staff Attorney, for appellee, Employment Security Commission of North Carolina.

HEDRICK, Judge.

N.C. Gen. Stat. Sec. 96-4(m) in pertinent part provides:

> When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence.

After the Commission made its findings and conclusions and entered its order denying unemployment compensation, claimant, Daisy Patrick, wrote a letter giving timely notice of appeal to the Superior Court. In this letter she satisfactorily took exceptions to the findings and conclusions made by the Commission. Such exceptions raise the question whether the findings and conclusions of the Commission are supported by competent evidence.

N.C. Gen. Stat. Sec. 96-4(p), in pertinent part, provides: "The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties." It is apparent that the hearing in the present case was not conducted in such a way as to "ascertain the substantial rights of the parties." In particular, the rights of the employee were not protected. There is in this record no *competent evidence* to support the critical finding that Ms. Patrick was "fighting" on the job in violation of one of the company rules. The testimony of Mr. Siliski was not based on any personal knowledge, but instead consisted in large part of referring in general terms to the admittedly conflicting testimony of unidentified witnesses. The only competent evidence with respect to the critical issue of whether Ms. Patrick had been involved in a fight on company property came from the employee herself, who testified that she had not been "fighting."

For the reasons stated the judgment of the Superior Court must be reversed, and the cause remanded to that court for the entry of an order reversing the decision of the Commission and remanding the proceeding to the Commission for the entry of an appropriate order.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

WINFAS, INC., D/B/A RADIO STATIONS WJNC-WRCM OF JACKSONVILLE, N.C. v. REGION P HUMAN DEVELOPMENT AGENCY

No. 824DC1225

(Filed 1 November 1983)

State § 1.1 – Human Development Agency – subject to Open Meetings Law

The Region P Human Development Agency, which was established by resolution of the Onslow Board of Commissioners, is a public body subject to the Open Meetings Law, G.S. 143-318.9 *et seq.*, notwithstanding it has been incorporated under the Nonprofit Corporation Act. G.S. 143-318.10(b)(2).

WINFAS, Inc. v. Human Development Agency

APPEAL by defendant from *Erwin, Judge.* Judgment entered 4 June 1982 in ONSLOW County District Court. Heard in the Court of Appeals 19 October 1983.

Plaintiff brought this action to force defendant to give public notice of its meetings. Plaintiff cited numerous occasions on which defendant held meetings without giving the public notice required by G.S. § 143-318.12. Defendant argued that it was not a "public body" as defined in G.S. § 143-318.10, so it was not subject to the open meeting laws of G.S. §§ 143-318.9 to -318.18. Plaintiff's evidence tended to show that defendant exercised administrative functions, consisted of two or more members, and was created by a 1964 resolution of the Onslow County Board of Commissioners. Defendant's evidence tended to show that it was a nonprofit corporation organized for charitable and educational purposes. Since its inception, defendant has received federal and state funds which it has administered through programs like Headstart, Community Service Block Grants, CETA, and Housing and Urban Development projects.

The trial court concluded that defendant is a public body subject to the open meeting laws of G.S. §§ 143-318.9 to -318.18. From a judgment enjoining defendant from holding further official meetings without giving public notice as required by G.S. § 143-318.12, defendant appealed.

Gaylor, Edwards, and McGlaughon, by H. King McGlaughon, Jr., for plaintiff.

Collins and Howard, by Jill R. Howard, for defendant.

WELLS, Judge.

North Carolina requires as a matter of public policy that public bodies conduct their business openly. G.S. § 143-318.9. "Public body" is defined in G.S. 143-318.10 as:

. . .

(b) . . . any authority, board, commission, committee, council, or other body of the State, or of one or more counties . . . that is composed of two or more members; and

(1) Exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function; and

(2) Is established by . . . (iv) an ordinance, resolution, or other action of the governing board of one or more counties . . . .

Defendant contends that it does not fall within the statutory definition of a public body because it was established pursuant to the Nonprofit Corporation Act of G.S. §§ 55A-1 to -89.1.

Defendant was established by resolution of the Onslow County Board of Commissioners who appointed defendant's initial board of directors and therefore falls squarely within the G.S. § 143-318.10(b)(2) definition of a public body. The later incorporation of defendant under the Nonprofit Corporation Act did not change its basic character or purpose or operation. The incorporation of defendant has not altered its existence as a public body. In *The News and Observer Publishing Co. v. Wake County Hospital System, Inc.*, 55 N.C. App. 1, 284 S.E. 2d 542 (1981), *pet. for disc. rev. den.*, 305 N.C. 302, 291 S.E. 2d 151 (1982), *pet. cert. den.*, 459 U.S. ---, 103 S.Ct. 26, 74 L.Ed. 2d 42 (1982), this court held that where a county hospital had "undergone little more than a change of name through incorporation" then it continued to be an agency of the county. The same reasoning applies in this case. To hold otherwise would eviscerate the public policy of G.S. § 143-318.9 by allowing public bodies to hold secret meetings due to a superficial change in their legal form.

The judgment of the trial court is in all respects,

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. RONALD EDWARD SIMMONS

No. 823SC1268

(Filed 1 November 1983)

Criminal Law § 138— conviction and sentence based on negotiated plea of guilty—no findings concerning sentence required

Where defendant pleaded guilty to and was convicted of five Class H felonies, since the sentence was imposed pursuant to a plea arrangement as to sentence, no findings as to aggravating and mitigating factors were required even though the sentence imposed differed from the presumptive term for the offenses. G.S. 15A-1340.4; G.S. 15A-1340.4(a) and (f); G.S. 14-1.1(a)(8); and G.S. 15A-1021 *et seq.*

APPEAL by defendant from *Friday, Judge.* Judgment entered 8 July 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 September 1983.

Defendant was charged with the offenses of manufacturing cocaine, possession of cocaine with intent to sell or deliver, sale or delivery of cocaine, possession of LSD with intent to sell or deliver, and sale or delivery of LSD.

Defendant negotiated a plea arrangement or plea bargain with the State. The terms of the arrangement were that defendant would plead guilty to all of the offenses with which he was charged and the charges would be consolidated for sentencing with a "total exposure" of ten years imprisonment. The judge signed the Transcript of Plea, indicating the court's acceptance of the arrangement.

At the sentencing hearing, the judge found two aggravating factors: (1) that the offenses were committed for hire or pecuniary gain, and (2) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. No mitigating factors were found. The judge found that the aggravating factors outweighed the mitigating factors and that they were proven by a preponderance of the evidence. The judge imposed a sentence of ten years and defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

EAGLES, Judge.

Defendant excepts to and assigns as error the judge's finding of the above-enumerated aggravating factors.

We need not consider these assignments of error nor the arguments advanced by defendant in support of them. The record in this case establishes, and both briefs concede, that defendant's conviction and sentence were based on a negotiated plea of guilty to the offenses charged.

Under our scheme of presumptive sentencing, a judge who imposes a prison term for a certain offense must impose the presumptive term for that offense. G.S. 15A-1340.4. If he imposes a term that differs from the presumptive term, he must justify the term imposed in terms of aggravating or mitigating factors and make appropriate written findings. G.S. 15A-1340.4(a). These requirements apply in all cases involving Fair Sentencing Act felonies, G.S. 14-1.1, "unless [the judge] imposes a prison term pursuant to [any/a] plea arrangement as to sentence under Article 58 . . . ." G.S. 15A-1340.4(a).

Here, the defendant pleaded guilty to and was convicted of five class H felonies, each carrying a presumptive term of three years imprisonment and a maximum term of ten years imprisonment. G.S. 15A-1340.4(f); G.S. 14-1.1(a)(8). The charges were consolidated for sentencing and defendant was sentenced to ten years imprisonment. The sentence imposed differs from the presumptive term for these offenses and the judge ordinarily would be required to make appropriate findings as to aggravating and mitigating factors. However, since the sentence was imposed pursuant to a plea arrangement with defendant, no findings are required. Our review of the record and the transcript of plea reveals no irregularities, and defendant has alleged none, that would remove the plea arrangement from the operation of Article 58 of Chapter 15A of the General Statutes. *See* G.S. 15A-1021 *et seq.* (relating to guilty pleas in Superior Court).

We hold that the judge's findings as to aggravating and mitigating factors regarding defendant's sentence may be disregarded as surplusage. The judgment and sentence are

Affirmed.

Judges ARNOLD and WELLS concur.

FRANZ (FRANK) JOSEPH BURMANN, PLAINTIFF v. HERTHA SCHWARZ BURMANN, DEFENDANT

No. 8210DC1220

(Filed 1 November 1983)

Divorce and Alimony § 21.9— Equitable Distribution of Marital Property Act— divorce granted prior to Act

The Equitable Distribution of Marital Property Act applies only to actions for absolute divorce filed after 1 October 1981, and a wife had no right under G.S. 50-11(f) to file an action for an equitable distribution of marital property within six months after an absolute divorce was granted on 13 May 1981.

APPEAL by defendant from *Bullock, Judge.* Order entered 25 August 1982 in District Court, WAKE County. Heard in the Court of Appeals 18 October 1983.

Gulley and Barrow by Jack P. Gulley and Linda C. Mobley for plaintiff appellee.

Sullivan & Pearson by Ernest C. Pearson for defendant appellant.

BRASWELL, Judge.

Defendant, the divorced wife of the plaintiff, through a motion in the cause now seeks to reopen the case and claim benefits under the Equitable Distribution of Marital Property Act. When the trial court granted summary judgment in favor of the former husband, the wife appealed. We affirm the granting of dismissal through summary judgment in favor of the plaintiff-husband.

The wife contends that the final judgment of absolute divorce of 13 May 1981 did not extinguish her rights to an equitable dis-

tribution of marital property under G.S. 50-11(f). That statute provides, in pertinent part, that "[a]n absolute divorce by a court that . . . lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to an equitable distribution of marital property under G.S. 50-20 if . . . [a] motion in the cause is filed within six months of the date of the divorce." When the General Assembly enacted G.S. 50-20, S.L. 1981, c. 815, s. 7, it provided that the act would become effective on 1 October 1981, "and shall apply only when the action for an absolute divorce is filed on or after that date."

On 6 April 1981 the husband filed the action for divorce. On 13 May 1981 the absolute divorce was granted. The divorce judgment did not make disposition of any marital property. On 1 October 1981 the Marital Property Act, G.S. 50-20, became a substantive part of the law. On 27 October 1981 the wife filed her motion in the cause seeking relief under G.S. 50-20, claiming procedural access through G.S. 50-11(f). The motion in the cause was filed 5 months and 14 days (thus within the statutory six months) of the absolute divorce date. Based upon these undisputed facts we hold that summary judgment for plaintiff was proper because the session laws which created G.S. 50-20 specifically provide that the act would apply only to actions for absolute divorce filed after 1 October 1981.

