NORTH CAROLINA COURT OF APPEALS REPORTS

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State v. Williams	67 N.C. App. 519	Denied, 311 N.C. 309
State v. Willis	67 N.C. App. 320	Denied, 311 N.C. 309
State v. Wilson	67 N.C. App. 177	Denied, 310 N.C. 748 Appeal Dismissed
State v. Wilson	67 N.C. App. 562	Denied, 311 N.C. 768 Appeal Dismissed
State v. Yarn	67 N.C. App. 325	Denied, 311 N.C. 768
Tetterton v. Long Mfg. Co.	67 N.C. App. 325	Denied, 311 N.C. 768
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Walston v. Wake Electric	67 N.C. App. 197	Denied, 311 N.C. 407
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Wilkinson v. Weyerhaeuser	67 N.C. App. 154	Denied, 311 N.C. 310

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

NATIONWIDE MUTUAL INSURANCE COMPANY v. ROBERT A. EDWARDS, AMERICAN INSURANCE COMPANY AND ETTA W. HENRY, ADMINISTRATRIX OF THE ESTATE OF DONALD RAY HENRY

No. 825SC1326

(Filed 6 March 1984)

1. **Insurance § 90— vehicle liability insurance—applicability of "trailer exclusion" and "like insurance" clause**

A liability insurer had no liability above the limits required by the Financial Responsibility Act for an accident involving an insured tractor because of a clause excluding coverage for a vehicle while used by one other than the named insured with any trailer owned by such other person and not covered by like insurance in the company where the driver was purchasing the tractor from a person who retained title pending full payment; pursuant to advice from plaintiff insurer's agent, the policy listed the titleholder as the named insured, but the driver paid the premium; and at the time of the accident, the driver was operating the tractor to pull his own uninsured trailer, which he had acquired six days after issuance of the policy.

2. **Insurance §§ 8, 90— vehicle liability insurance—no waiver of "trailer exclusion" and "like insurance" clause**

Plaintiff liability insurer's agent did not possess any knowledge which would constitute a waiver of its rights to assert an exclusion from coverage for a vehicle while used by one other than the named insured with any trailer owned by such other person and not covered by like insurance in the company where the evidence showed that the agent knew the driver of the insured tractor was in the process of buying the tractor, that he would operate it, and that the named insured had no use of it or interest in it except as holder of legal title while awaiting the outstanding balance of the purchase price, but the evidence did not show that plaintiff's agent knew the purchaser intended to operate the tractor with an uninsured trailer.

3. Estoppel § 6— necessity for pleading and evidence of estoppel

Defendant could not rely on appeal on the affirmative defense of equitable estoppel where she neither pled such defense nor tried the case on this theory. G.S. 1A-1, Rules 8(c) and 15(b).

4. Insurance §§ 8, 90— vehicle liability insurance—no estoppel to assert "trailer exclusion" and "like insurance" clause

Given the general rule in North Carolina that one who does not hold legal title to a vehicle cannot obtain owner's liability insurance thereon and that a vendee cannot acquire such insurance until legal title has been transferred or assigned to him, a statement by plaintiff liability insurer's agent that only the titleholder of a tractor could be the "named insured" did not constitute a false representation or concealment of a material fact which estopped plaintiff insurer from asserting an exclusion from coverage for a vehicle while used by one other than the named insured with any trailer owned by such other person and not covered by like insurance in the company.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 28 July 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 November 1983.

Plaintiff insurance company brought this action for declaratory judgment against, *inter alia,* an administratrix who had filed a wrongful death action for her decedent's demise in a collision with a tractor-trailer driven by defendant Edwards. Edwards was purchasing the tractor pursuant to a "gentlemen's agreement" with one Brafford, who retained title pending full payment.

Edwards had informed plaintiff's agent of this arrangement, and the agent had advised him that the policy should list Brafford, the titleholder, as the named insured. Edwards had paid the premiums and had operated the tractor to tow his own uninsured trailer, which he had acquired six days after issuance of plaintiff's policy.

The policy contained the following "trailer exclusion" or "like insurance" clause:

None of the following is an insured:

. . . .

(iii) any person or organization, other than the named insured, with respect to:

(1) a motor vehicle while used with any trailer owned or hired by such person or organization and not covered by like insurance in the company (except a trailer designed for use with a four wheel private passenger automobile and not being used for business purposes with another type motor vehicle), or

(2) a trailer while used with any motor vehicle owned or hired by such person or organization and not covered by like insurance in the company . . . .

Plaintiff sought a declaration that because of this clause it had no liability beyond that required by the Financial Responsibility Act, G.S. 20-279.21. The trial court concluded and adjudged that plaintiff provided coverage in the full amount of its policy.

Plaintiff appeals.

Murchison, Taylor & Shell, by Vaiden P. Kendrick, for plaintiff appellant.

Yow, Yow, Culbreth & Fox, by Stephen E. Culbreth, for defendant appellee Etta W. Henry, Administratrix.

WHICHARD, Judge.

The court made findings of fact, which are supported by competent evidence and are thus conclusive on appeal. *Broughton v. Broughton*, 58 N.C. App. 778, 781, 294 S.E. 2d 772, 775, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). The sole issue is the propriety of the conclusion and adjudication that plaintiff's policy provided coverage to the extent of its limits.

While the court did not state the basis of its conclusion, it appears to be that because of its agent's knowledge of conditions extant at the issuance of the policy, plaintiff either waived or was estopped to assert the trailer exclusion. We find evidence neither of such knowledge nor of other facts sufficient to create a waiver or estoppel, and accordingly reverse.

Specific exclusions of coverage when an insured vehicle is used with an uninsured trailer, or when an insured trailer is used with an uninsured vehicle, consistently have been held valid and enforceable because of the added hazard created by towing a

trailer. 12A M. Rhodes, Couch on Insurance 2d § 45:1089, at 745 (Rev. ed. 1981); 6C J. Appleman, Insurance Law and Practice § 4438, at 442-49 (1979); Annot., 31 A.L.R. 2d 298, 302 (1953). Whether the towed trailer caused or contributed to the loss in question is immaterial. *Maryland Casualty Co. v. Cross*, 112 F. 2d 58, 60 (5th Cir.), *cert. denied*, 311 U.S. 701, 85 L.Ed. 455, 61 S.Ct. 141 (1940); 6C J. Appleman, *supra*, at 457-58.

Under North Carolina law, coverage in excess of that required by the Financial Responsibility Act, G.S. 20-279.21, is voluntary. "The liability, if any, of the [carrier] for coverage in excess of that required by the Act must be judged according to the terms and conditions of the policy." *Caison v. Insurance Co.*, 36 N.C. App. 173, 178, 243 S.E. 2d 429, 432 (1978); *see also Younts v. Insurance Co.*, 281 N.C. 582, 585, 189 S.E. 2d 137, 139 (1972). Plaintiff concedes its liability to the limits set by the Act, but argues that it has no liability above those limits because of the exclusionary clause in the policy.

Our Supreme Court set forth general principles governing construction of insurance contracts in North Carolina in *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354-55, 172 S.E. 2d 518, 522 (1970); *see also Woods v. Insurance Co.*, 295 N.C. 500, 505-06, 246 S.E. 2d 773, 777 (1978). Absent ambiguity reasonably susceptible to conflicting interpretations, courts must enforce the contract as written, giving effect to each word and clause. They "may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Trust Co., supra*, 276 N.C. at 354, 172 S.E. 2d at 522. *See generally* 1 R. Anderson, Couch on Insurance 2d §§ 15:15 to :17 (1959); 13 J. Appleman, Insurance Law and Practice §§ 7383-84 (1976).

[1] The policy here covers the tractor and "any semi-trailer." This coverage is, however, "subject to all the terms of [the] policy having reference thereto." The "Basic Automobile Liability Insurance" section includes the "trailer exclusion" set forth above. The court found as facts that Brafford was the only named insured, that the trailer was owned by Edwards, that the trailer was not covered by "like insurance," and that the trailer was not designed for use with a four wheel private passenger automobile. At the time of the accident, then, the tractor fell within the

precise language of the exclusionary clause, and Edwards was not an "insured" under its terms. Plaintiff promised to pay only on behalf of the "insured." Under the precise terms of the policy, then, plaintiff has no liability. No other reasonable interpretation or alternative basis for liability is presented. Thus, nothing else appearing, the company was entitled to a judgment declaring absence of coverage beyond that statutorily required.

An insurance company may waive its right to assert exclusions from coverage.

> If an insurer, notwithstanding knowledge of facts then existing which by the language of the policy defeats the contract of insurance, nevertheless insures property, it will be held to have waived the policy provisions so far as they relate to the then existing conditions.

Fire Fighters Club v. Casualty Co., 259 N.C. 582, 585, 131 S.E. 2d 430, 432 (1963); *see Rea v. Casualty Co.*, 15 N.C. App. 620, 625, 190 S.E. 2d 708, 712, *cert. denied*, 282 N.C. 153, 191 S.E. 2d 759 (1972); *see also Cato v. Hospital Care Association*, 220 N.C. 479, 484, 17 S.E. 2d 671, 674 (1941); *Midkiff v. Insurance Co.*, 198 N.C. 568, 571-72, 152 S.E. 792, 794 (1930); *Midkiff v. Insurance Co.*, 197 N.C. 139, 143, 147 S.E. 812, 814 (1929); *Aldridge v. Insurance Co.*, 194 N.C. 683, 686, 140 S.E. 706, 708 (1927) (all finding waiver based on actual knowledge of agent). *But see Iowa National Insurance Co. v. Coltrain*, 143 F. Supp. 87, 89 (M.D.N.C. 1956) (general knowledge of operations insufficient where agent had no specific knowledge of operation of trucks by third party in violation of policy provision); *Midkiff v. Insurance Co.*, 197 N.C. 144, 145, 147 S.E. 814, 815 (1929) (knowledge of general practice in community insufficient; agent must have knowledge of particular insured's violation of provision of policy at time policy issued); *Greene v. Insurance Co.*, 196 N.C. 335, 340, 145 S.E. 616, 618 (1928) (knowledge of agent of insured's violation, when acquired *after* issuance of policy, not imputed to insurer so as to create waiver or estoppel). The claimant has the burden, on a waiver issue, of establishing knowledge by the agent of facts existing at the issuance of the policy. *Fire Fighters, supra*, 259 N.C. at 586, 131 S.E. 2d at 433.

[2] The evidence here shows that plaintiff's agent knew defendant Edwards was in the process of acquiring the tractor, that he would operate it, and that the named insured had no use of it or

interest in it except as the holder of legal title while awaiting the outstanding balance of the purchase price. It does not show that the agent knew Edwards intended to operate the tractor with an uninsured trailer. The insurance would have remained in effect had he driven the tractor alone or with a trailer not owned or hired by him. The record establishes that he did not purchase the trailer until six days after the policy was issued. The claimant thus has failed to show that the agent possessed any knowledge which would evoke a finding of waiver.

Knowledge by the agent of events occurring *after* issuance of the policy cannot support waiver. *Greene v. Insurance Co., supra,* 196 N.C. at 340, 145 S.E. at 618. Arrangements between Edwards and plaintiff or its agent subsequent to the accident are thus irrelevant.

[3] Defendant has argued, in effect, that the actions of plaintiff's agent amounted to a misrepresentation which equitably estops plaintiff's assertion of the exclusion. Estoppel is an affirmative defense which must be specially pleaded. G.S. 1A-1, Rule 8(c); *Stuart v. Insurance Co.,* 18 N.C. App. 518, 522, 197 S.E. 2d 250, 253 (1973). Failure to plead an affirmative defense ordinarily results in waiver thereof. *Smith v. Hudson,* 48 N.C. App. 347, 352, 269 S.E. 2d 172, 176 (1980). The parties may, however, still try the issue by express or implied consent. G.S. 1A-1, Rule 15(b).

Defendant-administratrix neither pled nor tried the case on this theory. She thus cannot now present it on appeal. *Delp v. Delp,* 53 N.C. App. 72, 76, 280 S.E. 2d 27, 30, *disc. rev. denied,* 304 N.C. 194, 285 S.E. 2d 97 (1981); *Grissett v. Ward,* 10 N.C. App. 685, 687, 179 S.E. 2d 867, 869 (1971).

[4] Had defendant-administratrix properly presented the issue, she did not offer sufficient evidence thereon to support a judgment in her favor. The party claiming protection under the rule of equitable estoppel has the burden of establishing facts warranting its application. *In re Will of Covington,* 252 N.C. 546, 549, 114 S.E. 2d 257, 260 (1960); 31 C.J.S. *Estoppel* § 160 (1964). Defendant has not sustained this burden.

Our Supreme Court has stated:

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false

> representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins v. Finance Corp., 238 N.C. 174, 177-78, 77 S.E. 2d 669, 672 (1953), *quoted with approval in Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 549, 206 S.E. 2d 155, 160 (1974). It is not necessary that the conduct of the party estopped be intentional; negligence may provide a basis for application of the doctrine. *Transit, Inc., supra*, 285 N.C. at 550-51, 206 S.E. 2d at 160-61 (failure to inform insured of changed business coverage in renewal); *see also* 16B J. Appleman, Insurance Law and Practice § 9088, at 560 (1981); 28 Am. Jur. 2d *Estoppel and Waiver* § 61 (1966).

The facts found here show only that (1) Edwards went to plaintiff's agent to obtain insurance for the tractor, (2) the agent knew he did not have legal title, (3) the agent told him Brafford would have to be the "named insured," (4) he accepted this arrangement and bought insurance so that he could operate the tractor, and (5) six days later he bought a trailer. There is no evidence that Edwards owned a trailer at the time he obtained the policy, or that he told the agent, then or later, that he intended to purchase one for use with the insured tractor.

There is no evidence that plaintiff's agent informed Edwards of the consequences of someone other than the "named insured" towing his own uninsured trailer with the insured tractor. She had no duty to warn him of all contingencies which could defeat coverage, however. "[A]n insurance agent is not required to affirmatively warn his customers of provisions contained in insurance policies." 16C J. Appleman, Insurance Law and Practice

§ 9168, at 176 (1981); *see also Farber v. Great American Insurance Co.*, 406 F. 2d 1228, 1233 (7th Cir. 1969) ("we have found no authority for the proposition . . . that an insurance agent must affirmatively warn his customers of the provisions contained in the insurance policies"). Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents. *Setzer v. Insurance Co.*, 257 N.C. 396, 401-02, 126 S.E. 2d 135, 138-39 (1962); *see also Biesecker v. Biesecker*, 62 N.C. App. 282, 302 S.E. 2d 826 (1983); 16B J. Appleman, *supra*, at 573. The record contains no representation by the agent which could have led Edwards reasonably to believe there was any coverage other than that supplied by the terms of the policy itself. *Cf. Collard v. Universal Automobile Insurance Co.*, 55 Idaho 560, 45 P. 2d 288 (1935) (agent, after full disclosure to him of title situation, stated "the policy will be in force"); *Farmers Mutual Automobile Insurance Co. v. Bechard*, 80 S.D. 237, 122 N.W. 2d 86 (1963) (agent expressly told insured he was covered "regardless of what he was driving"); *see* 16B J. Appleman, *supra*, at 555-60.

There is no evidence of knowledge on the part of the agent, actual or constructive, of real facts inconsistent with the terms of the policy when issued. When the policy was issued, Edwards did not own the trailer, and there is no evidence indicative of an intent to purchase or hire one. "[T]o make the rule of imputing notice from facts exciting inquiry apply, it must appear that the inquiry suggested, if fairly pursued, would have resulted in knowledge of the fact." 44 Am. Jur. 2d *Insurance* § 1589, at 597 (1982); *see also Lancaster v. Insurance Co.*, 153 N.C. 285, 69 S.E. 214 (1910) (insurance company not estopped to assert non-ownership exclusion by failure to inquire about ownership); 16B J. Appleman, *supra*, at 571-72.

There is no evidence from which an estoppel could be found, then, unless the statement by the agent that Brafford would have to be the "named insured," since he was the titleholder, amounts to a misrepresentation or concealment of a material fact. G.S. 20-4.01(26) defines "owner" as

> [a] person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agree-

> ment, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the . . . conditional vendee . . . said . . . conditional vendee . . . shall be deemed the owner for the purpose of this Chapter.

Under this definition the agent arguably could have issued the policy with Edwards as the "named insured." In that event, the accident would have been covered.

The legal milieu in which the agent acted, however, included not only the foregoing statute, but also the case law interpreting the term "owner." The general rule is that "as between a vendor and vendee of a vehicle, the vendee cannot acquire valid owner's liability insurance until legal title has been transferred or assigned to him by or at the direction of the vendor." *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 623, 298 S.E. 2d 56, 58 (1982), *cert. denied*, 307 N.C. 698, 301 S.E. 2d 101 (1983); *see also Insurance Co. v. Hayes*, 276 N.C. 620, 640, 174 S.E. 2d 511, 524 (1970); *Gaddy v. Insurance Co.*, 32 N.C. App. 714, 716, 233 S.E. 2d 613, 614 (1977); *Gore v. Insurance Co.*, 21 N.C. App. 730, 733, 205 S.E. 2d 579, 582 (1974). Our Supreme Court has stated that

> for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act . . . until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee.

Insurance Co. v. Hayes, supra.

In *Ohio Casualty Ins. Co. v. Anderson, supra*, 59 N.C. App. at 624, 298 S.E. 2d at 58, this Court rejected the argument that "one who does not hold legal title to a vehicle cannot under any circumstances obtain owner's liability insurance thereon." It stated that "[t]he 'owner' of a vehicle is the holder of the legal title '[u]nless the context otherwise requires.' " *Id.* at 626, 298 S.E. 2d at 59 (quoting G.S. 20-4.01). It held that "[t]he discrete facts and circumstances" dictated a holding that the policy covered the

vendee, though he was not the holder of the legal title, since coverage was clearly intended and a contrary holding would have provided no coverage whatever. *Id.* "The discrete facts and circumstances" there are not present here, however, and that case has no bearing on resolution of this one.

Given the general rules in North Carolina that one who does not hold legal title to a vehicle cannot obtain owner's liability insurance thereon, and that a vendee cannot acquire such insurance until legal title has been transferred or assigned to him, we do not believe the agent's statement that only the titleholder could be the "named insured" can be held to constitute "[c]onduct which amounts to a false representation or concealment of material facts." *Hawkins v. Finance Corp., supra.* Defendants thus have failed to show conduct on the part of the agent from which an estoppel could be found.

The continued acceptance of premiums by the company does not constitute grounds for waiver or estoppel. The law does not require automatic notification to insurers when their insureds purchase additional vehicles, nor do insurers have a legal duty to determine what other vehicles the insured owns. There is no evidence that the company knew Edwards owned a trailer until after the accident. It thus continued to provide the limited coverage for which it had contracted.

Had Edwards been involved in a second accident under like conditions, acceptance of premiums might have supplied grounds for waiver or estoppel. *See Gouldin v. Insurance Co.*, 248 N.C. 161, 164-66, 102 S.E. 2d 846, 848-49 (1958) (general rules); Annot., 1 A.L.R. 3d 1139 (1965). Such is not the case here, however.

On this record we find no basis for holding that the plaintiff provides coverage in the full amount of its policy. Accordingly, the judgment is reversed, and the cause is remanded for entry of a judgment in accordance with this opinion.

Reversed and remanded.

Judge WEBB concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent for two reasons. First and foremost, I am of the opinion that Judge Rouse's conclusion that, under the evidence recorded, plaintiff company is obligated for the full limits of the policy it sold defendant Edwards was proper. But even if that was not the case, the exclusionary provisions of the policy that plaintiff relies on to escape its obligation are contrary to public policy, in my opinion, and therefore unenforceable by law. To sooner put in focus the indefensible character of the exclusionary provisions involved, I discuss the public policy ground first.