Affirmed.

Judges ARNOLD and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 NOVEMBER 1983

IN RE RICHARD A. MEDLIN TIMOTHY GRAY MEDLIN Nos. 8319DC165 and 8319DC221	Rowan (82J107) (82J108)	Dismissed
STATE v. BARTON No. 8312SC160	Cumberland (82CRS9649)	No Error
STATE v. SIMMONS No. 8324SC187	Watauga (82CR2229)	No Error
STATE v. SMITH No. 8325SC124	Caldwell (82CRS842)	Dismissed
STATE v. TEEL No. 833SC146	Pitt (82CRS5484)	No Error
WINTERS v. W. H. BRADY CO. No. 8210SC1231	Wake (81CVS6853)	Affirmed

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADMINISTRATIVE LAW

§ 8. Scope and Effect of Judicial Review

Defendants waived their exclusive means by which to obtain judicial review when they informed plaintiff by letter that they did not wish to contest the assessment of a penalty in an administrative hearing. *State ex rel. Grimsley v. Buchanan*, 367.

In reviewing the decision of the Employment Security Commission, the superior court was functioning as an appellate court; therefore, it erred in determining unemployment compensation claims on grounds neither raised nor relied on in the proceedings appealed from. *In re Gorski v. N.C. Symphony Society*, 649.

ADOPTION

§ 1. Nature, Construction and Operation of Statutes in General

Our courts have never created the relationship of parent and child with the resulting right of inheritance solely from a private contract to adopt. *Ladd v. Estate of Kellenberger*, 470.

ADVERSE POSSESSION

§ 25.2. Insufficiency of Evidence

Defendant did not acquire title to land by adverse possession under color of title where the evidence showed that actual possession was by defendant's son who had no color of title and was not acting as agent for defendant. *Crisp v. Benfield*, 357.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An order denying plaintiffs' motion for a preliminary injunction to enjoin defendant from proceeding with the foreclosure of a deed of trust was interlocutory. *Helms v. Griffin*, 189.

The trial court's order granting plaintiffs' motion for summary judgment as to defendant's second defense to an action on a fire insurance policy was not immediately appealable. *McKinney v. Royal Globe Insur. Co.*, 370.

An order of the superior court remanding an unemployment compensation proceeding for a new hearing was immediately appealable. *Tastee Freez Cafeteria v. Watson*, 562.

§ 31.1. Necessity for Objection to Jury Charge

The propounders of a will failed to follow App. R. 10(b)(2) by offering no objection to any portion of the jury charge or omission therefrom before the jury entered to consider its verdict, and assuming the "plain error" rule for appellate review applies to civil actions, the doctrine is available only to remedy those unusual errors so contrary to fundamental fairness as to amount to a denial of the litigant's due process right to a fair and impartial trial. *In re Will of Maynard*, 211.

§ 50.3. Instructions; Effect of Curative Action by Trial Court

The court's erroneous instruction that defendants had stipulated that their negligence was the proximate cause of injury to plaintiff was cured by the court's further instructions which informed the jury that defendants had stipulated only to the issue of liability and not that plaintiff's condition at trial was caused by the accident. *Goble v. Helms*, 439.

APPEAL AND ERROR — Continued

§ 59. Review of Judgment Directing Verdict

In an action for wrongful timber cutting under G.S. 1-539.1, the trial court erred in granting a directed verdict for defendant on the basis that plaintiff had failed to establish title in the land. *Hefner v. Stafford*, 707.

§ 59.2. Review of Judgment on Motion for Directed Verdict, Evidence Considered

In a breach of contract action where the issue at trial required evidence of an agency relationship to support the action for breach of contract, appellant cannot offer on appeal five new theories to establish the existence of a contract that were not considered at the trial level. *Gilbert v. Thomas*, 582.

§ 68.2. Law of the Case and Subsequent Proceedings; Sufficiency of Evidence

A decision on a prior appeal that plaintiff had presented sufficient circumstantial evidence to support an inference by the jury that one defendant was the negligent driver of the car at the time of the accident in question became the law of the case and was controlling in a retrial. *Jones v. Allred*, 462.

§ 68.3. Law of the Case and Subsequent Proceedings; Decisions Relating to Pleading Motions

The appellate court's decision in a prior appeal affirming the trial court's ruling denying defendant's motion to amend its pleadings to allege unenforceability of the contract in question became the law of the case on that issue. *Bd. of Education v. Construction Corp.*, 158.

APPEARANCE

§ 2. Effect of Appearance

A third-party defendant waived its defense of lack of personal jurisdiction on a cross-claim by appearing in the action without objecting to the lack of service of process after it had been informed of the cross-claim. *McNair Construction Co. v. Fogle Bros. Co.*, 282.

ARSON AND OTHER BURNINGS

§ 3. Competency of Evidence

While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant. *S. v. Langley*, 674.

§ 4.1. Cases Where Evidence Was Sufficient

The evidence was sufficient to support a conviction of burning a barn in violation of G.S. 14-62. *S. v. Oxendine*, 559.

The trial court properly denied defendant's motion to dismiss an indictment for burning a building used in a trade or business even though all of the businesses in a shopping center were temporarily closed after a fire which happened a week before the fire for which defendant was charged. *S. v. Langley*, 674.

The trial court properly denied defendant's motion to dismiss the indictments for burning the personal property of two store owners. *Ibid.*

ASSAULT AND BATTERY

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Where Weapon is Firearm

In a prosecution for assault with a deadly weapon with intent to kill and robbery with a firearm, the trial court properly denied defendants' motion to dismiss all charges at the end of the State's evidence. *S. v. Bellamy*, 454.

§ 14.5. Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Where Weapon is a Knife

In a prosecution for assault with a deadly weapon with intent to kill, the trial court properly submitted the case to the jury. *S. v. Morris*, 595.

ASSOCIATIONS

§ 2. Rights of Members

A claim for breach of contract by the Highway Patrol Voluntary Pledge Fund Committee to pay disability benefits accrued on the date when the Fund Committee denied benefits to plaintiff, and plaintiff was entitled to benefits where he was receiving Federal Social Security disability benefits on the date of his retirement. *Pearce v. Highway Patrol Vol. Pledge Committee*, 120.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

A trial judge abused his discretion by failing to allow defendant's motion to dismiss for a violation of G.S. 1A-1, Rule 8(a)(2) by demanding monetary relief of $5 million in a malpractice action. *Harris v. Maready*, 1.

AUTOMOBILES AND OTHER VEHICLES

§ 5. Sale and Transfer of Title to Vehicles

A financial institution which had a security interest in a motor home in a dealer's inventory was not a "purchaser" of the motor home within the purview of G.S. 20-288(e) and thus was not entitled to recover under the dealer's surety bond when the motor home was sold by the dealer and the amount owed by the dealer was not remitted to the financial institution. *Fink v. Stallings 601 Sales*, 604.

§ 45.4. Evidence of Physical Conditions at Scene of Automobile Accident

The trial court properly refused to permit testimony by the investigating officer concerning measurements of physical evidence at an accident scene where it was not shown the measurements were taken close to the time of the accident. *Jones v. Allred*, 462.

§ 66.1. Identity of Driver

A patrolman's testimony that his investigation revealed that decedent was driving at the time of an accident was hearsay and improperly admitted. *Jones v. Allred*, 462.

BILLS OF DISCOVERY

§ 1. Examination of Adverse Party in General

Inasmuch as the trial judge offered to propounders of a will a reasonable time to consider and meet surprise testimony regarding the validity of the will, the

BILLS OF DISCOVERY — Continued

trial judge did not abuse his discretion in denying the propounder's request for a three weeks' continuance. *In re Will of Maynard,* 211.

The trial court did not abuse its discretion by admitting into evidence a contract between one of the propounders of a will and the testatrix on the ground that it was not listed as an exhibit in the pretrial order. *Ibid.*

BROKERS AND FACTORS

§ 6. Right to Commissions

Correspondence from an owner did not modify an exclusive listing and right to sell agreement and deprive a broker of his right to commissions for the owner's sale of the property. *Joel T. Cheatham, Inc. v. Hall,* 678.

Defendant owner was liable for the payment of a real estate broker's commission under an exclusive right to sell agreement although the broker was not the procuring cause of the sale to a third party. *Ibid.*

§ 8. Licensing and Regulation

There is no language in the real estate licensing statutes that can be construed as pre-empting reasonable self-regulation by private real estate boards. *Gaston Bd. of Realtors v. Harrison,* 29.

In a declaratory judgment action brought by plaintiff board of realtors in which plaintiff sought a judgment that the hearings in which it expelled defendant had not violated defendant's rights, the trial court did not err in failing to review the substantive aspects of plaintiff's decision to expel defendant. *Ibid.*

Given the fact that expulsion from a local real estate board may harm a defendant professionally and economically, such an expulsion must be done with some procedural due process. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

The State's evidence in a first degree burglary case was sufficient to raise an inference of an intent to commit larceny as alleged in the indictment. *S. v. Davis,* 186.

The State's evidence was insufficient to permit the jury to find that defendant broke into the victims' house with the intent to commit rape or larceny as alleged in the indictment so as to support conviction of defendant for first degree burglary. *S. v. Hankins,* 324.

§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally

The evidence was sufficient to support an "entry" into a vehicle even though there was a chain lock on the hood which prevented it from being raised more than twelve to eighteen inches. *S. v. Nealy,* 663.

§ 5.7. Sufficiency of Evidence of Breaking and Entering and Larceny

The fact that an accomplice who was the State's chief witness in a breaking and entering and larceny case was drunk at the time of the crimes did not make his testimony inherently incredible so as to require nonsuit. *S. v. Jones,* 505.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10.2. Sufficiency of Evidence of Undue Influence

In an action to set aside a deed on the ground of undue influence, there was ample evidence to support findings by the trial court that no confidential relationship existed between plaintiffs and defendant and that no undue influence had been exerted by defendant. *Curl v. Key*, 139.

CONSTITUTIONAL LAW

§ 23. Scope of Protection of Due Process

In a declaratory judgment action brought by plaintiff board of realtors in which plaintiff sought a judgment that the hearings in which it expelled defendant had not violated defendant's rights, the trial court did not err in failing to review the substantive aspects of plaintiff's decision to expel defendant. *Gaston Bd. of Realtors v. Harrison*, 29.

There was no error in the court's failure to appoint counsel for the defendant at his civil contempt hearing for nonsupport of his child. *Hodges v. Hodges*, 550.