Though insurance policies are contractual in nature, they are not to be confused with ordinary bargain and sale contracts, from which the law of contracts mostly developed. Insurance policies are "contracts of adhesion" between parties of grossly unequal bargaining power. 43 Am. Jur. 2d *Insurance* § 159 (1982). The terms of insurance policies, except the policy limits, are seldom negotiated for. Insurance companies usually fix the conditions under which they will pay and, as with other exercises of arbitrary power, the conditions fixed occasionally defeat the purposes that such policies are supposed to serve. Yet, motor vehicle owners in this state are required by statute to insure their vehicles against legal liability to the minimum limits specified; and coverage in larger limits is a practical, if not statutory, necessity for most owners, particularly those engaged in business. The two central purposes of liability insurance in this state are to protect the public by compensating innocent tort victims and to indemnify those who negligently injure others against financial detriment, up to the limits paid for. The "trailer exclusion" and "like insurance" provisions are inimical to the achievement of either purpose, with no counterbalancing benefits. These provisions arbitrarily reduce the insurer's exposure, without the risk insured against having been enhanced in any way; and they arbitrarily deprive both insureds and the public of needed protection that has been fully paid for. That such effects can arbitrarily result from a trailer not insured by that company being towed by an insured tractor, not operated by the registered owner or "named insured," is an absurdity that good and sound law cannot tolerate. Nor can it tolerate insurance policies that are largely counterfeit. It is a matter of common knowledge that highway traveling tractors are built, bought, maintained and operated for one main

purpose—to pull trailers, loaded with merchandise. They have virtually no commercial utility otherwise; the more trailers they pull the greater utility they have, and one doesn't have to be either a trucker or an insurer of trucks to know that the common practice of tractor operators is to pull all trailers that they can be legitimately and profitably paid for, and that the risk is not affected one whit because the trailer is insured by another company, or not insured at all. All of this means to me that no liability insurers of tractors in this state should be permitted to rely on policy provisions that limit its exposure on a tractor so insured to times when it is pulling no trailer at all or one insured by it.

But however contracts are arrived at, provisions therein contrary to public policy will not be enforced in this state. *In re Port Publishing Co.*, 231 N.C. 395, 57 S.E. 2d 366 (1950). Contract provisions are against public policy "when they tend clearly among other things to injure 'the public confidence in the purity of the administration of the law,'" *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E. 2d 77, 80 (1947), and when "the enforcement of them by the courts would have a direct tendency to injure the public good." *Electrova Co. v. Spring Garden Insurance Co.*, 156 N.C. 232, 235, 72 S.E. 306, 307 (1911). Also, "[a]greements which are unconscionable as a result of inequality of bargaining or sharp practices are clearly recognized as offensive to public policy and subject to equitable adjustment or rescission." Williston On Contracts Third Edition § 1628, p. 6 (1972). The "trailer exclusion" and "like insurance" provisions in the policy involved are clearly contrary to these principles. In *Mount Vernon Fire Insurance Co. v. Travelers Indemnity Co.*, 407 N.Y.S. 23, 63 A.D. 2d 254 (1978), the New York Supreme Court declared similar provisions to be void as against public policy. In *Great American Insurance Co. v. C. G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981), though not mentioning public policy, our Supreme Court correctly ruled that arbitrary policy cancellation provisions requiring timely notice of loss would no longer be automatically enforced to the ruination of insureds and members of the public, but would be enforced thereafter only when the failure to give notice harmed insurers. In doing so, the Court recognized that the provision requiring notice is a proper one, which serves the necessary purpose of enabling the companies to investigate and defend claims made against their insureds. Even so, the court irresistibly con-

cluded that when that necessary purpose has not been adversely affected by any delay that occurs, the law will not enforce the provision terminating the coverage. There is much more reason for not enforcing the "like insurance" and "trailer exclusion" provisions of this policy, because they serve no legitimate purpose whatever. In all events, however, in my opinion, the evidence of record supports the judgment appealed from and should be affirmed.

But the majority opinion's main failing is not the central holding that Edwards failed to prove that Nationwide had *waived* the exclusionary provisions that Nationwide relies on. Its main failing is the faulty premise that it starts from—that the insurance policy involved was really, rather than nominally, that of Brafford, in whose name it was issued. By starting there and treating the policy as written as though that was what the parties really agreed to, and moving thence to Edwards' technical status thereunder, which is essentially that of an uninterested stranger, and moving thence to the waiver question, the majority bypassed the undisputed import and thrust of the evidence; which was that the policy was really Edwards' and Brafford was but a straw or paper man, whose name was inserted as "named insured" only because the agent did not realize that the policy could properly be issued in Edwards' name or in both their names, and that in all events it was the purpose and agreement of both Nationwide and Edwards that his activities, rather than Brafford's inactivity, would be covered by the policy. This evidence, to my mind, not only shows that Nationwide waived, and is estopped from relying upon, the exclusionary provisions in the policy; it also shows that Nationwide agreed through its agent to cover Edwards' use of the tractor to the same full extent that it would have if he, Edwards, was designated "named insured," rather than Brafford. Had Brafford, as the "named insured," been operating the tractor when the accident involved in this case occurred, he would have been fully indemnified under the policy, regardless of whose trailer was being pulled. Edwards, who stands in Brafford's shoes, is entitled to no less.

The evidence, though brief, is without contradiction from Nationwide and shows that: The old tractor involved, which Bill Brafford owned, had been idle for several months, was not in condition to operate on the highway, had neither a license tag nor insurance, and Brafford had no desire to operate it. When Robert

Edwards, who owned and operated an auto supply business in Snow Hill, contracted to buy the tractor, his plan was to use it in operating a sideline hauling business and pay for it on time out of the proceeds, with Brafford retaining title until payment was completed. Nobody but Edwards was to be involved in this sideline business. After fixing, cleaning up, and painting the tractor, Edwards desired to insure his impending hauling operation against legal liability in the amount of $100,000 per person and $300,000 per occurrence. For the purpose of obtaining the insurance, Edwards went to Nationwide's Snow Hill agent, who was also a friend and neighbor. He told the agent how the tractor was acquired and what he was going to do with it and asked her what needed to be done to obtain the insurance. She told him the policy would have to be in Brafford's name because the title was in his name. She knew, and thus Nationwide knew, that the tractor was going to be operated by Edwards and that the insurance was being bought so that he could operate his hauling business and be insured while so doing. The agent and Nationwide knew that Brafford had no interest whatever in either operating the tractor or obtaining insurance on it; that Edwards was not asking it to insure Brafford's inactivity, but his own hauling operation with the tractor. In issuing the policy Brafford's name was inserted only because he still had title to the tractor and Nationwide and the agent (being presumably an honest person) intended to provide Edwards the full coverage sought and paid for, rather than meaningless and worthless coverage of only theoretical and technical benefit to Brafford. Edwards paid for the policy, which was mailed in an envelope addressed to Brafford, but in care of Edwards' place of business; and Edwards, of course, rather than Brafford, received the policy. The accident, which Nationwide now claims was not insured against, occurred when the tractor operated by Edwards was pulling a flatbed trailer loaded with corn, which is mostly what Edwards expected to haul when he got the tractor.

Though, as the majority recognizes, the agent was misinformed about it being necessary to issue the policy in Brafford's name, that is not important. What is important is that after being asked what to do to insure Edwards' operation the agent did not tell Edwards that if the policy was enforced as written, it would not provide the coverage that he came there to get and paid for.

Yet, under the majority's theory, Edwards and Nationwide contracted for insurance that would protect him only (1) when Brafford was using the tractor, which both knew would be never; or (2) when Edwards operated the tractor by itself, which both knew would be very seldom and never for profit, since they knew he did not get the tractor for the purpose of bob-tailing down the highway, but for the purpose of pulling loaded trailers; or (3) when the tractor was pulling a trailer insured by Nationwide, which both again knew would probably be never, since he had no trailer insured by Nationwide. No principle of law that I am aware of requires judges to conclude that people contracted to a vain and pointless thing when the circumstances also support the idea that they contracted for a sensible and useful purpose. That the company eventually admitted it was responsible for the statutory minimum limits of $15,000 per person and $30,000 per occurrence is not due to either the wording of the policy or the company's magnanimity; all liability was denied at the outset and this concession was not made until it was clear that Edwards was in lawful possession of the tractor when the accident occurred, and that the company was obligated for the minimum limits by operation of law.

Nor do I attach any significance to the fact, as the majority does, that the agent did not know Edwards was going to purchase the trailer that was involved in the collision. Under the circumstances, it was enough that she knew that the tractor would be pulling trailers of any kind, and that if Edwards did not receive the same coverage Brafford would have that the policy would be a pointless waste of time and money for Edwards. "If an insurer, notwithstanding knowledge of facts then existing which by the language of the policy defeats the contract of insurance, nevertheless insures property, it will be held to have waived the policy provisions so far as they relate to the then existing conditions." (Citations omitted.) *Winston-Salem Fire Fighters Club, Inc. v. State Farm Fire and Casualty Co.*, 259 N.C. 582, 585, 131 S.E. 2d 430, 432 (1963).

I vote to affirm the decision of the trial judge.

IN RE: WALTER WENDELL PHIFER

No. 8320DC725

(Filed 6 March 1984)

1. **Parent and Child § 1.6— proceeding to terminate parental rights—insufficient evidence of present neglect**

A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect in that both G.S. 7A-289.32 and 7A-517(21) speak in terms of *past* neglect and make no provision for termination for threatened future harm.

2. **Parent and Child § 1.6— proceeding to terminate parental rights—insufficient evidence to support findings that respondent failed to pay reasonable support**

In a proceeding to terminate parental rights, there were insufficient findings of fact to support the trial judge's conclusion that respondent failed to pay a reasonable sum for her child's care while he was in DSS custody.

APPEAL by respondent from *Burris, Judge.* Order entered 1 December 1982 in STANLY County District Court. Heard in the Court of Appeals 10 February 1984.

This appeal stems from the trial court's order terminating respondent's parental rights to her son, Walter Wendell Phifer. Following a hearing on a petition filed by the Stanly County Department of Social Services, the trial court entered an order containing the following pertinent findings of fact:

. . .

4) That the Petitioner Stanly County Department of Social Services first came in contact with Walter Wendell Phifer on December 16, 1981, upon receipt of a referral alleging the child to be unattended due to the mother's intoxication; that Carolyn Furr, a Case Worker with the Stanly County Department of Social Services visited the Phifer home with an Albemarle Policeman on that date; that both Furr and the Police Officer observed Mrs. Phifer to be in an intoxicated condition; further, that three or four empty pint bottles of liquor were observed lying about the Phifer home.

. . .

5) That a temporary hearing was held on December 18, 1981, at which time the child Walter Wendell Phifer was returned to his mother, with the proviso that if she were found to be in an intoxicated condition, the child would be removed and placed in foster care; that during a home visit by Carolyn Furr and another Case Worker on December 21, 1981, Mrs. Furr detected the odor of alcohol about Mrs. Bernice Phifer; that on this occasion, the child was in the care of his grandmother, Mary Frances Phifer.

6) That during the weekend of December 11th through December 13th, 1981, a neighbor of Bernice Phifer, Mrs. Mae Funderburke kept the child Walter Wendell Phifer while Bernice Phifer was drinking throughout the course of said weekend.

. . .

7) That on or about December 23, 1981 and January 7, 1982, Bernice Phifer was apparently unable to provide heat in the home where her child was kept, and received monies from the Stanly County Department of Social Services to provide fuel.

. . .

8) That on January 10, 1982, the respondent Bernice Phifer was found by Albemarle Police Officer Doyle Poplin in an intoxicated condition at 4:00 A.M. at Betty's Restaurant, East Main Street, Albemarle, N.C.; that the respondent was lying down in the booth at the time observed by Officer Poplin; that Officer Poplin thereupon drove Bernice Phifer to her home; further, that on January 19, 1982, when the Stanly County Department of Social Services again received a referral alleging neglect of Walter Phifer, Officer Poplin accompanied the Social Worker to the Phifer home, where Bernice Phifer was again observed to be in an intoxicated condition, with the odor of alcohol about her person, and swaying on her feet.

9) That on January 20, 1982, the Stanly County Department of Social Services, upon substantiation of a referral, removed the minor child Walter Wendell Phifer from the

home; that Mary Frances Phifer, the Grandmother of the child was present, and apparently intoxicated, smelling of alcohol and making incoherent conversation; that the mother, Bernice Phifer was not present; that the Grandmother, Mary Frances Phifer was unable to dress the child, and a neighbor, Sarah Harris dressed the child for departure.

. . .

10) That on January 22, January 28 and February 11, 1982, Stanly County Department of Social Services transported Bernice Phifer to seek employment, but Bernice Phifer failed to obtain any employment.

11) That after consultation with Bernice Phifer and her attorney, the Stanly County Department of Social Services prepared a contract setting forth objectives to be attained by Mrs. Phifer in order to have her child returned to her home; that some of the conditions of the contract were as follows: that Bernice Phifer attend the Piedmont Area Mental Health Center on a regular weekly basis; that Bernice Phifer cooperate with the Vocational Rehabilitation efforts to train and place her in public employment; that Bernice Phifer and Walter Pruette not consume alcoholic beverages; that Bernice Phifer demonstrate stability in the home environment, including providing lights and heat; that Bernice Phifer pay support for her child if employed; that Bernice Phifer enjoy day visits with Walter Wendell Phifer; and that Bernice Phifer show consistency in adhering to the terms of the contract.

12) Bernice Phifer violated virtually all of the terms of the contract cited above, in that she: failed to attend the Piedmont Area Mental Health Center on a regular weekly basis, and ceased attending at all in May, 1982; that she failed and refused to co-operate with Vocational Rehabilitation, and failed to obtain gainful employment; that she and Walter Pruette continued their former habits of consuming alcohol to excess; and that Bernice Phifer failed to exercise on a regular basis her opportunity for visits with her child Walter Wendell Phifer.

. . .

14) That following the execution of the contract on February 19, 1982, a home visit of Walter Phifer was allowed on February 20, 1982, with the child delivered to the Phifer home at 9:00 A.M.; that upon returning for the child at 6:00 P.M., the Social Worker found the parents, Bernice Phifer and Walter Pruette to be highly intoxicated and arguing; that Walter Pruette stated to the Social Worker that they were "loaded"; further, that Walter Wendell Phifer was extricated from the home only after an hour spent by the Social Worker in calming Bernice Phifer and Walter Pruette.

. . .

15) That from February 20, 1982 to March 24, 1982, the Department of Social Services made four (4) efforts to arrange further conferences with Bernice Phifer, to include visitations with Walter Wendell Phifer; that no response was received from Bernice Phifer; that during this period two letters were sent to Bernice Phifer, and one home visit made, along with one office visit contact by Bernice Phifer.

16) That as a result of an Order of the Juvenile Court, and the contract entered into as aforesaid, Bernice Phifer was to attend treatment and counseling at the Piedmont Area Mental Health Center; that the visits were scheduled to take place weekly; that Bernice Phifer missed at least two (2) visits, was late another and rescheduled yet another; that although the schedule of treatment was to continue, Bernice Phifer ceased . . . [to attend] the Piedmont Area Mental Health Center on or about May 4, 1982, and has failed to return; that the Mental Health Center followed up by letter, requesting that she continue her schedule of appointments, but she failed so to do; that a prior letter had been written to Mrs. Phifer in March, 1982, when she missed appointments; that the provisional diagnosis made by the Piedmont Area Mental Health Center upon entry of Bernice Phifer was "continuous alcoholism"; that after further treatment and evaluation, the diagnosis of Bernice Phifer was changed to "episodic alcoholism," whereby the subject is evaluated to consume alcohol on an at least weekly basis.

. . .

17) That Bernice Phifer was scheduled to take Walter Phifer for a four-week check-up at the Stanly County Health Department on December 16, 1981; that she failed to appear for this check-up with her child as scheduled; that on January 8, 1982, she was scheduled for a check-up for Walter Wendell Phifer, but appeared 25 minutes late, and could not be seen; that the appointment was re-scheduled for three (3) days later, at which time the child was seen, and was observed to have an extremely severe case of "diaper dermatitis" (diaper rash); that the diaper rash observed was of the kind due to neglect, that is not changing dirty diapers; that said rash was not a bacterial type of rash; that after the child was placed in foster care on or about January 20, 1982, he was taken back to the Health Department for examination shortly thereafter, and the diaper rash had cleared; further, that Bernice Phifer consulted the Health Department for pre-natal care on or about June 18, 1981, as one of a series of visits for pre-natal care; that on said date she smelled of alcoholic substances, which odor was detected by the attending nurse.

. . .

18) That the respondent Bernice Phifer has sought treatment at the Stanly Memorial Hospital on at least three (3) separate occasions from February to June, 1982, when she was the victim of violent injury incurred in or about her home setting; that on February 17, 1982, she received treatment for a laceration of her cheek, and stated that the injury was caused by her boyfriend; then on March 26, 1982, she received treatment and examination for vaginal injuries, and stated she had been raped; for which no criminal charges were ever pursued; and that on June 26, 1982, she was treated for an injury to her eye caused by an ax handle, at which time she was observed by the attending personnel to be under the influence of ethyl alcohol.

. . .

19) That during the calendar year 1982, the respondent Bernice Phifer has been convicted of four (4) separate criminal offenses, all of which she admits through her own testimony; that on March 8, 1982, she was convicted of concealing merchandise, and placed on probation; that on June

22, 1982, she was convicted of non-support of Walter Wendell Phifer, and prayer for judgment was continued for two (2) weeks to allow her the opportunity to become employed and support said child; that on June 28, 1982, she was convicted of driving under the influence of alcohol; and that on July 13, 1982, she was convicted of misdemeanor larceny; that as a result of the last conviction, Bernice Phifer was incarcerated from July 13, 1982 until September 13, 1982.

. . .

20) That upon the continuance of prayer for judgment on June 22, 1982, the respondent Bernice Phifer's probation officer, Ashford Matthews told her to come to his office on the following Monday and he would assist her in finding a job; that Bernice Phifer failed to appear on the following Monday.

. . .

21) That the respondent Bernice Phifer was employed by B & D Prints, Albemarle, North Carolina, during the calendar year 1981, and left that employment when her pregnancy with Walter Wendell Phifer became advanced; that as a result of said employment, the respondent was eligible to draw, and did draw unemployment benefits for the period February 6, 1982 until July 13, 1982, as well as for a three-week period upon her release from prison in September, 1982; that the unemployment benefits received by the respondent amounted to $48.00 per week for the period cited; further, that during the period from the birth of Walter Wendell Phifer to December 1, 1982, the Respondent has been an able-bodied person, without any physical disability, and able to maintain gainful employment.

. . .

22) That the Respondent Bernice Phifer is the owner in fee, through inheritance, of a whole or one-half interest in a certain house and lot at 803 E. South Street, Albemarle, North Carolina, and has been since prior to December, 1981; further, that said property is not encumbered by a mortgage or any other lien.

23) That from the removal of Walter Wendell Phifer pursuant to Court Order on January 20, 1982, until April 2, 1982, the respondent paid no child support whatsoever; that on April 2, 1982, as part of a Juvenile Court Order entered that date, the respondent was directed to pay $10.00 per week for the support of Walter Wendell Phifer, with the first payment to be made that date; that the respondent Bernice Phifer made a payment of $10.00 on April 2, 1982; that from April 2, 1982 until the date of this hearing, the respondent Bernice Phifer has paid no additional child support monies whatsoever, even though she continued to draw unemployment benefits through July 13, 1982, and in September and October, 1982, and was gainfully employed for at least three (3) weeks next preceding the trial of this matter.

24) That the Defendant [sic] is presently employed at Deluxe Cleaners, Salisbury, North Carolina, and has been so employed for at least three (3) weeks preceding the trial; that she earns $5.00 per hour, and works approximately four (4) days of each week.

25) That during the approximately two (2) months Walter Wendell Phifer was in the custody of his mother, he was frequently left with one Mae Funderburke; that Mae Funderburke has kept the minor child frequently during the period November 15, 1981 to January 20, 1982; that Mae Funderburke has seen Bernice Phifer intoxicated during this period on several occasions; further, that Mae Funderburke states "Bernice has a drinking problem."

. . .

26) That in May, 1982, the respondent Bernice Phifer left the State of North Carolina with no notification to the Department of Social Services, Piedmont Area Mental Health Center, to her probation officer, or to any other individual or agency; that she went to the Town of Bishopville, South Carolina, and attempted to secure employment; that she was unsuccessful in so doing, and returned to Stanly County in time for Court in June, 1982. That the respondent relates that she is making payment to Heilig-Meyers Furniture Company and Lowe's, Inc. for furniture; that the payments have recently been restructured to accomodate [sic] her current in-

come; that she relates that "I am young and like to have a little fun" in explaining why she left her minor child with a babysitter and/or her mother on numerous occasions during the two (2) months she had custody of said child; she further states that her mother, Mary Frances Phifer, the child's grandmother, has a drinking problem, and the child should not be left with Mary Frances Phifer; that she, the respondent, does not draw food stamps despite her low level of income, due to a "misunderstanding" with her social worker, whereby the social worker was "bothered by 'hearsay'" about Bernice's living arrangements and the like; that notwithstanding her employment, her ability to make furniture payments and sustain herself, the respondent has been unable to comply with the Juvenile Court Order of April 2, 1982, still in effect, requiring her to pay $10.00 per week for the support of her minor child, Walter Wendell Phifer.

27) That the Stanly County Department of Social Services has made investigation, and that a satisfactory plan of permanent care is available to Walter Wendell Phifer if the respondent's parental rights are terminated.

. . .

Upon these findings, the trial court entered its conclusion and judgment as follows:

WHEREFORE, based upon the foregoing facts, all of which have been proven by clear, cogent and convincing evidence, the Court concludes as a matter of law that the child who is the subject of this proceeding is a neglected child within the meaning of North Carolina G.S. 7A-517(21), and that said child, in addition, has been placed in the custody of the Stanly County Department of Social Services a licensed child placing agency, and the parent, for a continuous period of six (6) months next preceding the filing of the Petition, has failed to pay a reasonable portion of the costs of the care for said child; that the parent, Bernice Phifer, has demonstrated that she will not provide a degree of care and supervision which promotes the healthy and orderly physical and emotional well-being of the child; further, that the minor child, during the period in which he resided with his mother, lived in an environment injurious to his welfare, that the child's need for

a permanent plan of care outweighs the need to protect him from unnecessary severance of the relationship with his biological parent; and further, that it is in the best interest of the child that his parent's rights be terminated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the parental rights of Bernice Phifer, biological parent of Walter Wendell Phifer, are hereby completely and permanently terminated as to said child in accordance with North Carolina G.S. 7A-289.33(1) . . .

Respondent has appealed from the order of termination of her parental rights.

Michael W. Taylor for respondent.

Lefler and Bahner, by John M. Bahner, Jr., for petitioner.

WELLS, Judge.

Through various assignments of error, respondent contends that the trial court's findings are not supported by the evidence and the findings do not support the trial court's conclusions and judgment. For reasons which we state in our opinion, we will limit our opinion to the question of whether the findings support the conclusions and judgment.

Proceedings to terminate parental rights are governed by N.C. Gen. Stat. § 7A-289.32 (1981), which provides, in pertinent part, for termination upon the following grounds:

. . .

(2) The parent has abused or neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).

. . .

(4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

A neglected child, as defined by N.C. Gen. Stat. § 7A-517(21) (1981) is one who

> . . . does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State Law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

[1] We turn first to respondent's contention that the findings of fact do not support the trial court's conclusion that Walter was a neglected child within the meaning of G.S. §§ 7A-289.32 and 7A-517(21). At most, the relevant findings of fact show that Walter was removed from respondent's care on one occasion because of her intoxication; that respondent was drunk on approximately four occasions between December 1981 and January 1982; that respondent has asked for assistance in heating her home; that between February 21 and March 24, 1982 respondent contacted the department of social services (DSS) once but did not respond to DSS's efforts to arrange visits between respondent and Walter; that respondent missed or was late to two pediatrician's appointments and that Walter suffered from severe diaper rash on one occasion.

Petitioner argues that findings that respondent has abused alcohol show that Walter lived in an "environment injurious to his health," demonstrating neglect within the meaning of G.S. § 7A-517(21). Petitioner also contends that respondent's drinking habits and Walter's diaper rash show that respondent failed to provide adequate care and supervision for Walter within the meaning of the statute. At the very most, these findings present a threat that at some time in the future respondent might not be able to provide adequate care and supervision, if she fails to change her habits and lifestyle. Aside from Walter's diaper rash, these findings do not show that respondent's behavior has had any adverse effect on Walter. A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. Petitioner apparently recognizes the paucity of findings of actual harm to Walter, and strenuously contends that a threat of future harm is sufficient grounds for termination

of parental rights. We disagree. Both G.S. §§ 7A-289.32 and 7A-517(21) speak in terms of *past* neglect and make no provision for termination for threatened future harm. It is clear, however, that our legislature was mindful of the plight of children threatened by a risk of future neglect, as shown by the terms of G.S. § 7A-544. Under that statute, DSS may obtain temporary custody of a child where there is a risk of neglect by the parent or guardian. This supports our position that the legislature was aware of the problem urged by petitioner, and simply did not choose to make risk of neglect a grounds for termination of parental rights.

It is also significant that petitioner is unable to cite any decision from our courts supporting the contention that risk of harm is sufficient grounds for termination. In *In re Dinsmore*, 36 N.C. App. 720, 245 S.E. 2d 386 (1978), there was evidence that the mother was an alcoholic, but termination of her parental rights was based on allegations of nonsupport and abandonment. There was no contention that the mother had neglected her child within the meaning of the statute simply by her status as an alcoholic.

While the cases are not unanimous, the majority of other states which have considered the question deny termination of parental rights upon a mere showing that a parent has abused alcohol or drugs, without some evidence of harmful effect upon a child. *See, e.g., Matter of S. D. Jr.*, 549 P. 2d 1190 n. 25 (dicta) (Alaska 1976); *Matter of Appeal in Pima County*, 25 Ariz. App. 380, 543 P. 2d 809 (1975); *In re J. M.*, 131 Vt. 604, 313 A. 2d 30 (1973), *but see In re Scarlett*, 231 N.W. 2d 8 (Iowa 1975).

We note that the trial judge made numerous findings concerning respondent's criminal convictions, her failure to find employment and failure to comply with various agreements made with petitioner. These findings are not relevant to the issue of neglect in this case, since there is no showing that these events had any effect upon Walter. We note, however, that G.S. § 7A-289.32(3) permits termination of parental rights of a parent who

> . . . has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made . . . in correcting those conditions which led to the removal of the child or without showing positive response . . . to the diligent efforts of [DSS] . . . to encourage the parent to strengthen the

> parental relationship . . . or to make and follow through with constructive planning for the future of the child.

If petitioner wishes to seek termination of respondent's parental rights on the grounds of respondent's failure to correct the conditions which led to the removal of Walter, then it must comply with the statute, which clearly requires a two year "trial" period for the parent. One of the most disturbing aspects of this case has been the apparent haste with which petitioner has sought to terminate respondent's parental rights. Respondent has had custody of Walter for only two months; a very short time in which to demonstrate her fitness as a parent. It is clear, of course, that in some cases acts of neglect sufficient to support an order terminating parental rights may occur in less than two months. In the case at bar, however, given the lack of proof of harm to Walter, respondent's interest in preserving the rights of parenthood clearly outweigh petitioner's interest in obtaining the drastic remedy of termination of parental rights.

[2] We turn now to respondent's contention that there were insufficient findings of fact to support the trial judge's conclusion that respondent failed to pay a reasonable sum for Walter's care while he was in DSS custody. In considering whether a parent has failed to pay a reasonable portion of the cost of care, the trial judge must make findings of fact concerning both the ability of the parent to pay and the amount of the child's reasonable needs. *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). Although the trial judge in the case at bar made some findings concerning respondent's resources, he made no finding as to her ability to pay or the cost of Walter's care. Findings of fact concerning respondent's resources for the period after July, 1982 are irrelevant, since the termination statute specifically limits consideration to the amount of support paid for the six months next preceding the filing of the petition in termination. We hold that the findings of fact do not support the conclusion of law that respondent failed to pay a reasonable portion of the cost of Walter's care.

For the reasons stated above, we hold that there were insufficient findings of fact to support the trial judge's adjudication that Walter Phifer was a neglected child, and that respondent had failed to provide support within the meaning of G.S. § 7A-289.32.

Because of our holding that the order terminating respondent's parental rights must be reversed, we need not reach respondent's other assignments of error.

Reversed.

Judges BRASWELL and PHILLIPS concur.

BILLY R. SATTERFIELD v. SAM PAPPAS AND CLAIRE R. PAPPAS

No. 8221DC1202

(Filed 6 March 1984)

Frauds, Statute of § 8— sufficiency of written memorandum of oral lease

Two written leases, each of which had been signed by one of the parties, and other correspondence between the parties constituted a sufficient written memorandum of an oral agreement between the parties to give rise to an enforceable lease under G.S. 22-2 where the evidence showed that plaintiff lessor and defendant lessee reached an oral agreement upon the essential elements of a new lease for space used by defendant for a restaurant in plaintiff's shopping center, including the term of the lease, the rental price, and the property to be leased, and upon such non-essential lease provisions such as insurance, entry, use and assignment; the two written leases contained identical provisions on the essential elements; and the points of disagreement between the two written leases concerned only "boiler plate" language and non-essential terms to be included in the lease.

APPEAL by defendants from *Tash, Judge*. Judgment entered 14 June 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 September 1982.

Plaintiff, Billy R. Satterfield, filed this action for summary ejectment against defendants Sam Pappas and his former wife, Claire R. Pappas on 7 April 1982. The case was heard before the Magistrate of Forsyth County and judgment for the summary ejectment of Pappas was rendered on 19 April 1982. Pappas gave notice of appeal pursuant to G.S. 7A-228 and filed an answer to Satterfield's original complaint on 23 April 1982.

A jury was empanelled and trial held before Judge Tash. Both parties presented evidence. Defendants' motion for directed verdict at the close of the plaintiff's evidence and at the close of

all the evidence was denied. The trial court ruled in favor of the plaintiff's motion for directed verdict at the close of all the evidence. Defendants appeal from the judgment entered upon the directed verdict for plaintiff at the close of all the evidence.

Hutchins, Tyndall, Doughton & Moore, by Thomas W. Moore, Jr. and Richmond W. Rucker, for defendant appellants.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, Gray Robinson and Robert E. Price, Jr., for plaintiff appellee.

JOHNSON, Judge.

The plaintiff landlord, Billy R. Satterfield (Satterfield) brought this action against the defendant tenants, Sam Pappas and his former wife Claire R. Pappas (Pappas), seeking summary ejectment of Pappas on the grounds that the leases under which Pappas was renting space for his restaurant in Satterfield's shopping center had expired as of December, 1979 and October, 1981, respectively, leaving Pappas in the position of holdover tenant. In his answer, Pappas defended against summary ejectment on the grounds that he has a valid and existing lease to the premises for a term of 10 years ending in June, 1989. The issues presented by defendants' appeal are whether the trial court had jurisdiction over the subject matter of this action pursuant to G.S. 42-26 and whether the defendant presented sufficient evidence to demonstrate the existence of an enforceable lease agreement between the parties. For the reasons set forth below, we hold that the trial court had jurisdiction over the subject matter, but that the court erred in granting plaintiff's motion for directed verdict, and in denying defendants' motion for directed verdict.

The summary ejectment statute, G.S. 42-26 provides in part:

> Any tenant or lessee . . . who holds over and continues in possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for surrender, may be removed from the premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.

In the present case, Pappas entered a portion of the premises under two different written leases. The first written lease encompassed approximately 6,500 square feet of space in the Club Haven Shopping Center, Winston-Salem, North Carolina for a term of ten years ending 31 December 1979, at a monthly rental of $900.00. The second lease encompassed 750 square feet adjoining the other premises for a term of ten years ending 31 October 1981, for a monthly rental of $300.00. The parties also agreed that beginning in the late summer or early fall of 1979 Pappas might occupy additional adjoining space. It is undisputed that each of the original written leases expired according to its terms; that Pappas remained in possession of all three parcels; and that Satterfield may demand on Pappas to vacate the premises on or before 31 March 1982.

It was plaintiff's contention that he permitted defendant to remain on the premises pending negotiation of a new lease and that no new lease was, in fact, agreed upon by the parties and that no memorandum reflecting such an agreement was signed by plaintiff. Defendant appears to argue that because he continued to pay and plaintiff accepted rent, and further because a new lease was, in fact, entered into and a memorandum thereof signed by plaintiff, that the trial court lacked jurisdiction to hear this action under the summary ejection statute.

It is obvious from the complaint that had plaintiff succeeded in proving that no new lease had been entered into and that defendant was allowed to remain in possession only pending negotiations on a new lease, summary ejection would have been the appropriate remedy. *See Gurtis v. City of Sanford*, 18 N.C. App. 543, 197 S.E. 2d 584 (1973). That defendant alleges and is ultimately able to present a defense to such an action does not destroy the jurisdiction of the trial court over the subject matter. Whether defendant was in fact a holdover tenant was an issue to be decided at trial. Therefore, defendant's argument that there was no subject matter jurisdiction because there was no holdover situation is without merit.

A motion for a directed verdict pursuant to Rule 50(a) presents the question of whether the evidence presented is sufficient to carry the case to the jury. In passing on this motion, the trial judge must consider the evidence in the light most favorable

to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

The evidence regarding the parties' agreement upon a new lease is as follows: Pappas occupied the premises beginning in 1969 under the lease agreements mentioned above until the Spring of 1979. At that time Pappas asked Satterfield if he could lease an additional adjoining space, which was then occupied by a barbershop, so that he could expand his restaurant operation. In about May of 1979, the parties discussed and agreed to put both parcels of land covered by the two original leases into one lease and to include the third parcel (barbershop space) into that lease. Pappas and Satterfield negotiated a rent increase, in part, to cover expenses Satterfield incurred bringing the property into the city limits so that Pappas could obtain a liquor-by-the drink permit for his restaurant.

On cross-examination, Satterfield testified that prior to turning the matter over to their respective representatives and lawyers to work out the details, Pappas and he reached an agreement on a lease incorporating all three parcels.

> Mr. Pappas and I had agreed on the space to be leased, the original space, the wig shop and the barber shop, everything inside the building. We agreed on a price and the ten year term with a five year option to renew.

Satterfield then gave the information to his business associate and agent, Buddy Norwood. Donald R. Billings, an attorney, was handling the negotiations on the new lease for Pappas.

On 24 May 1979, Billings sent a proposed lease to Satterfield, leasing all three parcels to Pappas at a monthly rental of $2,000.00 for a term of 10 years, with an option to renew for 5 years at an increased rental based on the cost of living index, not to exceed 20%. The proposed lease left out the exact dates of the term and the exact space to be leased. The proposed lease also specified that certain alterations would be built by and made at the expense of the lessor.

On 15 June 1979, Satterfield's agent Buddy Norwood sent a letter to Pappas' attorney suggesting certain changes and provisions. The letter reads as follows:

> I will attempt in this letter to incorporate your letter of May 24, 1979, your draft of the lease, our telephone conversations, and your conversations with Billy Satterfield.
>
> 1. If you want a survey for Exhibit "A" [diagram of space to be leased] this would include only the building, not any specific portion of the parking lot.
>
> 2. *Term*: Should be July 1, 1979 to June 30, 1989.
>
> 3. *Rental*: Should be changed to say the Barber Shop space will be given to you on September 1, 1979 and the rent will be $1,800.00 for the first two months and $2,000.00 for the next 118 months.
>
> Let's add: "federal cost of living index—all items—using July 1, 1978 to July 1, 1979 [sic] as the base period."
>
> 4. *Fixtures*: Lessor to have prior written approval of all signs. Lessor to be responsible for air conditioner and heating compressors only.
>
> 5. *Alterations*: Add—no alterations to roof without lessor approval—meaning no holes cut for vents, etc. *Lessee* will build at his expense with *lessors* written approval of plans any and all alterations inside or out.
>
> 2nd Paragraph—omit—"except as hereinbefore stated" and add all alterations [shall be made at the expense of the lessee] . . .

The letter concluded that "we want to make this lease effective July 1, 1979 with the additional space effective September 1, 1979." Also, the legal lessee was identified as "Billy R. Satterfield." The letter was signed by "Ballard [Buddy] G. Norwood."

Pappas' attorney then incorporated these suggestions, with one or two exceptions, along with Norwood's exhibit of the space to be leased in a new proposed lease which was later to be signed by the defendant, Sam Pappas, and was sent to plaintiff's agent Norwood in September of 1979. (Hereafter "the Pappas lease.")

This lease essentially duplicated the lease proposed by defendant in May of 1979, except for the changes suggested by Norwood. The Pappas lease also contained a provision regarding non-exclusive parking privileges, did not provide *for written* approval of the lessor on alterations, although it did provide for approval by the lessor, and specified that the rental would be $1,800.00 per month for the first three months and $2,000.00 per month for the remainder of the term.

The next step in this series of negotiations was a lease drafted by plaintiff's attorney, G. Emmett McCall, signed by the plaintiff, Billy Satterfield, and sent to Attorney Billings on 17 October 1979. (Hereafter "the Satterfield lease.") The Satterfield lease duplicates the Pappas lease in the following respects:

(1) *Lessor*—Billy R. Satterfield and wife, Millie Satterfield;

(2) *Lessee*—Sam Pappas;

(3) *Term*—July 1, 1979 to June 30, 1989 with an option to renew for five years upon written notice from Lessee at least 90 days prior to the end of the term;

(4) *Rental*—$1,800.00 per month for the first three months and $2,000.00 per month for the remainder of the term. If Lessee renews for five years, rent will be increased according to the percentage rate increase in the federal cost of living index from July 1, 1978 to July 1, 1989, not exceeding 20%.

(5) *Property to be leased*—A 7,000 square foot area depicted in identical exhibits attached to the proposed leases.

(6) *Additional provisions*—The Satterfield and Pappas leases contain essentially the same provisions concerning use, payment of utilities, fire and liability insurance, default by the Lessee, termination of the lease, entry and assignment.

Attorney Billings testified that Pappas refused to sign the Satterfield lease because it contained "numerous boiler-plate clauses" which defendant found unacceptable. Billings and McCall then engaged in a series of negotiations over the boilerplate language. Meanwhile, Satterfield refused to sign the Pappas lease because he insisted that his lease contain "the right protection for

the landlord." Satterfield testified that, "I called Mr. Billings and told him I wouldn't sign his lease, I was tired of paying lawyers and why can't I get my own lease signed." The Pappas lease differed from the Satterfield lease primarily in its shorter length, in the omission of the need for *written* approval from the lessor for alterations, and in the inclusion of a provision concerning parking. Mr. Satterfield testified that it was essential to him that a lease contain a parking provision, despite the fact that the lease prepared by his own attorney failed to contain such a provision. Mr. Billings testified that he included the parking provision as an interpretation of Paragraph 1 in Norwood's letter.

On cross-examination, Satterfield testified that as of 1 July 1979, Mr. Pappas "took over the barber shop space and began paying rent *under the terms of this agreement . . . Sam and I agreed that as of July 1, the rent increased in accordance with Paragraph 3 of Mr. Norwood's letter.*" Further, that since 1 July 1979, Mr. Pappas has been paying, and Mr. Satterfield has been accepting, rent at the rate of $2,000.00 per month for the premises. However, Mr. Satterfield also testified that the agreement between the parties for a rent increase was separate from their negotiations for a new lease.

Mr. Billings testified that sometime between the first of July and the first of September, 1979, Mr. Pappas began renovating the premises by taking out the partition and three walls that created the barbershop to make a storage area for performers. The renovations cost Pappas $100,000.00 and the work was completed, without the written approval of Satterfield, by 17 October 1979.

Eventually, Billings realized that McCall would not take the boilerplate language out of the lease and he decided to have defendant sign the Pappas lease instead. Mr. Pappas did so, and Billings mailed the signed Pappas lease back to McCall for Satterfield to sign in January, 1980. Satterfield never signed the Pappas lease and Pappas never signed the Satterfield lease. Over 2 years later, on 31 March 1982, Satterfield gave Pappas notice to vacate the premises, claiming that there was no lease between the parties.

The central issue in defendant's appeal is whether defendant offered evidence from which the jury might find that the parties

entered into an oral lease agreement during the course of their negotiations in the spring and summer of 1979, that is evidenced by a writing or memorandum sufficient to satisfy the Statute of Frauds, G.S. 22-2. We conclude that sufficient evidence of such a lease agreement was presented to warrant entry of a directed verdict in defendant's favor.