§ 24.1. Due Process; Right to Notice and Hearing

Given the fact that expulsion from a local real estate board may harm a defendant professionally and economically, such an expulsion must be done with some procedural due process. *Gaston Bd. of Realtors v. Harrison*, 29.

§ 24.7. Service of Process on Foreign Corporations

The assertion of personal jurisdiction over defendant Swedish corporations in an action to recover for personal injuries received by plaintiff while operating a washing machine manufactured by defendants did not violate due process. *Bush v. BASF Wyandotte Corp.*, 41.

§ 30. Discovery; Access to Evidence and Other Fruits of Investigation

Defendant's right to a fair trial was violated by the trial court's denial of his pretrial motions seeking to obtain a written psychiatric evaluation of the State's chief witness, an independent psychiatric examination of the witness, disclosure of inducements to the witness, disclosure of the circumstances leading to a plea agreement with the witness, and disclosure of the full circumstances leading to hypnosis of the witness. *S. v. Hunt*, 81.

§ 48. Effective Assistance of Counsel

A defendant tried for felonious escape was not denied the effective assistance of counsel because counsel was appointed only six working days prior to trial. *S. v. Martin*, 180.

The record failed to show that defendant was denied the effective assistance of counsel in an assault case because defendant's attorney had previously represented the victim and other prosecution witnesses. *S. v. Wise*, 108.

Defendant was not denied the effective assistance of counsel by failure of his counsel to object to testimony by an alleged accomplice which repeatedly referred to the fact that the accomplice had taken a lie detector test. *S. v. Miller*, 390.

A defendant charged with narcotics offenses was not denied the effective assistance of counsel because of the failure of his counsel to make certain objections at trial. *S. v. Pagon*, 295.

Defendant was not denied the effective assistance of counsel because of the failure of his counsel to request an instruction on the defense of coercion. *S. v. Henderson*, 536.

CONSTITUTIONAL LAW — Continued

§ 68. Right to Call Witnesses and Present Evidence; Continuances

The denial of defendant's motion for a continuance did not deprive him of his right to prepare for and confront witnesses. *S. v. Martin*, 180.

CONTEMPT OF COURT

§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence

Where the issue of defendant's present ability to pay a sum ordered by the court for alimony and child support was fully adjudicated in the original contempt hearing, and defendant failed to appeal the contempt order, the court's findings as to defendant's ability to pay were res judicata on that issue in a subsequent hearing at which plaintiff demonstrated that defendant had failed to purge himself of contempt by making the necessary payments. *Abernethy v. Abernethy*, 386.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

A finding that defendant was not a general contractor required to be licensed under G.S. 87-1 was supported by the evidence. *Duke University v. American Arbitration Assoc.*, 75.

Unlicensed general contractors may not recover from the owners under a contract for construction of a home costing more than $30,000.00 although the unlicensed contractors had all work supervised by a licensed general contractor. *Sager v. W.M.C., Inc.*, 546.

§ 12.2. Interpretation of Ambiguous Agreements

Ambiguity in deeds from a charitable institution conveying property subject to ad valorem taxes on any portions which were "currently taxable" presented a jury question. *Cleland v. Children's Home*, 153.

§ 29.2. Calculation of Compensatory Damages

The proper measure of damages for breach of a contract to maintain a school roof was the cost of repair, and plaintiff's expert witness could properly base his estimate on the cost of repair by taking the actual cost in 1981 and reducing that figure to reflect inflation. *Bd. of Education v. Construction Corp.*, 158.

COUNTIES

§ 6. Authority of County to Issue Bonds

An action to set aside a special school bond referendum order brought more than thirty days after publication of the bond order was barred by G.S. 159-59. *Wright v. County of Macon*, 718.

A county board of commissioners could properly ratify the county manager's submission of an application to the Local Government Commission for approval of a school bond referendum. *Ibid.*

A school bond referendum order issued in August 1982 was not invalid because of the county's failure to disclose 1983 appraised values from a tax revaluation. *Ibid.*

COURTS

§ 14.1. Jurisdiction of Inferior Courts; Transfer and Removal of Causes

The district court did not abuse its discretion in denying defendant's motion to stay all proceedings and in disposing of the case while defendant's motion to transfer the case to the superior court division was pending in the superior court. *Langley v. Moore*, 520.

CRIMINAL LAW

§ 7. Entrapment

In a prosecution for possession of cocaine with intent to sell and deliver and for sale and delivery of cocaine, the defendant presented sufficient evidence of entrapment to require a jury instruction. *S. v. Jamerson*, 301.

§ 7.5. Compulsion

The trial court did not err in failing to charge the jury on the defense of duress or coercion although an accomplice testified that he and defendant were coerced into committing the robbery by a third person. *S. v. Henderson*, 536.

§ 9.3. Sufficiency of Evidence of Aiding and Abetting

The evidence was sufficient to be submitted to the jury in a prosecution for aiding and abetting an armed robbery. *S. v. Jackson*, 715.

§ 26.5. Former Jeopardy; Same Acts or Transaction Violating Different Statutes

Dual indictments charging defendant with possession of cocaine with intent to sell or deliver and actual sale or delivery of the same drugs did not violate the constitutional bar against double jeopardy. *S. v. Jamerson*, 301.

Double jeopardy prohibited punishment of defendant for both possession of more than one ounce of marijuana and possession of the same marijuana with intent to sell. *S. v. Pagon*, 295.

§ 34.7. Evidence of Defendant's Guilt of Other Offenses Admissible to Show Knowledge or Intent

Evidence in a Medicaid fraud case tending to show that defendant was causing the State to be overcharged for medicines for Medicaid patients a year and a half before the period in question was admissible to show guilty knowledge, intent, plan and design. *S. v. Beatty*, 511.

§ 43.2. Authentication and Verification of Photographs

A witness's testimony provided a sufficient basis for admission of photographs to illustrate testimony that defendant could not have seen his wife's car in a motel parking lot while he was driving along the highway. *S. v. Collins*, 656.

§ 61.3. Evidence of Tire Tracks

The trial court erred in admitting evidence of tire tracks where there was no evidence the tracks corresponded to tires on defendant's vehicle. *S. v. Jones*, 505.

§ 66.11. Identification of Defendant; Confrontation at Scene of Crime or Arrest

A pretrial identification procedure whereby defendant was shown to a robbery victim while sitting in a police car some thirty minutes after the robbery was not unnecessarily suggestive and did not taint the victim's in-court identification of defendant. *S. v. McLain*, 571.

CRIMINAL LAW — Continued

§ 66.18. Voir Dire to Determine Admissibility of In-Court Identification; When Voir Dire Is Required

Failure to hold a voir dire on the issue of pretrial identification procedures was harmless error. *S. v. King*, 574.

§ 74. Manner of Introducing Confession into Evidence

Because there were differences in a written confession and in an oral confession, the written statement was not unduly emphasized by allowing it to be read to, and then passed among, the jurors. *S. v. Thompson*, 485.

§ 74.2. Confession Implicating Codefendant

There was no prejudice to the defendant caused by the editing of his confession by deleting all references to the codefendant. *S. v. Cantrell*, 207.

§ 74.3. When Confession Implicating Codefendant is Competent

In a prosecution for aiding and abetting an armed robbery, the trial court properly allowed an investigating officer to make references to a confession made by one of the two principals during his testimony. *S. v. Jackson*, 715.

§ 75.2. Admissibility of Confession; Effect of Threats or Other Statements of Officers

A 16-year-old defendant's confession was improperly obtained by psychological coercion and by the continued interrogation of defendant after he stated that he did not want to answer further questions without his parents being present. *S. v. Hunt*, 81.

§ 75.10. Confession; Waiver of Constitutional Rights Generally

The State is not required to prove beyond a reasonable doubt that defendant voluntarily waived his right to counsel. *S. v. Jones*, 505.

§ 75.11. Confession; Sufficiency of Waiver of Constitutional Rights

In a prosecution for armed robbery, the trial court properly admitted defendant's confession into evidence. *S. v. Thompson*, 485.

§ 75.15. Mental Capacity to Confess or Waive Rights; Intoxication

The evidence supported the trial court's determination that defendant was not under the influence of drugs when he confessed and that his confession was voluntary. *S. v. Moore*, 686.

§ 76.3. Failure to Object to Admission of Confession or to Request Hearing

There was sufficient evidence of voluntariness of defendant's in-custody statements to eliminate the trial court's duty to exclude the statements on its own motion. *S. v. Pagon*, 295.

§ 84. Evidence Obtained by Unlawful Means

It was unnecessary to determine the legality of the seizure of a pair of blood-stained jeans in a warrantless search of defendant's home. *S. v. Collins*, 656.

§ 89.5. Slight Variances in Corroborating Testimony

The trial court properly allowed a witness to offer corroborating testimony regarding a telephone conversation with an earlier witness. *S. v. Bellamy*, 454.

CRIMINAL LAW — Continued

§ 91. Speedy Trial

The delay between the date defendant appeared for arraignment without counsel and the date when defendant and his court-appointed counsel filed a written waiver of arraignment was properly excluded from the statutory speedy trial period. *S. v. Herbin*, 711.

§ 92.1. Consolidation of Charges Against Multiple Defendants

In a prosecution for robbery with a firearm and assault with a deadly weapon with intent to kill, the trial court properly granted the State's motion for a joint trial. *S. v. Bellamy*, 454.

§ 95. Admission of Evidence Competent for Restricted Purpose

In a prosecution for felonious breaking or entering of a motor vehicle, the trial court properly admitted evidence of a previous theft of a battery from the victim's car for the limited purpose of showing why the victim's car hood was chained down. *S. v. Nealy*, 663.

§ 97.1. No Abuse of Discretion in Permitting Additional Evidence

The trial court properly allowed the State to offer rebuttal testimony from two witnesses where one witness's testimony could have been introduced in the State's case in chief, and where the other testimony was admissible as an admission by the codefendant. *S. v. Bellamy*, 454.

§ 99.1. Court's Expression of Opinion on the Evidence

The trial court expressed an impermissible opinion on the evidence in a prosecution for armed robbery. *S. v. Sidbury*, 177.

§ 102.8. Argument of Counsel; Comment on Failure to Testify

The trial court properly ruled that defendant's counsel could not argue to the jury concerning defendant's failure to testify or to introduce evidence. *S. v. Brown*, 578.

§ 106.5. Sufficiency of Evidence; Testimony of Accomplice

The fact that an accomplice who was the State's chief witness in a breaking and entering and larceny case was drunk at the time of the crimes did not make his testimony inherently incredible so as to require nonsuit. *S. v. Jones*, 505.

§ 118.4. Necessity for Objection to Instructions

Pursuant to App. R. 10, the court dismissed defendant's objection to an instruction to the jury. *S. v. Cantrell*, 207.

§ 122. Additional Instructions after Initial Retirement of Jury

A court's inquiry into a jury's numerical division is not per se reversible error. *S. v. Yarborough*, 500.

There was nothing in a trial judge's reinstruction as to the elements of the offense that could be considered prejudicial or coercive. *Ibid.*

There was no error in an instruction by the trial judge, which was given in response to a question, that the jury must govern itself in determining what weight to give unrebutted testimony. *Ibid.*

§ 122.1. Jury's Request for Additional Instructions

The trial court did not express an opinion in instructing the jury that questions asked by the jury had no bearing on the jury's task of determining the

credibility of the witnesses and whether their testimony showed beyond a reasonable doubt that defendant was guilty. *S. v. Saunders*, 350.

§ 127. Arrest of Judgment

Where judgment must be arrested upon one of two sentences of equal severity because of a double jeopardy violation, the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken. *S. v. Pagon*, 295.

§ 128.2. Particular Grounds for Mistrial

There was no basis for defendant's argument that the trial court grossly abused its discretion by disallowing a mistrial upon the district attorney asking a question of defendant concerning a polygraph test. *S. v. Elliott*, 525.

The trial court erred in denying defendant's motion for a mistrial when defendant stated that he had given a young girl guitar lessons and the district attorney asked the girl to stand up in the courtroom and asked defendant, "And is it not true that at the conclusion of numerous of these guitar lessons, you would unzip her jeans and pull down her pants and proceed to stare at her?" *Ibid.*

§ 132. Setting Aside Verdict as Contrary to Weight of the Evidence

In a prosecution for armed robbery, the trial court properly denied defendant's motion to set aside the verdict as contrary to the weight of the evidence even though the defendant's evidence tended to show that he did not commit the crime. *S. v. Thompson*, 485.

§ 138. Severity of Sentence and Determination Thereof

In a prosecution for larceny by an employee, it was proper for the trial court to use the value of the items taken to prove an aggravating factor. *S. v. Canipe*, 102.

It was not proper for the trial court to use the value of property stolen in a prosecution for larceny by an employee to prove more than one aggravating factor. *Ibid.*

The trial court erred in finding as an aggravating factor that the defendant had a prior conviction of driving under the influence of some intoxicating beverage since the court did not determine whether the defendant was indigent at the prior proceeding, and if so, whether he was represented by counsel or properly waived assistance. *Ibid.*

In a prosecution for armed robbery, the trial court improperly submitted as aggravating factors that the offense was committed for hire or pecuniary gain and that the defendant was armed with a deadly weapon at the time of the crime. *S. v. Cantrell*, 207.

The evidence in a sentencing hearing for voluntary manslaughter did not support the trial court's findings as aggravating factors that there was strong evidence of premeditation and deliberation and that the evidence would have warranted submission of an issue of first degree murder, and the court erred in finding as an aggravating factor that defendant had not acknowledged his guilt of wrongdoing. *S. v. Brown*, 578.

Failure of the trial court specifically to list in the record the mitigating factors it found was not prejudicial error. *S. v. Jones*, 505.

The trial court did not err in failing to make findings as to whether defendant was indigent and represented by counsel at the time of prior convictions which the court found to be aggravating factors. *Ibid.*

CRIMINAL LAW — Continued

The trial court erred in finding as an aggravating factor that the sentence imposed was necessary to deter others from committing the same crime. *S. v. Miller*, 618.

The trial court erred in considering defendant's use of a deadly weapon as an aggravating factor in imposing a sentence for voluntary manslaughter. *S. v. Rivers*, 554.

The trial court erred in considering the victim's age of 71 as an aggravating factor in imposing a sentence for voluntary manslaughter. *Ibid.*

The trial court erred in finding as an aggravating factor that defendant was deceptive in the early stages of the investigation. *Ibid.*

In imposing a sentence for voluntary manslaughter, the trial court erred in finding as an aggravating factor that the offense was committed with a stolen pistol. *S. v. Strange*, 614.

In a prosecution for robbery with a firearm under G.S. 14-87, the trial court properly found as an aggravating factor that a large sum of money was taken. *S. v. Thompson*, 485.

A trial judge erred in finding as an aggravating factor that the defendant used a deadly weapon at the time of the crime since use of a deadly weapon is an element of the offense of armed robbery. *S. v. Yarborough*, 500.

The record did not present the Court with sufficient evidence to require the trial judge to find as a mitigating factor that defendant had testified for the State in another felony prosecution. *Ibid.*

The trial court did not err in considering defendant's prior convictions as an aggravating factor in imposing sentence without making findings as to his representation by counsel. *S. v. Moore*, 686; *S. v. Herbin*, 711.

Where defendant pleaded guilty to five Class H felonies and sentence was imposed pursuant to a plea bargain, no findings as to aggravating and mitigating factors were required even though the sentence imposed differed from the presumptive term for the offenses. *S. v. Simmons*, 727.

In a prosecution where defendant pled guilty to breaking or entering and uttering a forged check, the trial court erred in considering as an aggravating factor that the offense was committed for pecuniary gain. *S. v. Thompson*, 354.

§ 143.3. Revocation of Probation; Place of Hearing

Although defendant was under the supervision of the State of Maryland, it was proper for his revocation hearing to have been held in North Carolina. *S. v. Coleman*, 384.

§ 143.5. Probation Revocation Hearing; Competency of Evidence

In a probation revocation hearing where one of the conditions of probation was that defendant support his family, and where a North Carolina probation officer testified that defendant told her he had been incarcerated for nonsupport, this was competent evidence that defendant had violated a condition of his probation. *S. v. Coleman*, 384.

§ 154.2. Effect of Failure to File Case on Appeal

Pursuant to App. R. 12(a) defendant's appeal was dismissed for his failure to file the record on appeal within 150 days of giving notice of appeal. *S. v. Bartlett*, 388.

CRIMINAL LAW — Continued

§ 158.2. Presumptions as to Matters Omitted

Where the record is silent as to whether the trial judge conducted a jury instruction conference as required by Rule 21 of the General Rules of Practice for the Superior and District Courts, it will be presumed that the trial court acted correctly. *S. v. Nealy*, 663.

§ 163. Appeal; Necessity for Objections to Instructions

The trial court's failure to summarize evidence favorable to defendant was not "plain error" requiring a new trial even though defendant failed to object to the charge. *S. v. Wise*, 108.

§ 173. Appeal and Error; Invited Error

When defendant elicited testimony on direct examination of his parole officer that defendant had been on parole for two years, he "opened the door" to the State's cross-examination of the parole officer concerning the conviction for which defendant was on parole. *S. v. Brown*, 637.

§ 178. Appeal and Error; Law of the Case

The court is bound by the conclusion in a previous appeal that the record contained ample evidence to support a conclusion that "extraordinary cause" had been shown justifying the remission of all outstanding executions on a judgment entered against a surety arising out of criminal charges against defendant. *S. v. Moore*, 516.

§ 181.4. Postconviction Hearing; Sufficiency of Showing

The court denied defendant's motion for appropriate relief which was based on newly discovered evidence. *S. v. Thompson*, 485.

DAMAGES

§ 5. Damages for Injury to Real Property

In an action for breach of both express and implied warranties in the construction of a home, the trial court erred in its instructions concerning damages. *Stiles v. Charles M. Morgan Co.*, 328.

§ 13.2. Competency and Relevancy of Evidence Concerning Lost Earnings

The trial court did not err in admitting evidence of plaintiff's prospects regarding future earnings and promotions with the company which employed him when the collision in question occurred. *Goble v. Helms*, 439.

§ 16.1. Sufficiency of Evidence as to Extent of Injuries

Plaintiff's evidence justified the trial court's instruction on damages for disfigurement. *Goble v. Helms*, 439.

§ 17.1. Instructions as to Extent of Injuries

There was sufficient evidence of causation, medical and otherwise, to merit the trial court's instruction that the jury could award damages to plaintiff for loss of use of a part of his body due to numbness and weakness. *Goble v. Helms*, 439.

§ 17.4. Instructions as to Future Damages

The evidence in a personal injury action supported the trial court's instruction that the jury could award damages for medical expenses which plaintiff would pay or incur in the future. *Goble v. Helms*, 439.

DECLARATORY JUDGMENT ACT

§ 3. Requirement of Actual Justiciable Controversy

The trial court properly failed to dismiss plaintiff's declaratory judgment action due to a lack of case or controversy between the parties. *Gaston Bd. of Realtors v. Harrison*, 29.

§ 4.4. Availability in Action to Quiet Title

A declaratory judgment is the appropriate action to quiet title to real property. *Kirstein v. Kirstein*, 191.

DIVORCE AND ALIMONY

§ 7. Grounds for Divorce from Bed and Board Generally

Cohabitation by the parties while a complaint for divorce from bed and board was pending did not prohibit the court from granting such a divorce based on habitual drunkenness and indignities. *Howell v. Tunstall*, 703.

§ 19.4. Modification of Alimony Decree; Burden and Sufficiency of Showing Changed Circumstances

Plaintiff failed to carry his burden of proving that his present overall circumstances, compared with those circumstances present at the time of the original alimony award, entitled him to a reduction in payment. *Medlin v. Medlin*, 600.

§ 21.3. Enforcement of Alimony Award; Evidence and Findings

Although there was not an explicit finding of present ability to comply or to take reasonable measures to enable plaintiff to comply with an order of alimony, that plaintiff had the ability to comply or to deal with his assets so as to enable him to comply, and had willfully failed or refused to do so, was implicit in the findings which dealt with his assets. *Medlin v. Medlin*, 600.

§ 21.5. Enforcement of Alimony Award; Punishment for Contempt

Where the issue of defendant's present ability to pay a sum ordered by the court for alimony and child support was fully adjudicated in the original contempt hearing, and defendant failed to appeal the contempt order, the court's findings as to defendant's ability to pay were res judicata on that issue in a subsequent hearing at which plaintiff demonstrated that defendant had failed to purge himself of contempt by making the necessary payments. *Abernethy v. Abernethy*, 386.

§ 21.9. Equitable Distribution of Marital Property

The Equitable Distribution of Marital Property Act applies only to actions for absolute divorce filed after 1 October 1981, and a wife had no right under G.S. 50-11(f) to file an action for an equitable distribution within six months after an absolute divorce was granted on 13 May 1981. *Burmann v. Burmann*, 729.

If a house was purchased by plaintiff before marriage, it was error for the trial court to subject the house, as such, to equitable distribution, but if an equity in the house developed during the marriage because of improvements or payments contributed to by defendant wife, that equity could be marital property. *Turner v. Turner*, 342.