A lease is a contract for valuable consideration whereby one agrees to let another have the occupation and profits of realty for a definite period of time. The essentials of a lease creating an estate for years are (1) the names of the parties (lessor and lessee); (2) a description of the demised realty; (3) a statement of the term of the lease; and (4) the rent or other consideration. *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Stallings v. Purvis*, 42 N.C. App. 690, 257 S.E. 2d 664 (1979).

The testimony of Satterfield himself established that in May or June of 1979, Billy Satterfield as lessor and Sam Pappas as lessee reached an oral agreement upon a new lease incorporating the three parcels in the Club Haven Shopping Center at a monthly rental of $2,000.00 for a term of ten years, effective 1 July 1979, with a five year option to renew at an increased rent indexed to the cost of living index, with a maximum increase of 20%.

G.S. 22-2 provides that all leases "exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." If all essential elements of a contract to convey or lease land have been agreed upon by the parties and are contained in some writing or memoranda, signed by the party to be charged or his authorized agent, then there can still be a valid, binding contract to convey or lease land, even if there is no agreement on other non-essential terms. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496 (1970). Furthermore, an enforceable lease or conveyance of land need not be set out in a single instrument, but may arise from a series of separate but related letters or other documents signed by the person to be charged or his authorized agent. *Hines v. Tripp*, 263 N.C. 470, 139 S.E. 2d 545 (1965).

In order for the oral agreement between Satterfield and Pappas to give rise to an enforceable lease between the parties, defendant had the burden of proving that one or all of the signed documents sent between the parties during the course of their negotiations were sufficient to satisfy G.S. 22-2. We conclude as a matter of law that the two lease agreements and other correspondence passing between the parties, and in particular the 24 May 1979 letter of Norwood, taken together, are sufficient written evidence of a contract or agreement between the parties to give rise to an enforceable lease between the parties.

The lease signed by Pappas and the lease signed by the Satterfields are in total agreement on the essential elements of the lessor and lessee, the term of the lease, the rental price, the property to be leased, as well as on many other non-essential lease provisions such as insurance, entry, use and assignment. The two leases are related documents, as are the Billings and Norwood letters, and all are signed by the parties to be charged or their agents. The points of disagreement between the lawyers and agents of the parties concerned primarily the "boilerplate" language to be included in the new lease and did not involve any of the essential elements of the lease. The other differences between the documents were also as to non-essential terms, many of which were effectively rendered moot by the subsequent actions of the parties.

> The fact that in the present case the attorneys for the parties were engaged in drafting and were attempting to agree on the language of an instrument which would spell out in detail not only the essential but also the subordinate features of the agreement, does not compel the conclusion that the minds of the parties had never met upon those features.

Yaggy v. B.V.D. Co., supra at 600, 173 S.E. 2d at 503. As long as there is a writing or memorandum containing all of the essential terms of the lease, "later negotiations regarding subordinate features of the [lease] do not negate the existence of a contract." *Hurdle v. White*, 34 N.C. App. 644, 651, 239 S.E. 2d 589, 594 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

Plaintiff's argument that no new lease came into effect because neither party ever accepted the written proposals or offers of the other fails to make the crucial distinction between "a

condition which goes to the making of a contract and a statement relating only to its ultimate performance or execution." *Carver v. Britt*, 241 N.C. 538, 540, 85 S.E. 2d 888, 890 (1955). In *Carver* the court held that where the offer is squarely accepted, the addition of a statement in the acceptance relating to the ultimate performance of the contract does not make the acceptance conditional so as to prevent the formation of the contract. The situation at bar is essentially no different. Satterfield admitted that he and Pappas reached an oral agreement upon the essential elements of a new lease for the subject premises. The two written leases, each signed by the respective principal, contained identical provisions on the essential elements, reflecting the agreement previously reached by the two principals. The subsequent disagreement over boilerplate language that arose between the attorneys for the parties during the drafting of the instrument may in no way be said to have prevented formation of the contract, and in all other respects the series of related documents that comprise the signed memorandum of the oral agreement were sufficient to satisfy the requirements of G.S. 22-2. Therefore, defendant offered sufficient evidence to prove that a valid and enforceable lease existed between the parties as a matter of law and the trial court erred by failing to grant defendant's motion for a directed verdict at the close of all the evidence. Accordingly, the judgment entered upon the directed verdict in plaintiff's favor must be reversed and the case remanded for entry of a directed verdict in favor of defendant on plaintiff's claim for summary ejectment.

Reversed and remanded.

Judges BECTON and BRASWELL concur.

DONNA LAPER FAUGHT v. WILLIAM FLENER FAUGHT

No. 8314DC353

(Filed 6 March 1984)

1. Divorce and Alimony § 21.5— willfulness of nonpayment—contempt

Defendant could properly be found in contempt of court under G.S. 5A-11(a)(3) for failure to comply with a court's order concerning alimony payments even though the alimony payments and various catch-up payments

totalled nearly 100% of his monthly income where defendant failed to pay arrearages and where defendant assumed new financial responsibilities in terms of a new wife, defendant's new wife's automobile, defendant's adult daughter's automobile, semi-annual payment for homeowner's insurance on residence purchased and owned by the defendant's new wife, monthly payments on a residential lot owned and purchased by defendant and defendant's new wife, and monthly payments to EAB on line of credit. To hold contrary would permit a supporting spouse to avoid his or her obligations by the simple means of expending assets as he or she pleased, and then pleading inability to pay support, thereby insulating him or herself from punishment by an order of contempt.

2. **Divorce and Alimony § 19.4— modification of alimony decree—increase in monthly living expenses—sufficiency of evidence**

There was sufficient evidence from which the trial judge could have found and concluded that plaintiff's monthly living expenses had risen from 1979 to 1982 in an action brought by plaintiff to increase the amount of her alimony payments among other things.

3. **Divorce and Alimony § 21.4— assignment of Army retirement benefits in alimony action proper**

A trial judge had the authority to compel defendant to execute an assignment of his United States Army retirement benefits pursuant to 10 U.S.C. § 1408 (1983) even though the federal statute became effective after the filing of the trial judge's order in the case at bar. 10 U.S.C. § 1408(d) does not deprive the trial judge of authority to order an assignment of benefits until notice is served upon the Secretary of the Army.

APPEAL by defendant from *LaBarre, Judge*. Order entered 18 June 1982 in DURHAM County District Court. Heard in the Court of Appeals 17 February 1984.

Defendant-husband and plaintiff-wife were married on 22 June 1952 and separated in May, 1979. The parties were subsequently divorced and plaintiff's motion for permanent alimony was granted in an order entered 28 December 1979. Under the order, defendant was required to pay alimony of $1,260.00 per month, maintain health benefits, transfer certain property, and pay plaintiff's attorney's fees. Defendant's appeal from the order was dismissed by the North Carolina Court of Appeals on 5 October 1981 for failure to perfect the appeal. Defendant then discharged his former attorney and retained his present counsel to represent him in the ongoing series of actions between defendant and plaintiff. On 29 October 1981, defendant was found in contempt of court for, *inter alia*, failing to make nearly $25,000.00 in alimony payments to plaintiff due under the order of 28 Decem-

ber 1979. During the early spring of 1982 plaintiff filed motions for an increase in alimony and an order compelling defendant to execute an assignment of his income, and defendant filed a motion to reduce alimony payments. Following a hearing on the motions in April, 1982, the trial court held defendant in contempt, but continued punishment on the condition that defendant make certain payments. The order of the trial court, filed 18 June 1982, also ordered defendant to make an assignment to plaintiff of part of his income, and granted plaintiff's motion for an increase of alimony. The trial judge made, in pertinent part, the following findings of fact and conclusions of law:

. . .

2. That by . . . the Order entered in this cause on November 19, 1981, the defendant should have paid the following sums to or on the account of the plaintiff on the dates specified:

(a) $5000 on or before December 19, 1981.

(b) $400 to plaintiff's attorneys on or before December 19, 1981;

(c) $5500 in monthly installments against alimony arrearages;

(d) $6595 in regular alimony payments;

(e) $1500 to plaintiff's attorneys on or before January 19, 1982.

3. That since the Order entered on November 19, 1981, the defendant has paid the following monies to or on behalf of the plaintiff pursuant to that Order:

(a) $400 to plaintiff's attorneys;

(b) $100 to plaintiff's attorneys against the $1500 amount ordered;

(c) $7658 to plaintiff against alimony arrearages and current alimony payments.

4. That at the time of the initial hearing in this cause held on November 19, 1979, the defendant was employed as a

senior Army instructor for the Junior ROTC Program at South Brunswick High School and was also receiving military retirement benefits as a Retired Colonel in the United States Army. That at that time the Court found his net income from these sources to be $2600 per month.

5. That at the last hearing in this cause on October 29, 1981, the Court found as a fact . . . [t]hat the monthly income received by the defendant from these sources totalled $3468.92.

. . .

6. That, at the time of this hearing, . . . the total monthly income received by the defendant from these sources now totals $3848.33.

. . .

7. . . . That, of the monthly expenses offered into evidence by the defendant, the following concern obligations which were incurred by the defendant after the original award of alimony entered in this cause: monthly payments for new wife's automobile; defendant's automobile; and defendant's adult daughter's automobile; semi-annual payment for homeowner's insurance on residence purchased and owned by the defendant's new wife; monthly payments on residential lot owned and purchased by the defendant and defendant's new wife; monthly payments to EAB on line of credit. That the combined monthly payments made on these obligations total approximately Nine Hundred Ninety Dollars ($990.00) per month.

8. That the defendant and his new wife are presently the owners of a residential lot. . . . That the fair market value of the lot is $13,500 but it is subject to a note and deed of trust which has an outstanding balance of $6,500.

9. That the defendant had the financial means and abilities since the entry of the Order in this cause on November 19, 1981, to make all of the payments required of him under that Order. That the defendant has willfully and deliberately failed and refused to pay monies required of him under that Order totalling $10,837.

. . .

11. That at the time the defendant was found to have abandoned the plaintiff in May of 1979, the plaintiff was unemployed and had been so for approximately two (2) years. That prior to that time, the plaintiff had been employed as a school teacher in the Virginia public school systems.

12. That, at the time of the original hearing in this matter on November 19, 1979, the plaintiff was 49 years of age, unemployed, and diagnosed as suffering from, among other things, phlebitis and degenerative arthritis of the spine, hips and knees.

13. That the plaintiff is presently employed by the Chapel Hill School System teaching night courses in bookkeeping and office management two nights a week from which she received a gross compensation of $660 per year.

14. That since the original hearing in this cause, the plaintiff has submitted applications for [various] teaching positions. . . . That with the exception of her present teaching position with the Chapel Hill School System and a brief tenure as a substitute teacher with the Wake County Schools, the plaintiff has been unable to find employment as a teacher.

15. That since the original hearing in this cause, the plaintiff has attempted employment with Duke University as a secretary; Durham Exchange Club Industries, Inc., as a secretary; and the Chapel Hill-Carrboro YMCA as office manager for the campaign fund.

16. That the plaintiff testified that she presently suffers from phlebitis and degenerative arthritis, and has recently suffered an impairment of vision in one eye as a result of a detached retina. That the plaintiff testified that she is undergoing medical treatment for each of these physical problems, but presented no medical evidence as to the condition of her eye.

. . .

17. That the Court . . . does not find as a fact that she is medically unfit to undertake active employment.

. . .

18. That at the original hearing in this cause, the plaintiff was found to have reasonable monthly needs totally $1542 to maintain herself according to the station in life to which she had become accustomed while living with the defendant.

19. That the amount of money that the plaintiff now needs to meet her fixed monthly financial obligations and to maintain herself according to the station in life to which she had become accustomed while living with the defendant is $1901.62.

. . .

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW as follows:

1. That the defendant is in further contempt of this Court for having willfully and deliberately failed to make the payments to or on behalf of the plaintiff required of him under the prior Order entered in this cause on November 19, 1981, despite having the ability to do so.

. . .

2. That in order to insure that the monthly payments required of the defendant for present alimony are made in a timely fashion, the defendant should execute an Assignment of Income covering earnings or benefits received by him from the United States Army and/or the Brunswick School System sufficient to meet those monthly payments as hereinafter ordered.

. . .

3. That the lump-sum payment of . . . ($5,000.00) previously ordered against alimony arrearages by that Order dated November 19, 1981, should be paid within . . . (30) days of the date of this Order.

4. That the outstanding balance of . . . ($1,400.00) in attorney's fees required of the defendant under the Order dated November 19, 1981, together with additional attorney's fees ordered hereinafter, should be paid on or before October 1, 1982.

. . .

5. That the monthly payments against [the $24,241.88 in] alimony arrearages previously required of the defendant under the Order dated November 19, 1981, should be reduced from . . . ($1,100.00) per month to . . . ($750.00) per month effective May, 1982.

6. That, as a result of the increased reasonable financial needs of the plaintiff and the increased earnings of the defendant since the original Order entered herein on December 29, 1979, a substantial change of circumstances has occurred, which justifies an increase in the alimony payments required of the defendant on behalf of the plaintiff. That the defendant has the present financial means to pay the plaintiff alimony in the amount of ($1,419.00) per month, and the alimony payment required of the defendant should be increased to that figure.

. . .

7. That there has been no substantial change of circumstances since the original Order entered herein on December 29, 1979, justifying a decrease in the alimony payments of the defendant on behalf of the plaintiff.

. . .

8. That the plaintiff is unable to defray her reasonable attorney's fees incurred in connection with this action and is entitled to the award of a reasonable attorneys fee to be paid by the defendant.

. . .

9. . . . That based upon all of the facts, the Court concludes that the reasonable value for the services rendered by the plaintiff's attorneys in seeking the enforcement of the prior Orders of this Court is . . . ($1500.).

. . .

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant is found to be in further contempt of this Court under North Carolina General Statutes § 5A-11 (a)(3) as a result of his willful and deliberate disobedience of the Order entered in this cause on November 19, 1981. That prayer for judgment for punishment under North Carolina General Statutes § 5A-12 for this most recent incident of contempt, as well as the contempt finding entered on November 19, 1981, is continued on the following conditions:

. . .

(a) That the defendant pay the plaintiff . . . ($5,000.00) against arrearages owed under prior orders within . . . (30) days of the date of this Order.

(b) That the defendant pay plaintiff's attorneys, . . . ($1,400.00) for attorney's fees awarded under the Order dated November 19, 1981, on or before October 1, 1982.

(c) That the defendant pay the plaintiff . . . ($24,241.88), representing the balance of arrearages owed for alimony under past orders, together with interest at the legal rate, in monthly installments of . . . ($750.00), beginning May 15, 1982, and on the 15th day of each month thereafter, ...

(d) That the defendant pay the plaintiff . . . ($1,419.00) per month, beginning May 15, 1982, and on the 1st of each month thereafter until otherwise modified by this Court, as permanent alimony.

. . .

(e) That the defendant pay the plaintiff . . . ($167.55) representing one-half (1/2) of loan payments received by Michael Faught and not forwarded to the plaintiff pursuant to prior Orders within . . . (30) days of the date of this Order.

. . .

2. That the defendant execute an Assignment of Income in favor of the plaintiff, covering earnings or benefits received by him from the United States Army, Veterans Administration and/or Brunswick County School System in an amount sufficient to meet the present monthly alimony payments . . . within . . . (30) days of the date of this Order.

. . .

3. That the defendant pay to the plaintiff's attorneys, . . . ($1500.) representing reasonable legal fees incurred by the plaintiff in connection with compelling enforcement of the prior Orders of this Court, on or before October 1, 1982.

. . .

From entry of the order increasing alimony, holding defendant in contempt, and requiring payment of attorneys' fees and an assignment of defendant's income, defendant appealed.

Maxwell, Freeman, Beason and Morano, P.A., by Homa J. Freeman, Jr. and James B. Maxwell, for plaintiff.

McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for defendant.

WELLS, Judge.

We note at the outset that defendant has failed to include in his brief exceptions supporting his assignments of error, a violation of Rule 28(b)(5) of the Rules of Appellate Procedure. Such error normally constitutes an abandonment of the omitted exceptions, but we will consider defendant's arguments on the merits through our discretionary power under Rule 2 of the Rules of Appellate Procedure.

[1] In defendant's first assignment of error, he contends that the trial judge erred in holding defendant in contempt for his failure to comply with earlier court orders, when defendant lacked the financial ability to comply. Defendant concedes that he had the financial ability to pay the monthly alimony payments under the 1979 court order, and willfully chose not to comply, resulting in an accrual of a large arrearage. Defendant contends, however, that he is unable to pay both the monthly alimony payments and the "catch-up" payments on the arrearage, ordered in both the 1981 and 1982 contempt orders. As there is nothing in the record to show that defendant has appealed from entry of the 1981 order, the only issue before us today is the validity of the judgment entered in June, 1982.

Defendant was found in contempt of court in 1982 under N.C. Gen. Stat. § 5A-11(a)(3) (1981) which provides that "[w]illful disobedience of . . . a court's lawful . . . order" constitutes criminal contempt. Failure to comply with a court order is not willful within the meaning of the statute, however, where a defendant does not possess the means to comply, *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966). In the case at bar, defendant contends that because the alimony payments and various catch-up payments totalled nearly 100 per cent of his monthly income, his failure to comply with the court's order was not willful within the meaning of the contempt statute.

Defendant overlooks a well-established line of authority which holds that a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order. *See, e.g., Williford v. Williford*, 56 N.C. App. 610, 289 S.E. 2d 907 (1982) (supporting spouse took lower-paying job and applied salary to matters other than support obligations); *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E. 2d 677 (1980) (supporting spouse failed to take steps to obtain employment which would have enabled him to meet obligations); *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974) (defendant spouse took lower paying job to avoid support obligations). A contrary rule would permit a supporting spouse to avoid his or her obligations by the simple means of expending assets as he or she pleased, and then pleading inability to pay support, thereby insulating him or herself from punishment by an order of contempt. Defendant's failure to comply with the alimony order was therefore willful within the meaning of G.S. § 5A-11(a)(3). Defendant's first assignment of error is overruled.

In his second argument, defendant contends that the trial judge erred by increasing instead of decreasing the alimony payments, because plaintiff had willfully failed to contribute to her own support. The trial judge found as facts that plaintiff had attempted to find work as a teacher and had held several teaching and clerical jobs and there is ample evidence to support these findings of fact. Defendant argues, however, that before ordering an increase in alimony the trial judge should have considered whether plaintiff had sought non-teaching jobs for which

she might be qualified. Defendant has not based this argument upon any assignment of error or exception in the record, and he may not raise it for the first time on appeal. Rule 10(a) of the Rules of Appellate Procedure. Defendant's assignment of error is overruled.

[2] In his third assignment of error, defendant contends that there was insufficient evidence from which the trial judge could have found and concluded that plaintiff's monthly living expenses had risen from $1,542.00 per month in 1979 to $1,901.62 in 1982. In the 1979 order the trial court found plaintiff's reasonable financial needs to be $1,542.00 per month, but ordered defendant to pay only $1,260.00 per month in alimony. In the 1982 order, the trial court found plaintiff's current needs to be $1,901.62 per month, but ordered payments of $1,149.00 per month. Thus, the 1982 order requires defendant to pay a sum less than the reasonable needs of plaintiff conclusively established in the 1979 order. Defendant has shown no harm from these findings and conclusions. Furthermore, our review of the record persuades us that the evidence in this hearing supports the trial court's findings and conclusions as to plaintiff's present needs. On appeal, a reviewing court must affirm the findings of the court below where there is competent evidence to support them, *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968).

[3] In his fourth assignment of error, defendant contends that the trial judge did not have the authority to compel defendant to execute an assignment of his United States Army retirement benefits and wages received from South Brunswick High School. Defendant has waived the portion of his assignment of error dealing with the assignment of his wages from South Brunswick High School by failing to support his contention with legal arguments in his brief. Rule 28(b)(5) of the Rules of Appellate Procedure.