The trial court's findings were insufficient to support an equitable distribution of the equity in a house owned by plaintiff husband and shares of stock purchased by plaintiff through his employer. *Ibid.*

In an action for divorce where defendant wife counterclaimed for equitable distribution of marital property pursuant to G.S. 50-20, the court's findings that

defendant contributed services which exceeded in value the fair market value of her interest in jointly held property and her separately held property was consistent with the court's conclusion that the parties were entitled to an equal division of the marital property. *White v. White*, 432.

§ 23. Child Custody and Support; Jurisdiction Generally

Although the court which first obtains jurisdiction and enters an order concerning child custody or support is the only proper court in which to bring an action for modification of custody or support, an individual judge may not retain exclusive jurisdiction over a case, and the trial judge erred in attempting to do so. *Wolfe v. Wolfe*, 249.

§ 23.3. Jurisdiction of Child Custody and Support Case after Divorce

North Carolina properly had jurisdiction over a contempt proceeding. *Beck v. Beck*, 89.

§ 23.4. Child Custody and Support; Service of Process

Service of process on defendant's attorney was sufficient to obtain personal jurisdiction on defendant by the North Carolina court. *Beck v. Beck*, 89.

§ 24.4. Enforcement of Child Support Order

G.S. 110-136(b) which requires a copy of the petition to garnish to be served on the responsible parent's employer in advance of the hearing is for the benefit of the employer, and failure to give notice was not prejudicial to defendant. *Champion v. Champion*, 606.

§ 24.5. Child Support; Modification of Order; Changed Circumstances

The findings of fact amply supported a court's conclusion that a substantial change of circumstances had occurred meriting an increase in child support payments. *Champion v. Champion*, 606.

§ 24.6. Child Support; Sufficiency of Evidence of Changed Circumstances

The trial court erred in proceeding to modify child support by considering changes in circumstances which predated the most recent order of child support. *Newman v. Newman*, 125.

§ 24.7. Child Support; Where Evidence of Changed Circumstances Is Sufficient

The trial court did not err in reducing the amount of child support which a court order required defendant father to pay from $275.00 per month to $150.00 per month. *O'Neal v. Wynn*, 149.

§ 24.9. Child Support; Findings

In a civil contempt proceeding for nonsupport of a minor child, the trial court erred in failing to find defendant presently had the means to comply with the order to make child support payments. *Hodges v. Hodges*, 550.

The trial court erred in decreasing the amount of child support due plaintiff. *Newman v. Newman*, 125.

Where the trial court made no findings concerning the relative abilities of the defendant and plaintiff to pay child support, the order awarding child support must be reversed. *Wolfe v. Wolfe*, 249.

DIVORCE AND ALIMONY — Continued

§ 25. Child Custody Generally

Husband and wife cannot enter into a temporary order concerning child custody and, by agreement, override an order of a trial judge concerning custody without a proper showing of substantial changed circumstances. *Wolfe v. Wolfe*, 249.

§ 25.3. Child Custody; Consideration of Child's Preference

The record clearly showed that a trial court in a child custody case permitted both children to testify concerning custody; however, the court was not bound by this testimony and could assign what weight it chose to the children's stated preferences. *Wolfe v. Wolfe*, 249.

§ 25.10. Modification of Custody Order; Where Changed Circumstances Are Not Shown

In a child custody action, plaintiff failed to show a substantial change of circumstances affecting the welfare of the children had occurred since the original custody order granting custody to defendant. *Wolfe v. Wolfe*, 249.

§ 25.12. Child Custody; Visitation Privileges

There was no merit to defendant's argument that she could not be adjudged guilty of contempt for failure to turn over the minor child when the father never came to visit him. *Beck v. Beck*, 89.

An order which provided that should plaintiff fail to comply with visitation conditions, a bond would be forfeited and foreclosure would be instituted without notice or hearing was error. *Wolfe v. Wolfe*, 249.

§ 25.13. Child Custody; Review, Abuse of Discretion

A trial judge improperly ordered that the mother of a child would be incarcerated upon the father's oral report to the sheriff of her noncompliance with a visitation order. *Mintz v. Mintz*, 338.

ELECTRICITY

§ 3. Rates

The Utilities Commission erred in using fuel costs established in a fuel clause proceeding as the fuel cost component for a power company in a general rate case without determining the reasonableness of the fuel expenses. *State ex rel. Utilities Comm. v. The Public Staff*, 609.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

The evidence was sufficient to convict defendant of embezzlement. *S. v. Earnest*, 162.

The State's evidence was insufficient for the jury in a prosecution of defendants for embezzlement of machinery parts where there was no evidence that defendants received the parts under the terms of their employment. *S. v. Keyes; S. v. Cashion*, 529.

EMINENT DOMAIN

§ 7.1. Proceedings to Take Land and Assess Compensation Generally

In a condemnation proceeding, a finding by the trial court that the deletion of the road from the State highway system by the Board of Transportation "was premised upon the city's assertion that the requested deletions were the result of 'annexation or changing of municipal corporate limits,'" was supported by the evidence. *City of Raleigh v. Riley*, 623.

In a condemnation proceeding, a prior judgment which found that the city was required to comply with G.S. 136-66.3 and reach an agreement with the State before proceeding with a condemnation project was res judicata with respect to the present action since no appeal was taken from the dismissal of that action and its validity was not challenged. *Ibid.*

The trial court properly found the city abused its discretion when it, whether by design or neglect, failed to properly execute its duty under G.S. 136-66.1 and G.S. 136-66.2. *Ibid.*

§ 13.4. Evidence in Actions by Owner for Compensation

In a civil action to establish the amount of compensation due respondents as a result of the appropriation by petitioner of an easement over respondents' property, the trial court erred in allowing certain photographs to be submitted for illustrative purposes since they were not relevant to the issue of compensation for the taking of the sewer easement. *Metro. Sewerage Dist. of Buncombe Co. v. Trueblood*, 690.

EVIDENCE

§ 29.3. Hospital Records

G.S. 8-44.1 merely eliminated the necessity of taking original hospital records to court and did not modify the requirements for authentication of such records. *In re Will of Cromartie*, 115.

§ 33.2. Examples of Hearsay Testimony

A patrolman's testimony that his investigation revealed that decedent was driving at the time of an accident was hearsay and improperly admitted. *Jones v. Allred*, 462.

§ 40. Nonexpert Opinion Evidence in General

It is not necessary for a lay witness to demonstrate any special knowledge of medicine before he can be permitted to testify that a blood count was done on him. *Vassey v. Burch*, 194.

§ 44. Nonexpert Opinion Evidence as to Physical Condition and General Health

Plaintiff wife was properly permitted to give non-expert opinion testimony that "it's very hard for [plaintiff husband] to relax now, like he used to," and that "sometimes we just can't have sexual relations because of that." *Goble v. Helms*, 439.

The trial court properly permitted plaintiff husband's former employer to testify concerning the appearance of numbness in plaintiff's face. *Ibid.*

§ 47. Expert Testimony in General

Plaintiff's expert witness could properly base part of his estimate on the amount of damages caused as a result of defendant's failure to maintain plaintiff's roof on the previous testimony of another roofing expert. *Bd. of Education v. Construction Corp.*, 158.

EVIDENCE — Continued

§ 49.2. Basis of Hypothetical Questions; Disputed Facts and Facts Not Shown by the Evidence

A hypothetical question was not improper because of the omission of certain relevant facts which did not go to the essence of the case. *Goble v. Helms*, 439.

§ 50. Testimony by Medical Experts in General

In a medical negligence action which was based on the alleged failure of the defendant physician to properly diagnose and treat plaintiff's appendicitis, the trial court erred in failing to allow a medical expert to express an opinion before the jury that the infection would not have developed if the appendix had been removed the day before. *Vassey v. Burch*, 194.

§ 50.1. Testimony by Medical Experts; Nature and Extent of Injury

By cross-examining plaintiffs' medical expert relating to injuries to the brain, defendants opened the door to a question on redirect concerning indications of a brain injury. *Goble v. Helms*, 439.

FIDUCIARIES

§ 2. Evidence of Fiduciary Relationship

In an action to recover a share of the royalties defendants received from the marketing of Sweet Acidophilus milk, the secret process for which had been developed by plaintiffs, plaintiffs' evidence raised a genuine issue of material fact as to whether defendants N.C. State University and N.C. Dairy Foundation had a fiduciary duty to plaintiffs which they breached so as to give rise to a constructive trust in the royalties. *Speck v. N.C. Dairy Foundation*, 419.

HIGHWAYS AND CARTWAYS

§ 4. What Constitutes a State Highway or Public Road

In a condemnation proceeding, a prior judgment which found that the city was required to comply with G.S. 136-66.3 and reach an agreement with the State before proceeding with a condemnation project was res judicata with respect to the present action since no appeal was taken from the dismissal of that action and its validity was not challenged. *City of Raleigh v. Riley*, 623.

§ 9. Actions Against the Highway Commission Generally

Where a highway construction contract provided that a subcontractor could not assert a claim against defendant Department of Transportation, the contractor could not assert a claim against defendant on behalf of its subcontractor. *Warren Brothers Co. v. N.C. Dept. of Transportation*, 598.

HOMICIDE

§ 21.9. Sufficiency of Evidence of Manslaughter

The State's evidence was sufficient to support conviction of defendant for the voluntary manslaughter of his father by shooting his father with a shotgun. *S. v. Brown*, 578.

Evidence in a second degree murder case that the gun discharged while defendant and decedent struggled for it and that defendant was attempting to prevent decedent's suicide by grabbing the gun was insufficient to support submission of an issue of involuntary manslaughter. *S. v. Crisp*, 493.

HOMICIDE — Continued

§ 27.1. Instructions on Voluntary Manslaughter; Heat of Passion

The trial court's instruction on adequate provocation for heat of passion was sufficient to encompass discovered adultery, and the court did not err in failing specifically to refer to discovered adultery as an adequate provocation. *S. v. Collins*, 656.

§ 28.5. Instructions on Defense of Others

The evidence did not require the trial court to instruct on the defense that defendant killed his wife's lover while defending his wife from attack. *S. v. Collins*, 656.

§ 28.8. Instructions on Defense of Accidental Death

The trial court's instructions in a second degree murder case could not have misled the jury to believe that the defense of accident or misadventure applied only to involuntary manslaughter. *S. v. Collins*, 656.

HUSBAND AND WIFE

§ 1.1. Liability for Debts and Other Rights and Duties of Marital Relationship

Upon divorce one spouse is not required to account for and reimburse sums expended for family purposes from a spousal joint account which originated in part from the other spouse's separate earnings and estate. *McClure v. McClure*, 318.