Under 10 U.S.C. § 1408 (1983), the Uniform Services Former Spouses' Protection Act, a supporting spouse's military retirement pay may be assigned to a dependent spouse under a valid court order. Although the federal statute became effective 1 February 1983, after the filing of the trial judge's order in the case at bar, it is clear that the federal act is to be applied retroactively to 26 June 1981, 10 U.S.C. § 1408(c)(1), *Smith v. Smith*, 458

A. 2d 711 (Del. Fam. Ct. 1983), *In re Marriage of Hopkins*, 191 Cal. Rptr. 70, 142 C.A. 3d 350 (1983).

Defendant contends, however, that even if the federal statute applies, the act cannot come into play until service upon the Secretary of the Army with a valid court order assigning defendant's military benefits. Defendant misconstrues the plain language of 10 U.S.C. § 1408(d)(1), which provides that service of a valid court order upon the proper military official is required to permit *payment* to the dependent spouse. There is nothing in the federal act which deprives the trial judge of authority to order an assignment of benefits until notice is served upon the Secretary.

Defendant's assignment of error is overruled, and the trial judge's order is

Affirmed.

Judges BRASWELL and PHILLIPS concur.

MILDRED R. TICE v. DEPARTMENT OF TRANSPORTATION, HAYWOOD WARD, OTIS EVANS, RICHARD EVANS AND TOMMY WILLIAMS

No. 831SC63

(Filed 6 March 1984)

Attorney General § 1— representation of State department—authority to enter consent judgment—necessity for consent of department

The Attorney General's office, when representing a State department pursuant to G.S. 114-2(2) and G.S. 147-17(b), has no authority to enter a consent judgment without the consent of the department.

APPEAL by plaintiff from *Allsbrook, Judge.* Order entered 9 November 1982 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 7 December 1983.

Plaintiff appeals from an order vacating a consent judgment entered between plaintiff and an assistant Attorney General purporting to act on behalf of defendant Department of Transportation (DOT).

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for the State.

Trimpi, Thompson & Nash, by John G. Trimpi and C. Everett Thompson, for plaintiff appellant.

WHICHARD, Judge.

I.

The appeal is from an interlocutory order. Because of the significance of the issue involved, however, we treat the appeal as a petition for a writ of certiorari and allow the writ in order to dispose of the issue on its merits. *See Stone v. Martin*, 53 N.C. App. 600, 602, 281 S.E. 2d 402, 403 (1981), *rehearing*, 56 N.C. App. 473, 289 S.E. 2d 898, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982); *Plumbing Co. v. Associates*, 37 N.C. App. 149, 152, 245 S.E. 2d 555, 557, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 250 (1978).

II.

The issue is whether the Attorney General's office, when representing a State department pursuant to G.S. 114-2(2), has authority to enter a consent judgment without the consent of the department. We hold that it does not, and we thus affirm the order vacating a consent judgment entered without the consent of defendant DOT.

III.

Plaintiff brought this action against defendant DOT and four individual defendants to establish title to a strip of land adjacent to other land which she owned. The strip is approximately one hundred feet long and fifty feet wide. It is located at the end of a State maintained road and connects the road to the waters of Tulls Creek Bay. Plaintiff also sought injunctive relief to prohibit defendant DOT from trespassing on her property. In its answer, defendant DOT admitted that it had operated a roadway adjacent to plaintiff's property, but claimed an interest in the land which plaintiff claimed as hers.

After almost two years of negotiations, the assistant Attorney General representing defendant DOT entered a consent

judgment with plaintiff. The consent judgment established the boundaries of the State road and enjoined plaintiff from interfering with the maintenance and public use of the road. There is neither allegation nor evidence that the assistant Attorney General acted in bad faith in signing the consent judgment on behalf of defendant DOT.

Subsequently defendant DOT filed a motion to set aside the stipulations upon which the consent judgment was based and the consent judgment itself. The grounds alleged as the basis for the motion were that the stipulations were untrue; that they were executed by the assistant Attorney General representing defendant DOT "by mistake and inadvertence under a misapprehension of the true facts"; and that the assistant Attorney General "was without authority from the [DOT], or any of its authorized officials, to execute the consent judgment on its behalf."

The trial court made findings of fact that the assistant Attorney General did not have defendant DOT's consent and was not authorized to consent to the judgment. The findings are supported by evidence in the record and are therefore conclusive. *Harrelson v. Insurance Co.*, 272 N.C. 603, 609, 158 S.E. 2d 812, 817 (1968).

The court concluded that the consent to the judgment conceded a substantial right of defendant DOT without its consent and was void. It therefore vacated the order, ordered that the case file be reopened, and further ordered that the case be added to the regular calendar for trial. The court's conclusion, and its action pursuant thereto, are subject to review. *Id.*

IV.

G.S. 114-2(2) provides that one of the duties of the Attorney General is to "represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." *See also* G.S. 147-17(b). The departments may not hire other counsel unless so authorized by the Governor. G.S. 147-17(a). Defendant DOT contends that while the statute prescribes that the Attorney General represent it, he cannot enter a consent judgment on its behalf without its consent.

Generally, an attorney cannot enter a consent judgment without the consent of his client. *Howard v. Boyce*, 254 N.C. 255, 264-66, 118 S.E. 2d 897, 903-04 (1961). "[A]bsence of authority to consent . . . deprive[s] the judgment of any sort of validity." *Bath v. Norman*, 226 N.C. 502, 504, 39 S.E. 2d 363, 364 (1946).

In *Bath* a town brought an action in which it sought to be declared the owner of certain land. The town attorney, without the town's consent or knowledge, entered a consent judgment. The Court held that even though the attorney acted in good faith, the consent judgment was void because he did not in fact have the town's consent. It stated that

> [i]n this State, as generally throughout the Union, the client, municipal or otherwise, is bound by many acts of his attorney incidental to the ordinary conduct of the case, often of great importance. But that power does not extend to an act of the sort under review, or to any other substantial compromise of the client's right . . . .

Bath, supra, 226 N.C. at 506, 39 S.E. 2d at 365.

V.

The question here is whether the legislature, in enacting G.S. 114-2(2), intended to deviate from the above general rule by allowing the Attorney General, when representing a State department, to enter a consent judgment without the department's consent. This situation must be distinguished from situations in which the Attorney General is prosecuting an appeal or in which he brings an action on behalf of the State. The general rule in those situations is that the Attorney General has control of the action and may settle it when he determines it is in the best interest of the State to do so. *See generally State v. Thompson*, 10 N.C. (3 Hawks) 613 (1825); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P. 2d 813 (Okla. 1973); 7 Am. Jur. 2d *Attorney General* § 18 (1980); Annot., 81 A.L.R. 124 (1932).

VI.

Brief examination of the development of the office of Attorney General, which originated at common law, is appropriate to decision of the issue. Originally, "the Crown did not act through a single attorney at all. Instead, the King appointed

numerous legal representatives and granted each the authority to appear only in particular courts, on particular matters, or in the courts of particular geographical areas." Edmisten, The Common Law Powers of the Attorney General of North Carolina, 9 N.C. Cent. L.J. 1, 4 (1977). As the office evolved in England, the Attorney General became the "Chief Legal Advisor for the Crown and had charge of the management of all legal affairs and the prosecution of all suits in which the Crown was interested." Morgan, The Office of the Attorney General, 2 N.C. Cent. L.J. 165, 166 (1970); *see* 6 W. Holdsworth, A History of English Law 467-68 (1924); National Association of Attorneys General Committee on the Office of Attorney General, Report on the Office of Attorney General §§ 1.1 to .13, at 11-19 (1971) (hereinafter National Association); Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am. J. of Legal History 304 (1958).

The duties of the Attorney General in England included the following:

(1) To prosecute all actions necessary for the protection and defense of the property and revenue of the Crown.

(2) By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

(3) By *"scire facias,"* to revoke and annul grants made by the Crown improperly, or when forfeited by the grantee.

(4) By information, to recover money and other chattels, or damages for wrongs committed on the land, or other possessions of the Crown.

(5) By writ of mandamus, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.

(6) By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.

Morgan, *supra*, at 165.

During the colonial period the office of Attorney General developed in the American colonies. "Not surprisingly, these colonial Attorneys General were viewed as possessing the common law powers or then-current powers of the Attorney General in England." Edmisten, *supra*, at 5. The accepted view was that "the Attorney General had the duty and the exclusive right to represent these governments and their agencies and officers." Morgan, *supra*, at 167.

The period after the American revolution, however, "was characterized by a distrust of centralized government. The Attorney General was made an independently elected official in most states, but he was deprived of much of his power over legal matters at both the state and the local level. Legal services, like state government organization, were fragmented." National Association, *supra*, § 5.12, at 272. A trend began to develop in which states passed legislation allowing state agencies to hire their own attorneys or allowing the Governor to appoint them. Morgan, *supra*, at 167; National Association, *supra*, § 1.34, at 49-51. Among the reasons given for the trend were "the distrust of centralization and the recognition of certain weaknesses in some of the Attorneys General." Morgan, *supra*, at 167.

VII.

Our legislature has acted counter to this trend. It has provided that "[t]he Attorney General shall be counsel for all departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." G.S. 147-17(b). It has further provided that "[n]o department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor." G.S. 147-17(a).

Our legislature also has created numerous state agencies and departments, each with its own specific responsibilities and areas of expertise. *See* G.S. 143A-1 to -245; G.S. 143B-1 to -492. The general purpose of the department in question here, defendant DOT,

> is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transporta-

> tion system for the economical and safe transportation of people and goods as provided for by law. The Department shall also provide and maintain an accurate register of transportation vehicles as provided by statutes, and the Department shall enforce the laws of this State relating to transportation safety assigned to the Department. The Department of Transportation shall be responsible for all of the transportation functions of the executive branch of the State as provided by law except those functions delegated to the Utilities Commission, the State Ports Authority, and the Commissioners of Navigation and Pilotage as provided for by Chapter 76.

G.S. 143B-346. Defendant DOT has been given the power

> to locate and acquire rights-of-way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Department of Transportation may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system.

G.S. 136-18(2).

It is thus clear that the legislature has provided a comprehensive scheme in which all decisions relating to the State highway system have been delegated to defendant DOT. This form of departmentalized government, with delineated responsibilities and areas of expertise, was unknown at common law. We do not believe the legislature, by providing that the Attorney General would serve as counsel for State departments, intended to authorize him to make decisions in areas which have been specifically delegated to a designated department. That would be the effect of allowing the Attorney General to enter, without the consent of defendant DOT, a consent judgment which establishes the boundaries of a road and gives defendant DOT a right-of-way. We believe, instead, that the legislature intended that when the Attorney General represents a State department pursuant to G.S. 114-2(2), the traditional attorney-client relationship should exist. The Attorney General thus would not have authority to enter a

consent judgment on behalf of a State department without the consent of a duly authorized department official.

VIII.

We believe considerations of sound public policy also suggest this conclusion. The Governor is a constitutional officer elected by the qualified voters of the State. N.C. Const. art. III, § 2. The executive power of the State is vested in him, N.C. Const. art. III, § 1; and he has the duty to supervise the official conduct of all executive officers, G.S. 147-12(1). The Attorney General is a constitutional officer elected independently of the Governor, N.C. Const. art. III, § 7; is the head of the Department of Justice, G.S. 143A-49; and has the duty to supervise that Department's activities, G.S. 114-1. The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. We do not believe the General Assembly, in the enactment of G.S. 114-2(2), intended to create such potential.

Such potential also could cause State agencies and departments, with the approval of the Governor as required by G.S. 147-17(a), to engage in more extensive employment of their own counsel. The traditional attorney-client relationship would exist between such counsel and the agencies or departments they would represent, and such counsel thus could not enter consent judgments without the consent of the agency or department. *Bath v. Norman, supra.*

This practice would, however, cause additional expense to the State. It would also undermine, and perhaps ultimately destroy, the customary role of the Attorney General's office in representing the agencies and departments of the State, a role which historically has served the State well.

Thus, to avoid additional expense to the State, and to preserve for the Attorney General's office a well-established role

of proven utility, we believe the better rule to be that an agency or department of the State should have the right possessed by other litigants to determine whether its counsel, whether the Attorney General or otherwise, can enter a consent judgment on its behalf. Such a right is also consonant with fulfillment by the respective agencies and departments of the State of their statutorily assigned duties.

IX.

We note that two state supreme courts, in analogous situations, have held as we do. In so doing, the Georgia Supreme Court stated that the Georgia Code "does not even permit any attorney to bind his client by settlement for less than the full sum claimed, unless express authority be given by the client. . . . It would seem strange, therefore, that the state should be bound by her attorneys without her express authority, when none of her people would be by theirs." *State v. Southwestern Railroad,* 66 Ga. 403, 407 (1880). The North Dakota Supreme Court stated that

> although it is perfectly obvious under the statute that the attorney general is the general and the legal adviser of the various departments and officers of the state government, . . . this does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

State ex rel. Amerland v. Hagan, 44 N.D. 306, 311, 175 N.W. 372, 374 (1919), *overruled on other grounds, Benson v. North Dakota Workmen's Compensation Bureau,* 283 N.W. 2d 96 (N.D. 1979).

X.

In summary, we find nothing in the common law powers of the Attorney General which grants him authority to enter consent judgments binding the agencies and departments of the State without their consent. Our statutes do not expressly grant such power. The assignment of specific responsibilities and duties to the various agencies and departments would appear to indicate legislative intent to the contrary. Given the constitutional and

statutory structure of state government, and the assignment of duties and responsibilities between and among its officers, agencies, and departments, considerations of sound public policy also suggest the contrary rule.

We thus hold that the Attorney General, when representing the "departments, agencies, institutions, commissions, bureaus or other organized activities of the State" pursuant to G.S. 147-17(b), is bound by the traditional rule governing the attorney-client relationship, and cannot enter a consent judgment without the consent of the entity represented. *Howard v. Boyce, supra; Bath v. Norman, supra.* The trial court found, on the basis of competent evidence in the record, that the judgment in question was entered without the consent of defendant DOT. It thus properly concluded that the judgment was void and should be vacated. Its order so doing is

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. CHESTEAN HARRELL

No. 8319SC797

(Filed 6 March 1984)

1. Searches and Seizures § 12— reasonable suspicion to stop defendant—motion to dismiss assault charges properly denied

Defendant's Fourth Amendment protection against unreasonable searches and seizures was not violated when an officer approached defendant around 2:30 a.m. at a Cannon Mills plant after a security guard had called the police station and requested that an officer be sent to the plant parking lot; the security guard had observed suspicious activity involving defendant's vehicle; defendant was sitting in a vehicle that matched the security guard's description; and the Cannon Mills parking lot was known to be a high crime area. These circumstances created a reasonable suspicion of criminal activity and furnished ample justification for a brief investigatory stop. Even if defendant had been illegally restrained under the Fourth Amendment, defendant's act of striking the officer in the face was an unnecessary show of force in response to the officer's retention of his license and request to search his car. G.S. 14-33 (b)(4).

2. Criminal Law § 98.2— failure to sequester witnesses—no abuse of discretion

There was no abuse of discretion in the denial of defense counsel's motion to sequester the prosecution witnesses.

APPEAL by defendant from *Long, James M., Judge.* Judgment entered 17 March 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 13 February 1984.

Defendant was convicted of assaulting a law enforcement officer in violation of G.S. 14-33(b)(4).

The State's evidence tended to show:

Linda Childress, a security guard at the Cannon Mills plant, testified that at around 2:30 a.m. on 25 September 1981 she was in the plant control room watching the video monitors, which were focused on the plant parking lot. At around 2:30 a.m., she observed defendant, driving an older model Chevrolet, pull into the lot and park next to what appeared to be a Lincoln Continental. Defendant was conversing with a person in the Lincoln when a third person came into camera view. The third person pulled something out of his jacket and handed it to the person in the Lincoln. The object was returned to the third person, who then left. Suspicious, Ms. Childress called the Kannapolis Police Department and talked to the dispatcher, Sergeant P. M. Bennick. She told Officer Bennick that something suspicious was going on in the parking lot, perhaps, a drug exchange. She described the vehicles involved in the exchange and asked that a police officer be dispatched to the parking lot. Officer Bennick broadcast a description of the vehicles to several other officers.

Officer Kenneth Woodard was told to check the individuals in the parking lot for suspicious activity or drug activity. Officer Woodard testified that the Cannon Mills parking lot was a high crime area and that the police had received numerous reports in the past concerning auto larceny and malicious damage to automobiles. When Officer Woodard arrived at the parking lot, he observed two vehicles, an older model Chevrolet and a Mercury, parked side by side. He approached defendant and asked for some identification. Defendant gave Woodard his driver's license, but shortly thereafter, demanded that it be returned. Woodard told defendant he needed it to check to see whether defendant

was employed with Cannon Mills. Defendant got out of his car and reached for his driver's license. Woodard asked defendant if he could look inside his car. Defendant refused, struck Woodard in the face, and attempted to dive into his car through the window. Officer Woodard and two fellow officers, Coker and Ballard, attempted to restrain defendant. Defendant fell to the ground, kicking the officers. Officer Woodard then struck defendant with his flashlight so that he could handcuff him, and arrested him for assaulting an officer.

Detective B. F. Ballard testified that he was called to the Cannon Mills parking lot to check for a possible drug exchange among persons in a Chevrolet, a Lincoln Continental, and a third vehicle leaving the lot. When Ballard arrived at the parking lot, Officer Woodard was talking to defendant and had defendant's license. Ballard then saw defendant strike Officer Woodard in the mouth and he went to help Officer Woodard.

Officer Coker testified that he, too, was called to the Cannon Mills parking lot to check several vehicles. He, too, saw defendant strike Officer Woodard in the face.

Captain Templeton, squad lieutenant, testified that the officers' story upon arriving at the station at around 2:45 a.m. substantially matched their testimony at trial.

Defendant's evidence tended to show:

Defendant, an employee at Cannon Mills, worked the 11:00 p.m. to 7:00 a.m. shift. On 25 September 1981, he and Tyrone Ijams, a co-worker, drove to work. Defendant told his boss that he was sick and was unable to work. Defendant left, but agreed to return to pick up Ijams at 3:00 a.m. Defendant returned to the parking lot at around 2:30 a.m. to pick up Ijams. He parked next to a fellow employee, Lola Washington. Defendant was sitting in his car when Officers Wood and Woodard approached and began searching the car, checking inside the glove compartment and under the seat. Officer Woodard asked for defendant's driver's license and told him to get out of the car. Officer Wood searched defendant, found nothing, and told Officer Woodard to take the keys from the car so they could check the trunk. Defendant, hearing this, pulled the keys from the ignition. Officer Woodard then began choking defendant and six other officers at the scene began

beating defendant until he let go of the keys. Defendant was handcuffed and thrown into the patrol car.

Lola Washington testified that on 25 September, she was not feeling well and decided to leave work early. At around 2:30 a.m., she was in her car in the parking lot when defendant drove in and parked next to her car. She testified that shortly thereafter, four police cars arrived. Defendant was thrown against his car, his person and his car were searched, and he was struck on the top of the head and beaten. Ms. Washington testified that she did not see defendant hit anyone.

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

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, P.A., by James E. Ferguson, II, and Thomas M. Stern, for defendant appellant.

VAUGHN, Chief Judge.

Defendant alleges, first, that the police encounter underlying the charge of assault was unconstitutional, and, second, that the trial judge's failure to sequester witnesses denied defendant due process and constituted prejudicial error. We deal separately with each of defendant's claims.

I

[1] Defendant contends that his constitutional rights were violated when he was stopped without reasonable suspicion of criminal activity and that, therefore, his motion to dismiss the assault charges should have been granted. We disagree.

The fourth amendment protects individuals against unreasonable searches and seizures. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). Not every police encounter, however, warrants fourth amendment scrutiny. Under *Terry v. Ohio* and its progeny, a three-tiered standard has developed by which to measure the need to investigate possible criminal activity against the intrusion on individual freedom which the investigation may entail:

(1) Communication between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.

(2) Seizures must be based on reasonable suspicion.

(3) Arrests must be based on probable cause.