§ 9. Liability of Third Person for Injury to Spouse

The evidence was sufficient to support the trial court's instructions as to the elements of plaintiff wife's loss of consortium for which the jury could award damages. *Goble v. Helms*, 439.

§ 14. Estate by the Entireties in General

A conveyance of realty to a husband and wife creates an estate by the entireties. Upon divorce, the estate is converted into a tenancy in common, and each former spouse is entitled to an undivided one-half interest in the property. *Kirstein v. Kirstein*, 191.

INDICTMENT AND WARRANT

§ 4.1. Validity of Proceedings before Grand Jury as Affected by Irregularities or Misconduct During Deliberations

An indictment was not invalid because only one of the two persons whose names were listed on the indictment was called to testify before the grand jury. *S. v. McLain*, 571.

INFANTS

§ 4. Protection and Supervision of Infants by Courts Generally

A 5-year-old child was a "neglected" child, and the trial court erred in dismissing a petition by a county department of social services for an order directing respondent mother to accept and cooperate with petitioner's Protective Services for Children and to permit evaluation and appropriate treatment of the child by the county Child Guidance Clinic. *In re Thompson*, 95.

INFANTS — Continued

§ 18. Delinquency Hearing; Sufficiency of Evidence

The State's evidence failed to show that a juvenile defendant intended permanently to deprive an owner of his watch so as to support the court's finding that defendant committed misdemeanor larceny and was thus a delinquent child. *In re Raynor*, 376.

INJUNCTIONS

§ 12.2. Hearing of Temporary Order; Consideration on Merits

The trial court had no jurisdiction to determine the merits of a case and grant permanent injunctive relief in a hearing on a motion to dissolve a standing preliminary injunction. *Shishko v. Whitley*, 668.

INSURANCE

§ 44.1. Actions to Recover Benefits; Hospital Expenses Insurance

Violation of the 75% coverage requirement for a group hospitalization insurance policy did not void the policy but merely gave the insurer the right to cancel the policy. *Stainback v. Investor's Consolidated Insur. Co.*, 197.

§ 122. Fire Insurance; Conditions; Forfeiture

Plaintiff was not entitled to recover under a fire insurance policy because plaintiff's sprinkler system was not maintained in good order as required by the policy. *Star Varifoam Corp. v. Buffalo Reinsurance Co.*, 306.

§ 149. Liability Insurance

A city building inspector's order that defendants remove two greenhouses from their property because he mistakenly believed they violated the city building code was not an "occurrence" which would be covered by a multi-peril insurance policy purchased by the city. *City of Wilmington v. Pigott*, 587.

JUDGMENTS

§ 21.1. Consent Judgment; Want of Consent

A motion in the cause made within a reasonable time was the correct procedure for presenting the question of whether a consent judgment was void for lack of consent by plaintiff. *Briar Metal Products v. Smith*, 173.

§ 21.2. Consent Judgment; Fraud or Mutual Mistake

The trial court should have made a finding as to whether authority previously given by plaintiff to his attorney to consent to a judgment had been withdrawn prior to the time the judgment was entered. *Briar Metal Products v. Smith*, 173.

§ 35.1. Res Judicata in General

In a condemnation proceeding, a prior judgment which found that the city was required to comply with G.S. 136-66.3 and reach an agreement with the State before proceeding with a condemnation project was res judicata with respect to the present action since no appeal was taken from the dismissal of that action and its validity was not challenged. *City of Raleigh v. Riley*, 623.

§ 37.4. Preclusion or Relitigation of Judgments in Particular Proceedings

A previous judgment involving an earlier attempted annexation of the lands in question by defendant town and ruling that condominium projects should each be

JUDGMENTS — Continued

treated as one residential tract under the subdivision test of G.S. 160A-36(c) did not collaterally estop the town from annexing the lands in question or the Court of Appeals from determining the scope of the statute. *Tar Landing Villas v. Town of Atlantic Beach*, 239.

§ 39. Conclusiveness of Judgments of Courts of Other States

A judgment of a Kentucky divorce court which purported to vest wholly in defendant title to treal property in North Carolina which had been held by the parties as tenants by the entirety was void. *Kirstein v. Kirstein*, 191.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien Generally

The trial court erred by entry of summary judgment allowing plaintiff to enforce the full amount of the blanket lien against a single unit in a multi-unit condominium project. *Dail Plumbing v. Roger Baker & Assoc.*, 682.

LARCENY

§ 7.1. Sufficiency of Evidence; Proof of Intent

The State's evidence failed to show that a juvenile defendant intended permanently to deprive an owner of his watch so as to support the court's finding that defendant committed misdemeanor larceny and was thus a delinquent child. *In re Raynor*, 376.

§ 7.2. Sufficiency of Evidence; Identity of Property Stolen

The evidence was insufficient in a prosecution for misdemeanor larceny for the case to have been submitted to the jury. *S. v. Greene*, 616.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

Defendant's Rule 12(b)(6) motion to dismiss was properly granted where it was clear, from the face of the complaint, that plaintiff's action for attorney malpractice was commenced after the statute of limitations had run. *Small v. Britt*, 533.

§ 7. Accrual of Action to Declare Constructive Trust

If defendants breached a fiduciary duty to plaintiffs so as to give rise to a constructive trust, the 10-year statute of limitations applies to plaintiffs' claim. *Speck v. N.C. Dairy Foundation*, 419.

MALICIOUS PROSECUTION

§ 11.1. Proof of Existence of Probable Cause; Facts Occurring after Institution of Prosecution

The trial court in a malicious prosecution action erred in instructing the jury that it could not consider the grand jury's return of embezzlement indictments against defendant as evidence of probable cause since the indictments were returned after plaintiff's action was filed. *Jones v. Gwynne*, 51.

§ 15. Damages

The evidence in an action for malicious prosecution of embezzlement charges was insufficient to support an award of punitive damages. *Jones v. Gwynne*, 51.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

The trial court erred in granting defendant's motion to dismiss plaintiff's complaint pursuant to G.S. 97-6.1 for retaliatory discharge or demotion based on plaintiff's good faith filing of a claim for workers' compensation. *Hull v. Floyd S. Pike Electrical Contractor*, 379.

§ 35.1. Employer's Liability for Injuries to Third Persons; Actions

The trial court's findings were sufficient to support its judgment for $1,000.00 in favor of each plaintiff against defendant for damages caused by defendant's employee. *Norman v. Royal Crown Bottling Co.*, 200.

§ 47. Workers' Compensation; Nature and Basis of Right to Compensation

Plaintiff was not estopped from receiving workers' compensation benefits for temporary total disability because he received unemployment compensation benefits for the same period upon a certification that he was available for work. *Dolbow v. Holland Industrial*, 695.

§ 48. Workers' Compensation; Employers Subject to Act

In a workers' compensation proceeding, the evidence was sufficient to support the Commission's conclusion that defendant had four or more regular employees in North Carolina during the time involved in an accident and thus was subject to the Act. *Hicks v. Brown Shoe Co.*, 144.

§ 55.6. Workers' Compensation; Relation of Injury to Employment; Meaning of "in the Course of" Employment

The evidence was sufficient to find decedent's fatal automobile accident occurred within the scope and course of her employment. *Hicks v. Brown Shoe Co.*, 144.

§ 68. Workers' Compensation; Occupational Diseases

In a workers' compensation case, the Industrial Commission properly found that plaintiff's claim was timely filed. *May v. Shuford Mills, Inc.*, 276.

Plaintiff's rights under the workers' compensation statute were not governed by the pre-1957 version since January 1, 1970 was the date plaintiff became incapable of earning wages and had to stop working due to his health. *Ibid.*

§ 69.1. Workers' Compensation; Meaning of Incapacity and Disability

The evidence supported a determination by the Industrial Commission that plaintiff mechanic was unable to work as a result of his injury from 21 August 1980 until 11 December 1980 and was entitled to temporary total disability for such period of time. *Dolbow v. Holland Industrial*, 695.

§ 78. Workers' Compensation; Enforcing Payment of Award

The Industrial Commission did not err in requiring interest to be paid on an award of the Hearing Commissioner from the date of its rendition. *Hicks v. Brown Shoe Co.*, 144.

§ 108. Right to Unemployment Compensation Generally

The referee's conclusion in an unemployment compensation proceeding that claimant had "good cause" for termination of his employment for racial discrimination and was entitled to unemployment benefits was supported by the referee's findings. *Tastee Freez Cafeteria v. Watson*, 562.

MASTER AND SERVANT — Continued

§ 108.2. Right to Unemployment Compensation; Availability for Work

Claimant was disqualified from receiving benefits under G.S. 96-14(1), where the evidence tended to show that claimant's pregnancy made performing her job difficult and was the reason for a month-long leave of absence which began on 27 May 1981; that plaintiff's doctor would not approve of maternity leave; and that plaintiff failed to return to work, failed to request an extension of her leave of absence, and failed to request a less strenuous job. *Sellers v. National Spinning Co.*, 567.

§ 110. Unemployment Compensation; Proceedings before Employment Security Commission

An unemployment compensation rehearing did not lack fundamental fairness because the same referee presided at both hearings, because the referee made references to the original hearing, or because leading questions were permitted. *Tastee Freez Cafeteria v. Watson*, 562.

§ 111. Appeal and Review of Proceedings before Employment Security Commission

In reviewing the decision of the Employment Security Commission, the superior court was functioning as an appellate court; therefore, it erred in determining unemployment compensation claims on grounds neither raised nor relied on in the proceedings appealed from. *In re Gorski v. N.C. Symphony Society*, 649.

Rule 6(e) does not apply to appeals from an Employment Security Commission adjudicator so as to give the appealing party, in addition to the 10-day period prescribed by G.S. 96-15(b)(2), three additional days within which to file an appeal when the adjudicator's decision is mailed to the parties. *In re Smith v. Daniels International*, 381.

§ 111.1. Conclusiveness and Review of Findings by Employment Security Commission

There was no competent evidence in the record to support a finding by the Employment Security Commission that claimant was "fighting" on the job in violation of one of the company rules, and the Commission erred in so finding. *In re Patrick v. Cone Mills Corp.*, 722.

MORTGAGES AND DEEDS OF TRUST

§ 21. Limitations on Right to Foreclose

An order which provided that should plaintiff fail to comply with visitation conditions, a bond would be forfeited and foreclosure would be instituted without notice or hearing was error. *Wolfe v. Wolfe*, 249.

MUNICIPAL CORPORATIONS

§ 2.2. Annexation; Compliance with Statutory Requirements; Use and Size of Tracts

Individual condominium units may be counted as lots or tracts in determining whether an area to be annexed meets the subdivision test of G.S. 160A-36(c). *Tar Landing Villas v. Town of Atlantic Beach*, 239.