State v. Sugg, 61 N.C. App. 106, 300 S.E. 2d 248, *review denied*, 302 S.E. 2d 257 (1983); *See Terry v. Ohio, supra.*

A police seizure occurs when a reasonable person, in light of the surrounding circumstances, would have believed that he was not free to walk away. *State v. Grimmett*, 54 N.C. App. 494, 284 S.E. 2d 144 (1981), *review denied*, 305 N.C. 304, 290 S.E. 2d 706 (1982); *U.S. v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497, *reh. denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed. 2d 1138 (1980). The evidence in this case shows that several officers went to the Cannon Mills parking lot in response to a request from the plant security guard. Officer Woodard approached defendant, who was sitting in his car in the parking lot, and asked for some identification. Defendant gave him his driver's license, but very soon thereafter asked that it be returned. Officer Woodard told defendant he needed to keep it to determine whether defendant was employed by Cannon Mills. The officer's conduct in this case amounted to a seizure; a reasonable person would not have believed he was free to walk away. *See State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907, 100 S.Ct. 220, 62 L.Ed. 2d 143 (1979); *State v. Grimmett, supra; U.S. v. Mendenhall, supra.*

A seizure falls within the second tier of fourth amendment analysis; the intrusion on personal freedom must be balanced against the government's interest in crime prevention. *See Terry v. Ohio, supra.* Officer Woodard's conduct in the instant case was thus justifiable if specific and articulable facts, taken together with the rational inferences from those facts created a reasonable suspicion of criminal activity. *State v. Thompson, supra.* The circumstances surrounding the seizure must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training. *Id.*; *see also State v. Gray*, 55 N.C. App. 568, 286 S.E. 2d 357 (1982).

The circumstances known to Officer Woodard before approaching defendant were:

(1) The time was around 2:30 a.m.

(2) The Cannon Mills work shift, which had begun at 11:00 p.m. would not end until 7:00 a.m.

(3) A security guard at Cannon Mills had called the police station and requested that an officer be sent to the plant parking lot.

(4) The security guard had observed suspicious activity—a possible drug exchange involving occupants of a Chevrolet, a Lincoln, and a vehicle already gone.

(5) Defendant was sitting in a Chevrolet that matched the security guard's description.

(6) The Cannon Mills parking lot was known to be a high crime area.

We hold that these circumstances created a reasonable suspicion of criminal activity and furnished ample justification for a brief investigatory stop.

Defendant argues that the circumstances surrounding the seizure here are similar to those in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979), wherein two police officers cruising in a patrol car at 12:45 in the afternoon observed two men walking away from one another in an alley known to have a high incidence of drug trafficking. The Court held that the police request that defendant identify himself and explain what he was doing violated the fourth amendment, since the police had no specific basis for believing he was involved in criminal activity. *Id.*

We find the *Brown* case to be inapposite to the case *sub judice*. Here, the police were responding to a request from the company security guard to investigate suspicious activity and a possible drug exchange, perhaps involving defendant. It is well recognized that a description of either a person or an automobile may furnish reasonable grounds for arresting and detaining a criminal suspect. *State v. Adams*, 55 N.C. App. 599, 286 S.E. 2d 371 (1982). So, too, may such a description, considered together

with the surrounding circumstances, furnish the basis for a lesser intrusion—the investigatory stop and seizure of defendant in this case.

A seizure, to be justified under the fourth amendment, must not only be based on a reasonable suspicion, but must also be brief. *State v. Grimmett, supra.* The State's evidence showed that Officer Woodard's conduct, in asking for and retaining defendant's driver's license in order to determine his identity and employment status did not unnecessarily intrude on defendant's freedom. Defendant was stopped but momentarily before he grabbed for his license and struck Officer Woodard in the face. A brief stop of an individual in order to maintain the status quo while obtaining more information does not violate the fourth amendment. *State v. Douglas*, 51 N.C. App. 594, 277 S.E. 2d 467 (1981), *aff'd per curiam*, 304 N.C. 713, 285 S.E. 2d 802 (1982); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972).

We note that defendant's evidence suggests that the officers used physical force to restrain defendant while they engaged in an unlawful search of defendant's automobile. On appeal from the denial of defendant's motion to dismiss, however, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Contradictions and discrepancies in the evidence are for the jury to resolve. *Id.* The evidence in this case, viewed in the light most favorable to the State, warranted jury consideration.

Defendant argues that the fact that the jury found against defendant shows that they were not properly instructed on the effect of an illegal search and seizure. The jury charge was not, however, included in the record on appeal. We must presume, therefore, that the jury was properly instructed as to the law arising on the evidence. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976).

Finally, we note that even if defendant had been illegally restrained under the fourth amendment, he had the right to use only such force as reasonably appeared necessary to prevent the unlawful restraint of his liberty. *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100 (1954); *See Keziah v. Bostic*, 452 F. Supp. 912 (W.D.N.C. 1978). Defendant's act of striking Officer Woodard in

the face was an unnecessary show of force in response to the officer's retention of his license and request to search his car. Defendant was, therefore, properly charged under G.S. 14-33(b)(4).

II

[2] At trial, before the State had introduced its evidence, defense counsel moved to sequester the prosecution witnesses. The trial judge denied defense counsel's motion. Defendant contends that this denial constituted an abuse of discretion and a denial of due process.

The rule regarding sequestration, stated in G.S. 15A-1225, provides in pertinent part, that "[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify." The decision whether to sequester witnesses is addressed to the discretion of the trial judge and is not reviewable on appeal absent a showing of abuse of discretion. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980).

Defendant cites several reasons attempting to show an abuse of discretion on the part of the trial judge. Specifically, defendant argues that the large number of prosecution witnesses who testified as to the same set of facts; the hotly debated issues of fact; the existence of a civil suit instituted by defendant against three of the police officers involved in the incident; the discrepancies in the testimony of two officers during a prior trial; and the fact that defendant's motion was timely, made in good faith, and well-supported are factors showing necessity for sequestration. While defendant's arguments are persuasive, we find no abuse of discretion on the part of the trial judge in refusing to sequester the witnesses. Due process does not automatically require separation of witnesses who are to testify to the same set of facts.

The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976). We find nothing to indicate that the testimony of any of the State's witnesses was influenced by the testimony of any other witness. We are not persuaded that the existence of a separate civil suit by defendant against three police

officers involved in the incident tended to influence the testimonies during the trial hereunder. We find nothing in the record to indicate the existence or nature of alleged discrepancies in the testimony of two police officers during a prior trial.

In general, "the trial and disposition of criminal cases is the public's business and ought to be conducted in open court. The public, and especially the parties, are entitled to see and hear what goes on in court." 1 Brandis on North Carolina Evidence § 20, *quoting, In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed. 2d 297 (1979). Defendant received a fair trial. Contrary to defendant's contention, we find no violation of defendant's right to confront and cross-examine witnesses.

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. WILLIE LEE O'NEAL

No. 832SC269

(Filed 6 March 1984)

1. Criminal Law § 128.2— motion for mistrial—retroactive allowance after trial had ended

Where defendant made a second motion for mistrial during a second degree murder case on the ground that the jury could not agree within a reasonable time, the jury thereafter returned a verdict finding defendant guilty of voluntary manslaughter, and five days later defendant filed a motion for appropriate relief seeking a new trial because the court erroneously instructed the jury on the issue of the use of excessive force, the trial court exceeded its authority in thereafter retroactively allowing defendant's motion for a mistrial because the jury could not agree within a reasonable time. G.S. 15A-1061; G.S. 15A-1062; G.S. 15A-1063.

2. Criminal Law § 126.3— acceptance of verdict

The trial court accepted the jury's verdict when it received the jury's answers to six of the seven special issues submitted, later received the jury's answer to the seventh special issue, and continued sentencing until the following week.

3. Criminal Law §§ 26.3, 177— remand for retrial of one issue—double jeopardy

Where the jury in a second degree murder case, in returning a verdict of guilty of voluntary manslaughter, properly answered six of the seven special issues submitted to it, but the trial court erred in its instructions on the seventh issue as to whether defendant used excessive force, a new trial will be granted only on the issue of excessive force. Furthermore, a retrial on the untainted issues would violate defendant's right against double jeopardy under the doctrine of collateral estoppel.

APPEAL by defendant from *Bruce, Judge*. Order entered 13 October 1982, in Superior Court, BEAUFORT County. Heard in the Court of Appeals 14 November 1983.

Defendant, Willie Lee O'Neal, was indicted on a single count of murder, and the State elected to try him for second degree murder. Defendant, a police officer who was off duty at the time of the shooting, did not deny shooting the deceased, but presented evidence that the deceased fired and that he fired only in self-defense.

The case was originally submitted on a general verdict form. After three hours of deliberation, the jury returned to ask a question about the law. Then, after a lunch break, the court submitted an additional special verdict form containing seven issues. Some two and one-half hours later, the jury returned, stating they had answered six issues but could not agree on the seventh. The court instructed them to resume deliberations.

An hour and one-half later defendant moved for a mistrial because the jury could not agree within a reasonable time. The court denied the motion. Twenty minutes later defendant unsuccessfully renewed his motion. The jury then returned and indicated it still was unable to agree on the remaining issue. The court thereupon took its verdict with the following result:

The jury answered the questions in open court as follows:

1. Yes
2. Yes
3. No
4. No
5. No answer

6. No

7. Yes

The unanswered issue was whether or not defendant had used excessive force. The court then erroneously instructed the jury on the issue, telling them that defendant had a duty to retreat and not use deadly force unless the retreat itself would endanger him. Twenty minutes later the jury reached a unanimous verdict that defendant had used excessive force. Accordingly, they returned a verdict of guilty of voluntary manslaughter. Sentencing was continued to the following week.

Five days later defendant filed a motion for appropriate relief, asking that the verdict on the last issue be set aside and that the court grant a new trial solely on that issue. The court found facts as outlined above, including a finding that the last instruction was erroneous. It concluded that its order denying defendant's second motion for mistrial "was contrary to law," and that defendant was entitled to a mistrial at that time. The court therefore declared a mistrial and granted a new trial on all issues; concluding that by making his motion for mistrial, defendant waived his right to plead former jeopardy at the new trial. From this order defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Gaskins, McMullan & Gaskins, P.A., by Herman E. Gaskins, Jr., for defendant appellant.

JOHNSON, Judge.

Although this appeal is interlocutory, in that no final judgment was entered, we have elected in our discretion, and in aid of our jurisdiction, to treat the "appeal" as a petition for writ of certiorari and proceed to address the merits of the case. G.S. 7A-32(c); App. R. 21(a); *Ziglar v. Du Pont Co.*, 53 N.C. App. 147, 280 S.E. 2d 510, *disc. review denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981).[1]

1. As discussed *infra*, we hold that the trial court had no authority to declare a mistrial when it did. Therefore, mandamus would also lie. G.S. 7A-32(c); App. R. 22; *State v. Surles; State v. Barnes; State v. Williams & State v. Sutton*, 55 N.C. App.

I

[1] We hold first that the court exceeded its authority in declaring the mistrial over defendant's objection. G.S. 15A-1061 empowers the trial court to declare a mistrial "Upon motion of a defendant or with his concurrence. . . ." Defendant's motions for a mistrial were made before the jury first announced its verdict (with six of seven issues answered). Defendant contended in his motions that the jury was apparently unable to agree within a reasonable time. The court denied both motions. Then the jury returned its verdict, first with the unanswered issue and then with all issues answered. To retroactively declare a mistrial, after the jury had returned a verdict which even with the erroneous finding amounted to an acquittal on the murder charge, goes far beyond any concurrence which may be implied from the motions themselves. To do so ignores the very purpose of defendant's motions. Defendant's limited motion for a new trial also cannot be construed as concurrence to a general declaration of a mistrial and a new trial on all issues.

In addition, the court may exercise its power under G.S. 15A-1061 only "during the trial." Here, the court expressly found that 11 motions for mistrial made by defendant *during the course of the trial* were denied. Thus, it is evident that the court lacked authority to declare a mistrial under G.S. 15A-1061. Although the court did not specifically refer to this section in its order, by ruling that defendant waived his right to raise former jeopardy by making his motions, it may be inferred that the court looked to this section for its authority, and thereby erred. Furthermore, the State did not move for a mistrial. The record reveals no misconduct sufficient to trigger the State's right to make such a motion. The court therefore had no authority to declare a mistrial under G.S. 15A-1062.

G.S. 15A-1063 allows the court to declare a mistrial on its own motion, if "(1) It is impossible for the trial to proceed in conformity with law; or (2) It appears there is no reasonable probability of the jury's agreement upon a verdict." Although it may have appeared at one point that there was no reasonable probability for the jury reaching agreement, the court gave addi-

179, 284 S.E. 2d 738 (1981), *disc. review denied*, 305 N.C. 307, 290 S.E. 2d 707 (1982). We grant certiorari to more fully review the complex issues involved.

tional instructions and the jury did in fact reach a verdict. The fact that part of that verdict was tainted by an erroneous instruction does not justify a mistrial. Nor does this appear to be one of the "limited number of situations" where further proceedings are impossible. *See* G.S. 15A-1063, Official Commentary. No deaths or natural catastrophes occurred during the trial, *id.*; no juror became intoxicated, *see State v. Tyson*, 138 N.C. 627, 50 S.E. 456 (1905); or insane, *see State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930); the court was not incapacitated, *see State v. Boykin*, 255 N.C. 432, 121 S.E. 2d 863 (1961); no tampering took place, *see State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *disc. review denied and appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 442 (1980). In short, nothing occurred which justified an order of mistrial for impossibility. We, therefore, conclude that the court had no authority under any section of the Criminal Procedure Act to order a mistrial.[2]

We also find no justification for the court's declaration of mistrial five days after the jury had been discharged. The obvious purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function. Once the court has discharged the jury, there is no purpose in ordering a mistrial: the proceedings may be determined by rulings of the court on matters of law, including new trial motions. The retroactive declaration of a mistrial upon reconsideration has no valid basis in policy or law. *See State v. Aldridge*, 3 Ohio App. 3d 74, 443 N.E. 2d 1026 (1981) (vacating order reviving and granting a previously denied defense motion for mistrial); *State v. Carey*, 290 A. 2d 839 (Me. 1972) (appellant "in no position" to urge motion for mistrial retroactively after verdict). This practice, if allowed, would impermissibly place a defendant who made *any* mistrial motion at *any* time in peril, subject to the unlimited discretion of the trial court, of losing his constitutional right to not be twice put in jeopardy for the same offense.

Since the trial court had no authority to declare a mistrial, its order is void and must be vacated. *State v. Bryant*, 280 N.C. 407, 185 S.E. 2d 854 (1972) (no jurisdiction or statutory basis for

2. G.S. 15A-1235(d) allows declaration of a mistrial on the same grounds as G.S. 15A-1063(2); G.S. 15A-1224 also provides for mistrial on death or disability of the trial judge.

order; vacated); *Insurance Co. v. Johnson*, 41 N.C. App. 299, 254 S.E. 2d 643 (1979) (no authority to correct legal error under G.S. 1A-1 Rule 60(a); order vacated).[3]

II

The court ordered a new trial on all issues, although defendant moved for a new trial only as to the one "tainted" issue. Here, special issues were submitted to the jury, as has long been acceptable (though not recommended) practice in criminal trials in this state. *See State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964); *State v. Belk*, 76 N.C. 10 (1877).[4] The court "took" the jury's verdict when it returned the third time, receiving answers to six of the seven issues. It then gave the erroneous instruction and shortly thereafter received the seventh answer. Sentencing was postponed; five days later defendant made his limited new trial motion.

A

[2] The State argues that the court did not "accept" the jury's verdict; therefore defendant has no right to it, and accordingly a new trial on all issues is proper. In *State v. Hampton*, 294 N.C. 242, 247-48, 239 S.E. 2d 835, 839 (1978), the Supreme Court discussed the circumstances under which the trial court must accept a verdict:

> A verdict is a substantial right and is not complete until accepted by the court. *State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651 (1966). The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. *Davis v. State*, 273 N.C. 533, 160 S.E. 2d 697 (1968). In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict.

3. Arguably, the court's order could be treated as a new trial order. However, since the new trial issue is treated separately, we do not discuss this question here.

4. The court also submitted a general verdict; however, where special issues are used, no general verdict should be submitted, but the court should announce its conclusion of law as to innocence or guilt based on the jury's findings. *State v. Ellis, supra.*

> Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded.

The criminal cases governing this situation do not include special issues answered separately, or continued sentencing. But the court here could easily have passed judgment on the issues as answered. The fact that sentencing was continued does not detract from the finality of the jury's findings. Nothing before us suggests that the verdict itself, and especially the answers to the first six issues, was "not responsive" or "incomplete, insensible or repugnant." The underlying error of law may have tainted one of the answers, but retroactive refusal to accept the verdict is not the proper method of curing the defect. We also note that the presence or absence of formal words of acceptance does not determine this question. *See State v. Caudle*, 58 N.C. App. 89, 293 S.E. 2d 205 (1982), *cert. denied*, 308 N.C. 545, 304 S.E. 2d 239 (1983).

We therefore conclude that nothing justified the exercise of the court's "limited legal discretion" to reject the verdict and that by "taking" it and postponing sentencing, the court did in fact "accept" it.

B

[3] The court found as a fact that the instruction on excessive force was erroneous. We agree. *See State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979). In this case, defendant has clearly met his burden of establishing prejudice, and a new trial is required. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974). Since, however, the jury has heard the evidence, deliberated, and without error returned a verdict as to the other six issues, no new trial is required on these issues. Neither the State nor defendant is entitled to one. *State v. Ellis, supra* (paternity and nonsupport issues; error as to nonsupport issue did not entitle defendant to new trial on paternity issue).

C

In addition, to grant a new trial on all issues would violate a fundamental constitutional right of defendant. The right to not be

twice put in jeopardy for the same offense "is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence." *State v. Crocker*, 239 N.C. 446, 449, 80 S.E. 2d 243, 245 (1954). It has always been an integral part of the law of North Carolina, now guaranteed by Art. I, § 19 of the Constitution. *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971). The Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, also guarantees this right. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). It is a substantial right, fundamental to the American scheme of justice.

In *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970), the United States Supreme Court held that this right included the doctrine of "collateral estoppel," which precludes relitigation of issues of ultimate fact. Although *Ashe* does technically require a "valid and final judgment," it dealt only with general verdicts, and the rules of construing them. In a case like this, where a large number of special issues are submitted, and error is committed only as to one, we see no reason to apply this rule in defendant's case.[5] As the Supreme Court cautioned in *Ashe*, "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444, 25 L.Ed. 2d at 475, 90 S.Ct. at 1194. Realism and rationality require us to hold that retrial on the untainted issues would violate the rule and thus defendant's constitutional right. Defendant came before the court of justice, both sides presented their evidence, and the jury deliberated and pronounced its verdict as to six of seven issues. After a clearly erroneous instruction, the jury pronounced its verdict on the seventh. The court was ready to sentence defendant based on these findings. Defendant has shown that the erroneous instruction entitles him to a new trial. In fairness he should not have to "run the gauntlet" again from the beginning. We believe a retrial on all issues, in the limited circumstances before us, is too harsh a result.

We conclude, then, that defendant is entitled a new trial, limited to the one issue of whether or not he used excessive force

5. The rationale for a less restrictive view of what are "final" judgments is well explained in 1B Moore's Federal Practice, § 0.441[4] (1983).

in his defense. The court will be able, with the jury's answer to that question, to pass judgment as a matter of law on defendant's innocence or guilt.

III

The jury found as fact that although defendant intentionally shot the deceased and thus proximately caused his death, he did so in the reasonable belief that the shooting was necessary to protect himself from death or great bodily injury. It also found that defendant was not the aggressor and did not act in the heat of passion. Therefore, defendant has established at least an "imperfect" right of self-defense and can at most be convicted of voluntary manslaughter. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981). Accordingly, the second degree murder charge must be dismissed.

IV

In conclusion, we hold that the court's order of 13 October 1982 must be vacated and a new trial conducted. However, inasmuch as all issues except the issue of excessive force have been fully adjudicated, the new trial must be limited to that issue. We remand for further proceedings consistent with this opinion.

Vacated and remanded.

Chief Judge VAUGHN and Judge WELLS concur.

WILLIAM H. DIXON v. ANNE C. DIXON

No. 834DC295

(Filed 6 March 1984)

1. Divorce and Alimony § 25.11— award of custody—insufficient findings—findings unsupported by evidence

The findings of fact in an order awarding custody of the minor child to defendant-wife were not supported by competent evidence and failed to treat an important question raised by the evidence. There was no support for the findings concerning defendant's work schedule and housekeeping abilities, her enrollment in various parent training programs, or support for the finding that the child is "active in school and extracurricular activities" since the child was

preschool age at the time of the custody hearing. Further, there was evidence that defendant abused the minor child, and the only findings of fact potentially addressing this issue were the findings that defendant enrolled in two courses designed to improve her knowledge and understanding of how to cope with physiological, psychological, nutritional and medical problems associated with child rearing, and further findings that defendant stated she now uses "less force" in dealing with her son, and that she intends to continue whatever further training might be necessary to make her a better mother.

2. Divorce and Alimony § 24.11— award of child support—no abuse of discretion

An award of child support in a custody order which was based upon affidavits of the respective parties was not a gross abuse of judicial discretion amounting to reversible error since evidence of the minor child's reasonable needs and expenses, and evidence of the plaintiff's ability to pay were presented and duly considered by the court.

APPEAL by plaintiff from *Martin (James N.), Judge.* Orders entered 27 May 1982 and 4 October 1982 (two orders) in District Court, ONSLOW County. Heard in the Court of Appeals 13 February 1984.

This is an action brought by plaintiff for absolute divorce and custody of one child born of the marriage. At the time the action was brought the parties had separated and at some point after their separation entered into a written separation agreement which gave one-year temporary custody of the child to the plaintiff. Defendant filed an answer and counterclaim for divorce from bed and board, custody, child support and alimony. Plaintiff subsequently obtained an absolute divorce from the defendant in another action. A hearing was held on the issues of child support and custody on 27 February and 11 March 1981 and the court entered its order on 9 April 1981 awarding custody to the defendant and ordering plaintiff to pay $300.00 per month in child support.

This order was the subject of the first appeal in this matter. In an unpublished opinion, this Court concluded that the order did not contain sufficient findings of fact to support the conclusion of law that it would be in the minor child's best interest to award the defendant custody, and that there was insufficient evidence to support the finding of fact pertaining to the child's reasonable financial needs. The Court vacated this original order and remanded the case for further findings and a hearing on the child's needs and expenses.

After its custody order was vacated, the trial court issued an order for rehearing on 23 April 1982 on the issue of the child's reasonable financial needs, which order also awarded temporary custody of the minor child to defendant pending further order of the court. The parties then submitted affidavits of financial standing, and stipulated that the court might resolve the issue of child support based on those affidavits alone. On 27 May 1982, the court issued a new order containing additional findings of fact and additional conclusions of law, based on the court's recollection of evidence taken at the original hearing, such recollection being refreshed by notes taken by the court during the proceedings. This order again awarded custody of the child to defendant, and also ordered that $300.00 per month be paid by plaintiff as child support.

After this order was entered plaintiff moved for a new trial, moved that the 23 April 1982 order be vacated in that the court was without jurisdiction to award temporary custody, and also issued a subpoena to Judge Martin ordering him to produce the notes he took at the hearing and which he used to refresh his memory of the evidence produced at the hearing in order to write the 27 May 1981 custody and support order. Judge E. Alex Erwin, III subsequently issued an order quashing the subpoena pursuant to defendant's motion and also issued two orders on 4 October 1982 denying plaintiff's motions for a new trial and declining to vacate the 23 April 1982 order.

Plaintiff appeals from Judge Martin's 27 May 1982 order and from Judge Erwin's 4 October 1982 orders.

Gene B. Gurganus, for plaintiff appellant.

Earl C. Collins, for defendant appellee.

VAUGHN, Chief Judge.

[1] The primary issue in this appeal is as follows: In the 27 May 1982 order awarding custody of the minor child to the defendant, are the trial judge's findings of fact supported by competent evidence such that the award of custody will not be disturbed on appeal? After a careful examination of the evidence as set forth in the record, we are compelled to answer this question in the negative. The order must be vacated because important findings

of fact are unsupported by the evidence, and because a crucial issue raised by the evidence and bearing directly upon the question of custody, that is, defendant's history of child abuse, was never adequately resolved by the trial court in its order.

The law in North Carolina regarding the awarding of custody of minor children was well-summarized by former Chief Judge Morris in *Green v. Green*, 54 N.C. App. 571, 284 S.E. 2d 171 (1981):

> G.S. 50-13.2(a) provides that an order for custody of a minor child "shall award the custody of such child to such person, . . . as will, in the opinion of the judge, best promote the interest and welfare of the child." This provision codified the rule declared many times by the North Carolina Supreme Court that in custody cases the welfare of the child is the polar [sic] star by which the court's decision must be governed. . . . The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. . . . While the welfare of the child is always to be treated as the paramount consideration, . . . wide discretionary power is vested in the trial judge. . . . The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal. . . . The facts found must be adequate for the appellate court to determine that the judgment is sustained by competent evidence, however. . . .

Id. at 572-3, 284 S.E. 2d at 173. (Citations omitted.)

That the findings of the trial judge regarding custody and support are conclusive when supported by competent evidence, *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E. 2d 197 (1976), is true even when the evidence is conflicting, *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967), the standard for disturbing the trial judge's decision on appeal being "a clear showing of abuse of discretion." *King v. Demo*, 40 N.C. App. 661, 668, 253 S.E. 2d 616, 621 (1979). Put otherwise, a custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest

of the child, *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967), and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. *See, e.g., Hunt v. Hunt*, 29 N.C. App. 380, 224 S.E. 2d 270 (1976); *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971). A custody order will also be vacated where the findings of fact are too meager to support the award. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977).

A custody order may contain extensive findings of fact and still be fatally defective—when the findings of fact are not supported by the evidence. The 27 May 1982 order is defective in precisely that regard. Furthermore, the order fails to deal with evidence pertaining to defendant's history of child abuse, and an order for custody will also be deemed fatally defective when it fails to treat an important question raised by the evidence.

As to the first defect, an examination of the evidence adduced at the custody hearing reveals that a number of Judge Martin's findings of fact have no foundation in that evidence. For example, this Court finds no support for the findings concerning defendant's work schedule and housekeeping abilities, or for the finding that her enrollment in various parent training programs enhanced her parenting abilities, the evidence only showing that she took the courses. Nor is there support for the finding that the child is "active in school and in extracurricular activities," the child having been of preschool age at the time of the custody hearings. These findings appear to be just the sort of "ritualistic recitations" discouraged by this Court in *Montgomery v. Montgomery, supra.*

In *Green v. Green, supra*, the court vacated a custody order where the court concluded after an examination of the record that a number of findings of fact were unsupported by the competent evidence, and that the remaining findings were insufficient to support the conclusion that it was in the child's best interest to award custody to her father. Likewise at bar, once the unsupported findings are removed from the court's consideration, the remaining findings of fact do not support the award of custody to the defendant.

As to the second ground on which the order can be vacated, the findings in a custody order "bearing on the party's fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto." *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E. 2d 45, 48 (1978). In *Kowalzek*, the court found that questions concerning the wife's leaving her husband and child, and her subsequent failure to inquire about her child for several months after being notified of her husband's death were not resolved in the order awarding her custody, and the order was vacated.

At bar, there is evidence that defendant abused the minor child. Plaintiff testified that defendant had started abusing the child when it was an infant, that he once observed her jabbing the child's buttocks with a diaper pin, and several times returned home from work to find defendant beating their child. Two former baby-sitters for the child gave testimony relating to the defendant's abuse of her child, and both of defendant's parents testified that defendant was too strict with her son, although they denied ever having seen evidence of mistreatment. According to a letter to the court from the Onslow County Department of Social Services, which letter evaluated each parent's fitness for custody, the department had received three child abuse reports on the defendant, two of which were substantiated.

The only findings of fact potentially addressing the defendant's tendency to corporally punish her child in an abusive way is the finding that defendant enrolled in two courses designed to improve her knowledge and understanding of how to cope with physiological, psychological, nutritional and medical problems associated with child rearing, and further findings that defendant stated she now uses "less force" in dealing with her son, and that she intends to continue whatever further training might be necessary to make her a better mother.

Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child, and it is clear that the findings of fact at bar do not adequately resolve the issue of child abuse raised by the evidence in the record. We do not here imply that the evidence establishes that defendant is

currently abusing her child, nor do we hold that any evidence of child abuse means that the abusing parent has permanently forfeited any right to ever gain custody. We do hold, however, that the nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. This was not done and the order is therefore vacated and the case remanded for a *new hearing* on the issue of custody.

[2] Although the errors of the trial court in awarding custody alone demand that the order be vacated and the case remanded for a new hearing, we will also treat here plaintiff's assignment of error concerning child support so that the trial court will be guided by proper authority in setting child support in its new order.

In *Poston v. Poston*, 40 N.C. App. 210, 252 S.E. 2d 240 (1979), our Court vacated a support order, stating that

> [t]o support an award of payment for support, the judgment of the trial court should contain findings of fact which sustain the conclusions of law that the support payments ordered are in "such amounts as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

Id. at 212, 252 S.E. 2d at 241 (*quoting* G.S. 50-13.4(c) (citations omitted)). The standard for reviewing child support orders resembles that for reviewing awards of custody, in that the amount of child support allowed by the trial judge will be disturbed only when there is an abuse of discretion. *Sawyer v. Sawyer*, 21 N.C. App. 293, 204 S.E. 2d 224, *cert. denied*, 285 N.C. 591, 205 S.E. 2d 723 (1974). *Accord, Evans v. Craddock*, 61 N.C. App. 438, 440-1, 300 S.E. 2d 908, 910 (1983) (uphold child support order if competent evidence supports it, even if there is conflicting evidence).

Although the survival of the child support portion of Judge Martin's order upon remand will depend on the award of custody at rehearing, we note that the award of child support in the 27 May 1982 order in the amount of $300.00 per month based upon the affidavits of the respective parties was not a gross abuse of

judicial discretion amounting to reversible error. An order for child support will necessarily be vacated where there is no evidence offered as to a party's ability to pay, *Williams v. Williams*, 18 N.C. App. 635, 637, 197 S.E. 2d 629, 630 (1973), or where there is no evidence as to the child's needs and expenses. *Gordon v. Gordon*, 46 N.C. App. 495, 265 S.E. 2d 425 (1980) (party presented evidence of needs and expenses of only one of two children for whom support was sought).

This was not the case at bar, where evidence of the minor child's reasonable needs and expenses, and evidence of the plaintiff's ability to pay were presented and duly considered by the court. Plaintiff's argument that defendant's affidavit does not contain the child's "actual past expenditures," *see Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978), must fail.

Defendant's 4 May 1982 affidavit was for estimated monthly expenses on 27 February 1981, the initial date on which the custody and support hearing was held. The fact that the minor child was not actually living with the defendant on that date is not dispositive. First, some of the expenditures listed in defendant's affidavit were presumably actual, such as rent, car payment and other fixed monthly expenses. Second, the child had resided with his parents until their April 1980 separation, and continued to visit with the defendant thereafter. Defendant thus had an ample and actual factual basis on which to base the figures contained in her affidavit. *See Falls v. Falls*, 52 N.C. App. 203, 214, 278 S.E. 2d 546, 554, *review denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981) ("Although the wife admitted that the monthly figures in her affidavit include amounts which do not represent actual present expenditures such as summer camp which the children may or may not attend, that testimony does not vitiate the award").

Our resolution of the assignments of error concerning custody and child support disposes of this appeal, and it will therefore not be necessary to consider plaintiff's other assignments of error.

Vacated and remanded.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. EMERY A. BRADLEY

No. 8327SC58

(Filed 6 March 1984)

1. **Criminal Law § 112.7— requested instruction on alibi—harmless error in failure to give**

The trial court erred in failing to give defendant's requested instruction that "if, upon considering all the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, you must find him not guilty," but such error was not prejudicial to defendant where the trial court adequately instructed the jury on the defendant's contention that he was present at his home at all times during the perpetration of the robbery in question and made it clear that the burden remained on the State, when all the evidence was considered, to prove each element of the offense beyond a reasonable doubt.

2. **Criminal Law § 112.7— confusing instructions on State's theory and alibi—no prejudicial error**

Although there was potential confusion from the court's placement of a detailed statement of the State's theory that defendant planned and procured a robbery but had left the scene before the robbery was committed in the middle of an instruction on the legal effect of alibi evidence, which included the words "even if defendant was not at the scene when the events occurred," any possible prejudice to defendant was neutralized when the court, in stating defendant's contentions, made it clear that defendant relied on alibi evidence and contended that he was at his home until after the time of the robbery and took no part in either the planning or the commission of the robbery.

3. **Criminal Law § 163— failure to object to instructions—no plain error**

The trial court's summary of the State's evidence in an armed robbery case and its instructions on the element of intent permanently to deprive the victim of the property did not constitute "plain error" which would require a new trial despite defense counsel's failure to lodge a contemporaneous objection at trial. App. R. 10(b)(2).

4. **Criminal Law § 102.10— jury argument—no prejudicial error**

The prosecutor's jury argument in a robbery case concerning defendant's regular receipt of shoplifted goods was not prejudicial error, notwithstanding the court had suppressed defendant's statement relating thereto, where defendant failed to object to the argument, and where defense counsel first brought up the matter, apparently realizing that defendant's activities could easily be inferred from other admissible evidence.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 10 September 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 28 September 1983.

Defendant was tried on a single indictment for armed robbery. The State's evidence tended to show the following: Robert Shaw, Wade Henderson and defendant, Emery Bradley, were acquaintances. On 30 April 1982, defendant picked up Shaw and Henderson and drove them from Charlotte to a shopping mall in Gastonia. There he talked with Shaw and Henderson about making some money. Defendant supplied them with pistols and pillow cases and told them he would shoot them if they did not rob a jewelry store in the mall. After showing Shaw and Henderson where he would wait for them, defendant dropped them off. Shaw and Henderson entered the store twice, committing an armed robbery the second time. Henderson escaped with some $48,000 worth of jewelry; Shaw ran the wrong way and arrived at the designated spot after the defendant had driven off. Police captured Shaw shortly thereafter, and arrested defendant three days later. A ring identified by the store owner as one exactly like the rings stolen from the store was found on the defendant's dresser at the time of his arrest.

Defendant did not testify but presented alibi evidence from his girlfriend and another who lived at his house that they had been at the house with defendant at the time of the commission of the crime and had not seen him leave. Defendant's girlfriend testified that Henderson had borrowed defendant's car and returned it several hours later.

The jury found defendant guilty, and he received a sentence of 14 years imprisonment. From the verdict and judgment imposed, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

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

JOHNSON, Judge.

Defendant assigns error to the jury charge and to statements by the prosecutor in his argument to the jury.

[1] First, defendant assigns error to that portion of the charge regarding the defense of alibi. Defendant submitted a timely writ-

ten request for an instruction on alibi, however, the court's instruction was not a verbatim recitation of defendant's requested instruction. Defendant argues that the following portion of his requested instruction was omitted from the instruction actually given by the trial court and that this omission constitutes prejudicial error.

> The defendant's contention that he was not present and did not participate is simply a denial of facts essential to the State's case.
>
> Therefore, I charge that if, upon considering all the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, you must find him not guilty.

In response to defendant's request for instruction, the trial court instructed the jury as follows:

> The defendant relies upon the defense of alibi. The defendant contends that he was at some other place at the time of the formulation of the plan to commit the robbery and at the time of the robbery. The word alibi simply means somewhere else. The burden of proving alibi does not rest upon the defendant. [T]o establish the defendant's guilt, [t]he State must prove beyond a reasonable doubt that the defendant counseled, commanded, or procured, or knowingly aided [Shaw and] Henderson in the commission of the armed robbery even if he was not at the scene when the events occurred. If the State fails to meet the burden, you shall find the defendant not guilty.

Defendant first argues that the trial court erred by omitting that portion of his requested instruction reprinted above and by substituting for it a detailed factual statement of what the State must nevertheless prove. Defendant contends that the omitted portion of the alibi instruction was critical since it is the portion which makes it clear to the jury that if the evidence with respect to alibi *considered together with all the other evidence* raises a reasonable doubt that defendant participated in the crime, he should be found not guilty. Further, that the placement of an instruction on the law arising on the State's evidence in the very middle of the instructions on the law arising on the defendant's

evidence had the practical effect of nullifying the effect of the alibi instruction.

When a defendant in apt time specifically requests an instruction on alibi evidence which has been introduced, he is entitled to such an instruction. *State v. Cox*, 296 N.C. 388, 250 S.E. 2d 259 (1979); *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973). Moreover, in *State v. Hunt*, the Supreme Court stated that when an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to a request, such statement must be correct, and the substance of the alibi instruction must accord with that approved in *State v. Minton*, 234 N.C. 716, 726-27, 68 S.E. 2d 844, 851 (1952) and *State v. Spencer*, 256 N.C. 487, 489, 124 S.E. 2d 175, 177 (1962). The approved charge is as follows:

> An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal.

"Alibi" is simply evidence contradictory of the State's evidence that defendant committed the alleged crime where *presence* is necessary for conviction. In such a case, evidence that defendant was at another place, if it raised a reasonable doubt in the minds of the jurors, would properly result in an acquittal under the reasonable doubt instruction. *State v. Hunt, supra* at 624, 197 S.E. 2d at 518. It is essential that the jury understand that a reasonable doubt may arise out of the defense testimony as well as the State's. *Id.* at 625, 197 S.E. 2d at 519. Hence, the approved instruction contains a statement substantially similar to the sentence omitted from the instructions request in this case, that "if, upon considering all the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, you must find him not guilty."

We agree with defendant that he was entitled to the omitted portion of the alibi instruction, pursuant to his request, under *State v. Cox, supra* and *State v. Hunt, supra*. Furthermore, we

agree that the placement of a detailed statement of the State's theory that defendant was involved in the offense but had left the scene before the crime was committed, in the middle of an instruction as to the legal effect of alibi evidence, was potentially confusing to the jury. However, these errors cannot be considered prejudicial in this case.

With regard to the omitted sentence, the trial court had earlier in the charge adequately instructed the jury on the defendant's contentions that he was present at his home at all times during the perpetration of the robbery and that Henderson returned the defendant's car at some time later during the morning of the robbery and at that point gave defendant a ring. In addition, the trial court, in the course of the charge made it clear that the burden remained on the State, when all the evidence was considered, to prove each element of the offense beyond a reasonable doubt. In this respect, the charge read as a whole and construed contextually, contained no prejudicial error. *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970).

[2] Defendant's argument regarding the juxtaposition of an incomplete alibi instruction and a statement regarding the State's theory of aiding and abetting is more problematic. In a related argument, defendant contends that the trial court erred in the alibi instruction when it included the words "even if he was not at the scene when the events occurred" because there was no evidence to support a conviction on the theory that defendant was involved in the planning of the offense but was not actually or constructively present at the mall in Gastonia or in the vicinity thereof. Defendant contends that the statement suggested to the jury a theory not supported by any evidence, to wit: that defendant planned or procured the commission of the offense either sometime prior to the morning of 30 April 1982 or at the time defendant loaned the car to Shaw and Henderson while they were at his house that morning.

The record shows that Shaw, on direct examination, testified expressly that defendant and another man had in effect coerced him and Henderson into committing the robbery once they were all together in defendant's car approaching Gastonia. The defendant's evidence, on the other hand, showed that defendant was home in bed at the time according to Shaw, that the robbery was

allegedly *planned and perpetrated*, and that he had simply loaned his car to the perpetrators earlier that morning with no knowledge of their intentions. Therefore, it was crucial to the defense that the jury be adequately instructed as to the way in which defendant's alibi evidence tended to contradict the State's factual contention that defendant planned the robbery and procured Shaw and Henderson to perpetrate the crime while he was with them in Gastonia that morning.

It is evident that the alibi instruction was confusing on precisely this point, that is, the relation between the State's theory of aiding and abetting (that defendant planned and procured the crime while he drove the perpetrators to the mall and then left the scene) and the defendant's theory that he was not present when the crime was planned and committed. The confusion was created by the juxtaposition of the two theories in the course of incomplete instruction on the legal effect of alibi evidence, and compounded by the addition of the phrase, "even if [defendant] was not at the scene when the events occurred." In short, the instruction as given tends to undermine the thrust of the defense that defendant was "somewhere else."

Under G.S. 14-5.2 a defendant not actually or constructively present at the scene is guilty and punishable as a principal if it be shown that he counseled or procured or commanded the others to perpetrate the crime. Obviously, "at the scene" in this context would refer to defendant's not being at the jewelry store itself when Shaw and Henderson staged the robbery, nor waiting nearby with the car for them as he was supposed to be. In other words, "scene" would refer to the actual perpetration of the robbery. To that extent, the court's statement regarding defendant's whereabouts was not incorrect. However, under the facts of this case, the potential for confusing the jury was created by the fact that the jury could have understood the statement to refer to the defendant's contention that he was not present for the *planning* of the robbery either. In such a case, the defense of alibi would not be merely undermined, but rendered nugatory.