The fact that the boundaries of an area to be annexed did not encompass an adjacent golf course did not constitute a failure to use natural topographic features "wherever practical." *Trask v. City of Wilmington*, 17.

MUNICIPAL CORPORATIONS — Continued

§ 2.6. Extension of Utilities to Annexed Territory

The failure to include a proposed sewer interceptor on a map of the proposed water and sewer extensions into the area to be annexed did not invalidate the annexation ordinance. *Trask v. City of Wilmington*, 17.

A city's plan for providing sewer facilities to an area to be annexed was not dependent on a doubtful contingency because the plan depended on a county's construction of a sewer interceptor project and a town's construction of a sewer connector pursuant to a federally financed regional plan. *Ibid.*

§ 29.3. Construction of Ordinances

In a civil action in which plaintiff property owners sought to prevent defendant city from allowing developers to proceed with a real estate development, the question that was properly before the trial court was not whether the proposed development was a planned development within the meaning of the ordinance, but whether it failed to conform to the requirements of the zoning ordinance and therefore required consideration as a special exception. *Roberts v. City of Brevard*, 542.

§ 30.6. Zoning; Special Permits and Variances

In a proceeding to obtain a special use permit for a camping trailer park, the record supported a finding by the county board of commissioners that petitioner failed to produce substantial evidence that the proposed use would not unduly disrupt the significant natural features of the site as was required by the county zoning ordinance for issuance of the permit. *Charlotte Yacht Club v. County of Mecklenburg*, 477.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

Dual indictments charging defendant with possession of cocaine with intent to sell or deliver and actual sale or delivery of the same drugs did not violate the constitutional bar against double jeopardy. *S. v. Jamerson*, 301.

Double jeopardy prohibited punishment of defendant for both possession of more than one ounce of marijuana and possession of the same marijuana with intent to sell. *S. v. Pagon*, 295.

§ 3.1. Competency and Relevancy of Evidence Generally

In a prosecution for the sale of a controlled substance, an officer was properly permitted to testify that he was familiar with defendant's residence and that he began an investigation of defendant's residence after learning from confidential sources of drug activities at such residence. *S. v. Saunders*, 350.

§ 4. Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution for possession of marijuana and possession of marijuana with intent to sell. *S. v. Pagon*, 295.

The State's evidence was sufficient to support conviction of defendant for manufacturing cocaine found on a table next to defendant in an apartment to which defendant had the key. *S. v. Brown*, 637.

NEGLIGENCE

§ 6. Res Ipsa Loquitur

The trial court properly failed to submit to the jury the theory of res ipsa loquitur in a negligence action. *B&J Sales & Service Corp. v. Moss*, 170.

NEGLIGENCE — Continued

§ 12.3. Last Clear Chance; Defendant's Opportunity to Avert Injury

The projected evidence in a negligence case raised an issue of whether the driver of a truck had the last clear chance to avoid a collision with plaintiff pedestrian. *McCullough v. Amoco Oil Co.*, 312.

§ 35.4. Cases Where Contributory Negligence is not Shown as a Matter of Law; Accidents Involving Motor Vehicles

In a negligence action where plaintiff pedestrian was struck by defendant's truck, the trial court erred in entering summary judgment for defendant. *McCullough v. Amoco Oil Co.*, 312.

§ 48. Negligence in Condition of Lands and Buildings; Condition and Maintenance of Entryway

In an action to recover for injuries received when plaintiff patron fell after failing to see a second step down at the street curb while carrying two bags of groceries from defendant's store, defendant was not negligent in maintaining between the store entrance and the street a bi-level sidewalk containing one step four feet from the entrace and another step down at the street curb three feet further down the sidewalk. *Frendlich v. Vaughan's Foods*, 332.

§ 57.10. Cases Involving Other Injuries to Invitees Where Evidence is Sufficient

In a negligence action brought to recover medical expenses and loss of services for injuries sustained by plaintiff's minor son in a grocery store, the trial court erred in granting defendant's motion to dismiss. *Phillips v. Grand Union Co.*, 373.

PARENT AND CHILD

§ 1. Termination of Relationship

In a proceeding to terminate parental rights, the findings of fact were amply supported by the evidence and in turn supported the conclusions of law terminating the parental rights. *In re Wright*, 135.

G.S. 7A-289.32(2), dealing with "neglected" children, is not unconstitutionally vague. *Ibid.*

G.S. 7A-289.32(4), authorizing parental rights to be terminated upon a parent's failure for six months preceding filing of the petition to pay a reasonable portion of the cost of caring for the child, was not unconstitutional as applied to a minor child's father. *Ibid.*

In a proceeding to terminate parental rights, a contention that a new trial should be ordered because of the failure of a recording device used at the hearing was without merit. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 5. Licensing and Regulation of Dentists

There was substantial evidence in the record to support a decision by the Board of Dental Examiners revoking a dentist's license for violations of the Dental Practice Act by the improper delegation of professional duties to dental assistants, by the unauthorized prescription of valium to family members, and by dental malpractice in the treatment of two patients. *Little v. Board of Dental Examiners*, 67.

PROCESS

§ 1.2. Defect in Copy of Process Delivered to Served Party

Plaintiff failed to comply with the statutory rules for service of process which were necessary to obtain valid service and jurisdiction against an individual defendant, Maready, where a summons addressed to defendant C. Roger Harris was served upon Maready. *Harris v. Maready*, 1.

§ 2. Issuance and Service in General

Plaintiff did not obtain jurisdiction over the law firm itself by serving a general partner in the law firm. *Harris v. Maready*, 1.

§ 5. Amendment of Process

There was no abuse of discretion in the trial court's denial of plaintiff's oral motion to amend a summons served upon the individual defendant Maready by deleting the name "C. Roger Harris" and inserting in lieu thereof the name "W. F. Maready," and to amend the summons served upon the law firm by deleting the letters "P.A." *Harris v. Maready*, 1.

§ 14. Service of Process on Foreign Corporation by Service on Secretary of State

Plaintiff's method of service of process on defendant Swedish corporations through the Secretary of State was sufficient. *Bush v. BASF Wyandotte Corp.*, 41.

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence; Contacts within this State

The assertion of personal jurisdiction over defendant Swedish corporations in an action to recover for personal injuries received by plaintiff while operating a washing machine manufactured by defendants did not violate due process. *Bush v. BASF Wyandotte Corp.*, 41.

QUASI CONTRACTS AND RESTITUTION

§ 2. Actions to Recover on Implied Contracts Generally; Pleading Express and Implied Contract

The trial court properly permitted plaintiff to recover on the basis of quantum meruit although plaintiff alleged only an express contract in his complaint. *Paxton v. O.P.F., Inc.*, 130.

§ 2.1. Action to Recover on Implied Contract; Sufficiency of Evidence

The evidence was sufficient to support the trial court's determination that plaintiff was entitled to recover on a quantum meruit basis for services rendered to defendant corporation in the development of property owned by defendant, but the evidence was insufficient to support the trial court's determination that the reasonable value of plaintiff's services to defendant was $22,500.00. *Paxton v. O.P.F., Inc.*, 130.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

The State's evidence was sufficient to permit an inference that defendant knew or had reasonable grounds to believe that a pistol was stolen so as to support his conviction of possession of stolen goods. *S. v. Taylor*, 165.

§ 7. Verdict and Judgment

Defendant's conviction of possession of a stolen firearm was a conviction for a misdemeanor where there was no evidence that the firearm had a value of more

RECEIVING STOLEN GOODS — Continued

than $400.00 or that it was stolen from the person or by a breaking or entering. *S. v. Taylor*, 165.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3.1. Judicial Determination of Controversy as to Right to Use and Control Church Property

The major question to be answered in an action between a parent body of a hierarchical church and a local affiliated church was whether defendant local church was in fact in a hierarchical relationship with the plaintiff parent body with respect to property matters. *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 391.

ROBBERY

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

In a prosecution for assault with a deadly weapon with intent to kill and robbery with a firearm, the trial court properly denied defendants' motion to dismiss all charges at the end of the State's evidence. *S. v. Bellamy*, 454.

RULES OF CIVIL PROCEDURE

§ 4. Process

There was no abuse of discretion in the trial court's denial of plaintiff's oral motion to amend a summons served upon the individual defendant Maready by deleting the name "C. Roger Harris" and inserting in lieu thereof the name "W. F. Maready," and to amend the summons served upon the law firm by deleting the letters "P.A." *Harris v. Maready*, 1.

Plaintiff did not obtain jurisdiction over the law firm itself by serving a general partner in the law firm. *Ibid.*

Plaintiff failed to comply with the statutory rules for service of process which were necessary to obtain valid service and jurisdiction against an individual defendant, Maready, where a summons addressed to defendant C. Roger Harris was served upon Maready. *Ibid.*

§ 6. Time

Rule 6(e) does not apply to appeals from an Employment Security Commission adjudicator so as to give the appealing party, in addition to the 10-day period prescribed by G.S. 96-15(b)(2), three additional days within which to file an appeal when the adjudicator's decision is mailed to the parties. *In re Smith v. Daniels International*, 381.

§ 8.1. Complaint

A trial judge abused his discretion by failing to allow defendant's motion to dismiss for a violation of G.S. 1A-1, Rule 8(a)(2). *Harris v. Maready*, 1.

§ 14. Third Party Practice

The trial court in a child custody action erred in making the person with whom plaintiff was living an additional party defendant. *Wolfe v. Wolfe*, 249.

§ 15. Amended and Supplemental Pleadings Generally

The trial court properly allowed defendants' motion to strike an amendment to plaintiff's complaint through which plaintiff sought to delete "P.A." from the caption of the party-defendants, a law firm. *Harris v. Maready*, 1.

RULES OF CIVIL PROCEDURE — Continued

In a breach of contract action where the issue at trial required evidence of an agency relationship to support the action for breach of contract, appellant cannot offer on appeal five new theories to establish the existence of a contract that were not considered at the trial level. *Gilbert v. Thomas*, 582.

§ 50. Motions for Directed Verdicts

Where plaintiff sued to recover the value of carpentry services he performed on two separate theories of recovery and where defendants failed to state to the trial court any specific grounds for their motion for a directed verdict, defendants failed to preserve the trial court's denial of their motion for appellate review. *Oxendine v. Moss*, 205.

§ 55. Default

The clerk of court was without authority to make an entry of default and to enter a default judgment one day before the time to answer had expired. *G & M Sales v. Brown*, 592.

Defendant's filing of a motion to set aside an entry of default and a default judgment and correspondence between counsel for both parties did not constitute the filing of a pleading which would prohibit the clerk from subsequently making another entry of default. *Ibid.*

§ 56.1. Summary Judgment; Notice

A third-party defendant waived its right to ten days notice of the hearing on a motion for summary judgment by participating in the hearing and failing to request a continuance. *McNair Construction Co. v. Fogle Bros. Co.*, 282.

§ 56.4. Summary Judgment; Sufficiency of Supporting Material; Opposing Party

The trial court properly granted summary judgment for plaintiff in an action wherein plaintiff bank sought to recover from defendant car dealer money allegedly due pursuant to security agreements executed by the parties and a ready reserve account maintained by defendant. *Wachovia Bank & Trust Co. v. Grose*, 289.

§ 59. New Trials

Where the trial court heard the evidence and found the facts against plaintiff under a misapprehension of the controlling law, the factual findings may be set aside on the theory that the evidence should be considered in its true legal light. *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 391.

The trial court did not abuse its discretion in refusing to set aside on grounds of excessiveness a $335,000.00 personal injury verdict for plaintiff husband and a $60,000.00 loss of consortium verdict for plaintiff wife. *Goble v. Helms*, 439.

§ 60.1. Relief from Judgment; Timeliness of Motion; Notice

A motion in the cause made within a reasonable time was the correct procedure for presenting the question of whether a consent judgment was void for lack of consent by plaintiff. *Briar Metal Products v. Smith*, 173.

§ 60.2. Relief from Judgment; Grounds

Defendant failed to meet the requirements for vacating a judgment of divorce from bed and board where he presented no evidence that the judgment was void but only presented evidence that he may have had a genuine defense to the divorce. *Howell v. Tunstall*, 703.

The trial court's denial of defendant's motion to set aside entry of default and default judgment pursuant to Rule 60(b) was proper where defendant failed to show either excusable neglect or a meritorious defense. *S. v. Mitchell*, 202.

SALES

§ 17.1. Sufficiency of Evidence in Cases Involving Warranties of Merchantability and Fitness for Particular Purpose

An express warranty of doors sold to plaintiff by defendant was not excluded for warped doors because the doors were hung with only three hinges. *McNair Construction Co. v. Fogle Bros. Co.*, 282.

§ 19. Actions for Breach of Warranty; Damages

In an action for breach of express warranty of doors sold to plaintiff, plaintiff alleged its damages with sufficient certainty to support summary judgment on the damages issues. *McNair Construction Co. v. Fogle Bros. Co.*, 282.

SEARCHES AND SEIZURES

§ 1. What Constitutes Search or Seizure; Scope of Protection Generally

While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant. *S. v. Langley*, 674.

§ 10. Warrantless Search and Seizure on Probable Cause

No exigent circumstances justified an officer's warrantless entry into defendant's house and his seizure of heroin in plain view in the house where the officer had arrest warrants for two persons and followed into the house a person who he erroneously believed might be one of the two persons to be arrested. *S. v. Johnson*, 256.

§ 12. "Stop and Frisk" Procedures

An arrest of defendant was with probable cause and the search of defendant's person was incidental to a lawful arrest and proper even though the arrest was made after surveillance of defendant had been discontinued for a fifteen minute span. *S. v. Hart*, 699.

§ 15. Standing to Challenge Lawfulness of Search Generally

Defendant failed to establish his standing to object to the admission of a sweatshirt into evidence. *S. v. King*, 574.

§ 19. Validity of Warrant in General

There was not a substantial deviation from the requirements of G.S. 15A-252 where the application and affidavit attached to a search warrant were illegible. *S. v. Copeland*, 612.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Defendant pharmacist who dispensed medicines to Medicaid patients was a "provider of medical assistance" within the purview of the Medicaid fraud statute, and the State's evidence was sufficient to support conviction of defendant on various Medicaid fraud charges. *S. v. Beatty*, 511.

STATE

§ 1.1. Open Meetings Law

The Region P Human Development Agency is a public body subject to the Open Meetings Law although it has been incorporated under the Nonprofit Corporation Act. *WINFAS, Inc. v. Human Development Agency*, 724.

TAXATION

§ 11.1. Issuance of Bonds; Irregularities

An action to set aside a special school bond referendum order brought more than thirty days after publication of the bond order was barred by G.S. 159-59. *Wright v. County of Macon*, 718.

A county board of commissioners could properly ratify the county manager's submission of an application to the Local Government Commission for approval of a school bond referendum. *Ibid.*

A school bond referendum order issued in August 1982 was not invalid because of the county's failure to disclose 1983 appraised values from a tax revaluation. *Ibid.*

§ 45. Title and Rights of Purchaser at Tax Sale

The trial judge erred in granting summary judgment for plaintiff city on the issue of right to immediate possession of certain property which allegedly had been purchased at a tax foreclosure proceeding. *City of Wilmington v. Forden*, 361.

TORTS

§ 1. Nature and Elements of Torts

In an action which was pled and tried in tort and in which plaintiffs sought damages for damage caused to their trees by defendants' horses running at large, in order to establish negligence on the part of defendants it was imperative that plaintiffs show a breach of some duty, and the record was devoid of any evidence of any duty on the part of the defendant. *Sexton v. Bolick*, 590.

TRESPASS

§ 2. Trespass to the Person

Plaintiff's evidence was sufficient to support the jury's verdict finding that defendant intentionally inflicted mental distress upon plaintiff school superintendent by posting on the "Wanted" board of a post office copies of court papers for a criminal action in which plaintiff had been involved some thirty years earlier. *Woodruff v. Miller*, 364.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

In an action for wrongful timber cutting under G.S. 1-539.1, the trial court erred in granting a directed verdict for defendant on the basis that plaintiff had failed to establish title in the land. *Hefner v. Stafford*, 707.

TRIAL

§ 6. Stipulations

In a proceeding to terminate parental rights, a contention that a new trial should be ordered because of the failure of a recording device used at the hearing was without merit. *In re Wright*, 135.

The court's erroneous instruction that defendants had stipulated that their negligence was the proximate cause of injury to plaintiff was cured by the court's further instructions which informed the jury that defendants had stipulated only to the issue of liability and not that plaintiff's condition at trial was caused by the accident. *Goble v. Helms*, 439.

§ 58.3. Trial by the Court; Appellate Review

Findings of fact made by the court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary. *Curl v. Key*, 139.

TRUSTS

§ 4. Charitable Trusts; Construction, Operation and Modification

The evidence was sufficient to support a trial court's finding that a testator manifested a general charitable intent in a bequest in which she left a sum of money to a university. *Board of Trustees of UNC-CH v. Heirs of Prince*, 61.

A trial court's finding that a change of circumstances rendered a charitable trust impracticable or impossible of fulfillment was supported by the evidence. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 31. Rights of Holder in Due Course

In an action by plaintiff bank to recover monies due from defendant on dishonored personal checks written by defendant on an account which he thereafter closed, the trial court properly entered summary judgment for plaintiff. *City National Bank v. Rojas*, 347.

UTILITIES COMMISSION

§ 32. Property Included in Rate Base

A finding by the Utilities Commission that a nuclear generating plant was "used and useful" to a power company was supported by the evidence. *State ex rel. Utilities Commission v. Conservation Council*, 266.

The Utilities Commission's determination that construction work was in progress at a nuclear power plant and that the costs associated with the plant should be included as construction work in progress in the power company's rate base was supported by the evidence. *Ibid.*

The Utilities Commission was not required to make a finding on the reasonableness of including construction work in process in the rate base of a power company. *Ibid.*

§ 34. Property Included in Rate Base; Property not in Use at End of Test Period

The Utilities Commission did not err by including in the rate base of a power company an allowance for funds used during construction which arose after 1 July 1979 but accrued on construction work in process occurring prior to that date. *State ex rel. Utilities Commission v. Conservation Council*, 266.

UTILITIES COMMISSION — Continued

§ 38. Establishment of Rate Base; Current and Operating Expenses

It was error for the Utilities Commission to consider factors other than the cost of fossil fuel in a proceeding pursuant to former G.S. 62-134(e). *State ex rel. Utilities Comm. v. Kudzu Alliance*, 183.

The cost of fuel is an operating expense of the utility and, as such, the Utilities Commission must examine these costs for the reasonableness of their having been incurred before incorporating them into the base rate. *Ibid.*

While it was proper for the Utilities Commission to use fuel costs of a power company from a fuel adjustment proceeding as the basis for fuel costs in a general rate case, the Commission erred in failing to rule upon the reasonableness of the fuel costs. *State ex rel. Utilities Commission v. Conservation Council*, 266.

The Utilities Commission erred in using fuel costs established in a fuel clause proceeding as the fuel cost component for a power company in a general rate case without determining the reasonableness of the fuel expenses. *State ex rel. Utilities Comm. v. The Public Staff*, 609.

§ 44. Ratemaking; Proceedings Before and by Commission

The Utilities Commission did not err in extending the hearing of a general rate case for a power company to allow evidence on the "used and useful" status of a nuclear generating unit. *State ex rel. Utilities Commission v. Conservation Council*, 266.

VENDOR AND PURCHASER

§ 5.1. Matters Precluding Specific Performance

Plaintiff vendees were not prohibited from obtaining specific performance of a contract to convey realty because the vendor did not own the full fee but only owned a one-half undivided interest in the property, and the trial court properly entered partial summary judgment for plaintiffs on the issue of defendant's liability. *Langley v. Moore*, 520.

WILLS

§ 22. Mental Capacity; Evidence of Mental Condition of Testator

Testamentary capacity differs from the mental capacity to manage one's affairs, and a person who has been declared incompetent may subsequently have the testamentary capacity to execute a will. *In re Will of Maynard*, 211.

§ 22.1. Mental Capacity; Expert and Opinion Evidence

The trial court in a caveat proceeding erred in permitting a witness who had not observed testator during the month in question to state his opinion that testator had sufficient mental capacity to make a disposition of his property, and in refusing to permit lay witnesses to state opinions as to testator's mental state because the date in each question was the date that each witness observed and talked with testator rather than the date the will was executed. *In re Will of Cromartie*, 115.

§ 24.1. Jury Trial

A trial judge's refusal to grant a motion to set aside the verdict in a caveat proceeding in which the jury found that the testatrix had sufficient mental capacity to make and execute a will did not constitute an abuse of discretion. *In re Will of Maynard*, 211.

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§ 1.4. Absence of Witness from List Furnished Defendant

Inasmuch as the trial judge offered to propounders of a will a reasonable time to consider and meet surprise testimony regarding the validity of the will, the trial judge did not abuse his discretion in denying the propounder's request for a three weeks' continuance. *In re Will of Maynard*, 211.

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