A close reading of the entire charge, contextually and not in isolated portions, however, leads to the conclusion that the potential for prejudice to defendant was effectively neutralized. The trial court, in stating the factual contentions of the defendant,

made it quite clear that defendant was relying upon the defense of alibi; contending that he was present at his home until after the time of the robbery; and that when Henderson returned the defendant's car on that morning after the robbery, he brought defendant a ring. Then, in the final mandate to the jury, the trial court instructed as to the several elements of the crime which the state must prove beyond a reasonable doubt. The court then instructed the jury:

> However, if you do not find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Therefore, the unfortunate juxtaposition of instructions within the alibi portion of the charge cannot be considered to have prejudiced defendant.

[3] Next, defendant contends the trial court erroneously summarized the State's evidence and erred in its instructions on the element of "intent to permanently deprive the victim of the property." Defendant's objections to these portions of the charge are made for the first time on appeal. Therefore, defendant has failed properly to preserve these exceptions for review. Rule 10(b)(2) of the Rules of Appellate Procedure provides in part:

> 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 objections out of the hearing of the jury and, on request of any party, out of the presence of the jury.

In the present case, the record reveals that immediately after the court had concluded its instructions to the jury but before they retired to deliberate upon its verdict, defense counsel requested and was granted a conference at the bench, after which the court (apparently at defendant's request) gave additional instructions. Thus, defendant had ample opportunity to object to these portions of the charge to which he now complains. The Rules of Appellate Procedure are mandatory and preclude review of these assignments of error in the absence of error so fundamental that we would invoke the power under Rule 2 to sus-

pend the rules and consider these assignments of error. *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982).

Defendant, however, contends that these alleged errors are so "fundamental" that a new trial is required despite defense counsel's failure to lodge a contemporaneous objection. We disagree. Nonetheless, we have reviewed the entire charge in considering defendant's first assignment of error and find no error so "plain" or "fundamental" as to require a new trial. We find that the trial judge's summary of the evidence was supported by substantial evidence, and that the trial judge's instruction sufficiently and properly apprised the jury of all elements of the crime.

[4] Defendant's final assignment of error regards statements by the prosecutor in his argument to the jury. The court had suppressed evidence that defendant had given a statement indicating that he regularly received shoplifted goods. Nevertheless, the prosecutor brought the matter up in argument. However, defendant again failed to object; "When counsel makes an improper remark in his argument to the jury, an exception must be taken before verdict or the alleged impropriety is waived." *State v. Morgan*, 299 N.C. 191, 207, 261 S.E. 2d 827, 837, *cert. denied*, 446 U.S. 986, 64 L.Ed. 2d 844, 100 S.Ct. 2971 (1980). Even if defendant had made a timely objection, the record indicates that he himself first brought the matter up, apparently realizing that defendant's activities could be easily inferred from other admissible evidence. In this context, we find no prejudice in the remarks, nor error in the court's failure to take action *ex mero motu*. *See State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976) (defendant might have "provoked" remarks).

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges BECTON and BRASWELL concur.

In re Tate

IN THE MATTER OF: CHRISTINE TATE D.O.B. 11/2/79

No. 8326DC210

(Filed 6 March 1984)

1. **Parent and Child § 1.6— termination of parental rights—sufficiency of evidence**

In a proceeding to terminate parental rights, the evidence supported a finding that appellant willfully left the minor child in foster care for two years without showing positive response to the significant efforts of the Department of Social Services to encourage her to strengthen her parental relationship with her child where the evidence showed a gradual abandonment of efforts to improve herself and her situation and to regain custody of her child.

2. **Parent and Child § 1.6— termination of parental rights—lack of substantial progress—sufficiency of evidence**

There was clear, cogent, and convincing evidence to support a trial court's finding of lack of substantial progress in a proceeding to terminate parental rights where appellant admitted she still had setbacks with her drinking, appellant was still unemployed despite having had three jobs and being able to work, and appellant still lived a nomadic life by changing her address twenty-four times from June 1980 to September 1982.

3. **Parent and Child § 1.6— termination of parental rights—finding of failure to pay reasonable portion of foster care—supported by evidence**

In a proceeding to terminate parental rights, there was ample evidence to support a finding and conclusion that appellant failed to pay a reasonable portion of the cost of foster care of the minor child where appellant conceded that she paid nothing toward the cost of foster care of her child since April 1981, more than a year before the filing of the petition, the record showed that appellant was able to pay support, and the announcement by the Department of Social Services of its intention to seek a termination of parental rights did not excuse appellant from paying support.

APPEAL by respondent Theresa G. Tate from *Bennett, Judge.* Order signed out of session 26 October 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 20 January 1984.

Tate K. Sterrett for respondent appellant.

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

Griffin, Gerdes, Mason, Brunson & Wilson, by James L. Mason, Jr., Guardian ad Litem for Christine Tate, appellee.

BRASWELL, Judge.

The mother of a minor child, Theresa G. Tate, appeals from an order terminating her parental rights pursuant to G.S. 7A-289.32(3) and G.S. 7A-289.32(4). Appellant brings forward seven questions for review, which can be classified into three groups: (1) those relating to the trial court's findings and conclusions under G.S. 7A-289.32(3); (2) those relating to the trial court's findings and conclusions under G.S. 7A-289.32(4); and (3) those relating to the trial court's conclusion that termination of parental rights was in the child's best interests. We find that there was clear, cogent and convincing evidence to support the trial court's findings, which in turn sustain the trial court's conclusions and order terminating appellant's parental rights. We accordingly affirm.

On 3 June 1980, by order of the trial court based upon a finding of dependency, the minor child, Christine Tate, was placed in the custody of the Mecklenburg County Department of Social Services. Thereafter periodic review hearings were held on 6 January 1981, 9 April 1981 and 18 September 1981 to review the appellant's progress towards overcoming her drug and alcohol abuse and mental problems, and towards stabilizing her life.

On 19 July 1982 the Department of Social Services filed a petition to terminate appellant's parental rights. The natural father and legal father had previously surrendered the child for adoption. A hearing upon the petition was held on 27 September 1982. Appellant was not present at this hearing, despite having been given notice and been advised by her attorney of the time of the hearing. Appellant's counsel did attend the hearing. After hearing evidence, the trial court entered an order terminating appellant's parental rights and containing the following pertinent findings of fact and conclusions of law to which appellant has excepted:

> 2. That Theresa Grose Tate willfully left said child in foster care for more than two years without showing positive response to significant efforts made by the Department of Social Services to encourage said mother to strengthen her parental relationship with her child; that the said mother failed to make and follow through with constructive planning for the future of the child; that while Mrs. Tate made some efforts, at least until about twelve months ago, to get her liv-

ing conditions straightened out so that she might have her child returned to her, to deal with her alcohol problem, and to support her child, the Court believes that in March of 1982, she ceased, without justification, efforts to secure and maintain a home and suitable employment so that she might care for her child. The Court finds that Ms. Tate is in no better condition with respect to providing for her child than she was before the child was removed from her. Additionally, Ms. Tate voluntarily terminated her relationship with Treatment Alternatives to Street Crime (TASC) and with the Randolph Clinic without completing rehabilitative programs designed to help her substance abuse problems.

3. That the mother has had a total of 16 visits since the child came into custody in June, 1980, but the Court does not feel that the seven visits she has made in the past year demonstrate a diligent effort to maintain a relationship with her child.

4. That the said Theresa Grose Tate failed, for a continuous period of more than six months next preceding the filing of this petition, to pay a reasonable portion of the cost of care of said child; that she paid a total of $120.00 since the child was placed in the care of the petitioner and has paid no support since April, 1981; and the Court finds that at least in March of 1982 Ms. Tate was working and quit her job because she did not wish to work on weekends.

5. That the Court concludes that the provision of G.S. 7A-289.32(3) relative to showing response to efforts of the petitioner to encourage the strengthening of the parent/child relationship requires a showing of some results from efforts to eliminate the conditions which lead [*sic*] to the removal of the child. This Court finds that the mother has not been successful in eliminating the conditions which lead [*sic*] to the removal of the child and has made only sporadic response to the Department's efforts.

6. That based upon the foregoing, the Court concludes as a matter of law that the petitioner has established grounds under G.S. 7A-289.32(3) and under G.S. 7A-289.32(4); and the Court further concludes that the best interests of this par-

ticular child require that the parental rights of the mother be terminated.

The text of the two grounds under G.S. 7A-289.32 which the judge found germane in his conclusions of law read (as of 26 October 1982) as follows:

> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
>
> (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

[1] Appellant's first argument is that the evidence did not support a finding that appellant willfully left the child in foster care for two years without showing positive response to the significant efforts of the Department of Social Services to encourage her to strengthen her parental relationship with her child because the evidence shows that appellant took several steps towards becoming a responsible person. We reject this argument.

Although the record shows that the appellant did indeed undertake to comply with the recommendations of the Department of Social Services and with court orders, and took steps on her own initiative to improve herself and her situation, it also shows a gradual abandonment of those efforts. As appellant candidly admitted at the September 1981 review hearing, since April 1981 she had quit attempting to comply with a parent-agency agreement which established goals for the parent to reach in order to regain custody of her child. Also, since April 1981,

although she had some income from the sale of her crafts, she had intentionally quit paying child support because she knew of another woman with a child in foster care who was not paying support. Since October 1981 appellant has had only two jobs: one as a waitress which lasted one day and another at Sharon Memorial Gardens in March of 1982 which lasted only one week. She quit the latter job because she had to work on Saturdays and she "wanted her weekends." Appellant was terminated by the Treatment Alternatives to Street Crime (TASC) program in September 1981 for her failure to remain in contact with the program and failure to pay the fee, without giving any indication that she was unable to pay the fee. Appellant was also terminated by Vocational Rehabilitation in December 1981 because appellant had not contacted them since 11 June 1981.

Appellant did continue to schedule visits with the child as late as 23 September 1982, the week of the termination hearing; however, appellant declined the petitioner's offer to schedule more frequent visits. Other than continuing the visits, albeit on an irregular basis, appellant effectively abandoned all efforts to regain custody of her child. In fact, appellant did not even attend the parental rights termination hearing.

The record shows that the Department of Social Services referred appellant to the Randolph Clinic for her drinking problems, to the Mental Health Center for her emotional problems, and to the Vocational Rehabilitation Division of the North Carolina Department of Human Resources and the Employment Security Commission for help in seeking employment. A social worker, Ann Barnes, tried to help appellant with her housing situation by contacting appellant's landlord in an attempt to persuade the landlord to permit appellant to remain in her apartment, by contacting appellant's mother to see if she would house appellant, and by referring appellant to the Salvation Army. Appellant declined Ms. Barnes' offer to accompany appellant in her search for housing and for employment. Ms. Barnes helped appellant clean her apartment and advised appellant to apply for food stamps. The Department of Social Services kept abreast of appellant's progress and in touch with the various other agencies. These efforts by the Department of Social Services were more than "significant"—they were diligent efforts.

We hold the record clearly supports the trial court's findings and conclusion that appellant willfully left the child in foster care for two years without showing positive response to "significant" efforts of the Department of Social Services to encourage appellant to strengthen her parental relationship with her child. The fact that appellant made some efforts within the two years does not preclude a finding of willfulness or lack of positive response. *See In re Moore*, 306 N.C. 394, 293 S.E. 2d 127, *rehearing denied*, 306 N.C. 565 (1982), *appeal dismissed*, --- U.S. ---, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983); *In re Burney*, 57 N.C. App. 203, 291 S.E. 2d 177 (1982).

[2] Appellant next argues that the trial court erred in making findings and conclusions to the effect that appellant has failed to show substantial progress in correcting the conditions which led to the removal of the child because: (1) the child was not removed for neglect, but for dependency, so the provision of G.S. 7A-289.32(3) requiring a showing to the court "that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect" is inapplicable; (2) if efforts have been made by the parent to strengthen the parental relationships, a finding of "lack of positive response" is precluded; and (3) the findings were not supported by clear, cogent and convincing evidence.

We reject these arguments. Implicit in the term "positive response" is that not only must positive efforts be made towards improving the situation, but that these efforts are obtaining or have obtained positive *results*. Otherwise, a parent could forestall proceedings indefinitely by making sporadic efforts for that purpose. As for the argument that progress is considered only when the child is removed for neglect, we note that the General Assembly deleted the "for neglect" language in G.S. 7A-289.32(3), effective 23 March 1983. G.S. 7A-289.32 (Cum. Supp. 1983); 1983 N.C. Sess. Laws Ch. 89, § 2.

There was clear, cogent, and convincing evidence to support the trial court's finding of lack of substantial progress. Appellant admitted she still had setbacks with her drinking. Appellant was still unemployed despite having had three jobs and being able to work. Appellant still lived a nomadic life—from June 1980 to

September 1982, appellant changed her address twenty-four times. Since October 1981, appellant had moved seven times.

[3] Appellant next argues that the trial court erred in finding and concluding that the appellant failed to pay a reasonable portion of the cost of foster care of the child because: (1) there was no evidence as to the cost of care of the child; (2) there was insufficient evidence of appellant's ability to provide support; and (3) appellant should be excused from paying support after the Department of Social Services announced its intention to seek a termination of appellant's parental rights. Again, we disagree.

Appellant concedes that she paid nothing towards the cost of foster care of her child since April 1981, more than a year before the filing of the petition. In July 1980, appellant was ordered to pay $10.00 per month for support. There is nothing in the record to indicate that appellant challenged this amount as being an unreasonable portion of the child care costs, therefore whether the amount appellant was ordered to pay is a reasonable portion of the costs is not before us. *In re Allen*, 58 N.C. App. 322, 293 S.E. 2d 607 (1982).

The record shows that appellant was able to pay support. The evidence shows that appellant is an able-bodied woman capable of working as a waitress or a maid. Appellant had three jobs while the child was in foster care. She quit one job where she had been earning $120 to $150 per week. She quit another job in March 1982 after working only a week because she did not want to work Saturdays. Vocational Rehabilitation had secured two job offers for her in July 1981, but there is no record of appellant's working during the months of July and August 1981. In September 1982, appellant indicated to a social worker she could make support payments from her craft sales. Appellant also indicated to the social worker that her attorney was upset because she had not been making support payments. Appellant told her she did not make any payments because she knew of another mother with a child in foster care who was not paying support and "she did not feel the need to comply with the Court Order" requiring appellant to pay $10.00 per week child support.

Finally, the announcement by the Department of Social Services of its intention to seek a termination of parental rights did not excuse appellant from paying support. A parent retains an

obligation to pay support up to the actual adjudication of termination of parental rights. Moreover, when a parent has forfeited the opportunity to provide some portion of the cost of the child's care by her misconduct, she "will not be heard to assert that . . . she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E. 2d 800, 802-803 (1982).

There was plenary evidence that appellant had demonstrated that she "will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child." G.S. 7A-289.22(1). When the mother left from visits with the child, the child did not cry. The visits would seldom last the whole hour because the mother would usually leave early or arrive late. There was an apparent lack of bonding with the mother. When placed in foster care the child was seven months old. At the time of termination, the child was not quite three years old. The mother had also demonstrated an inability to provide a stable environment.

The decision to terminate parental rights is often a heart-wrenching one for the court. On one hand, the court considers the interests of the parents who, despite shortcomings, have often formed a bond with his or her child. On the other hand, the court must consider the best interests of the child. When the interests of the child and parents conflict, the best interests of the child control. G.S. 7A-289.22(3); *In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982). This policy is reflected in G.S. 7A-289.31(a), which provides that although the court shall issue its order terminating parental rights upon a conclusion that one or more of the conditions authorizing termination exists, the statute still permits a judge to order that parental rights not be terminated if the judge shall go forward and make an adequate determination that the best interests of the child requires non-termination. Here, there was no such determination, and the order entered was correct. The requirements of the statute were fulfilled.

As stated by Justice Carlton's dissent in *In re Moore*, *supra*, at 407, 293 S.E. 2d at 134, "There are few losses, if any, more grievous than the abrogation of parental rights." We have examined the ends and the means used which achieved the results

in this case. Here, we note that the mother, the appealing parent, did not attend the trial even though she was given proper notice.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JAMES AVERY BILL HARRIS

No. 8326SC704

(Filed 6 March 1984)

1. **Criminal Law § 75.7— question as to defendant's address—no custodial interrogation**

An officer's question as to defendant's address, asked solely to obtain information so that the officer could fill out a waiver of rights form for defendant, did not constitute interrogation within the meaning of the *Miranda* decision, and defendant's statement of his address was properly admitted into evidence even though defendant had not been given the *Miranda* warnings prior to making the statement.

2. **Robbery § 5.4— armed robbery—failure to instruct on common law robbery**

The trial court in an armed robbery case did not err in failing to instruct on the lesser included offense of common law robbery where the evidence showed that defendant perpetrated the robbery with the threatened use of a shotgun, and there was no conflicting evidence with respect to the elements of the crime charged.

3. **Robbery § 5.2— armed robbery—actual danger or threat to victim—sufficiency of instructions**

The trial court's instructions in an armed robbery case adequately explained the element of actual danger or threat to the victim, and the court did not err in refusing to give special instructions tendered by defendant to make clear this element of the crime, where the evidence showed that defendant was armed with a shotgun contained in a four-foot tube; the victim saw the barrel of the shotgun inside the tube when defendant pointed it at her and saw the stock of the gun protruding from the other end of the tube; and on one occasion when defendant pointed the shotgun directly at the victim, she begged, "Please don't shoot me."

4. **Criminal Law § 119— oral request for instructions—no abuse of discretion in failure to give**

The trial court did not abuse its discretion in refusing to give defendant's requested instruction on alibi where the requested instruction was not submitted in writing and signed as required by G.S. 1-181.

5. Criminal Law § 134.4— policy of not sentencing armed robbers as youthful offenders

The trial court did not abuse its discretion under G.S. 148-49.14 in refusing to consider the possibility of youthful offender status for defendant because he had been convicted of armed robbery.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 10 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 January 1984.

Defendant was tried for robbery with a dangerous weapon. The evidence showed that on 9 December 1982 the Action Clean laundromat in Charlotte, North Carolina was opened for the day's business just prior to 7:00 a.m. by its manager, Vonnie Hodson. Shortly thereafter, defendant, wearing blue jeans and a green Army jacket, entered the store carrying a tube that was about four feet long and two inches in diameter. Defendant asked Mrs. Hodson for change for a dollar. As Mrs. Hodson bent down under the counter to unlock the cash box, the defendant pointed the tube at her and said, "Just give it all to me." Mrs. Hodson could see the barrel of a shotgun inside the tube and the stock of the gun at the other end of the tube. Defendant took the money from the cash box and told Mrs. Hodson to open the Coke machine which she did. Defendant complained that there was no money in the Coke machine and pointed the tube at Mrs. Hodson again who begged, "Please don't shoot me." Defendant told Mrs. Hodson to back out of his way and then he left the store.

On 18 December 1982 a young boy who had been in the store immediately prior to the robbery came into Action Clean and told Mrs. Hodson that he had just seen the man who committed the robbery going into the nearby Revco store. Mrs. Hodson contacted a security guard and went with him to the Revco store whereupon she identified the defendant as the man who committed the robbery. Mrs. Hodson also identified the defendant at trial as the man who robbed her.

At trial, defendant's mother, Mrs. Willa Mae Harris, testified that the defendant lived at 2848 Willow Street in Charlotte with her and the rest of her family. This address is located about 13 miles from the Action Clean store. She said that on the night before the robbery defendant worked at a temporary job until

midnight and that the next day he stayed home in bed until 3:00 p.m. She said defendant did not own a green Army jacket.

Police Officer C. H. Parker, who questioned the defendant subsequent to his arrest, testified that in the course of his questioning he asked the defendant for his address. Defendant said his address was 624-D Billingsly Road. Defendant's girl friend lived at this same address which was located near the Action Clean store. Officer Parker then advised defendant of his constitutional rights and asked him about the robbery. Defendant denied knowing anything about the crime.

The jury returned a verdict of guilty and defendant was sentenced to the statutory minimum term of 14 years. From the judgment entered, defendant appealed.

Attorney General Edmisten, by Associate Attorney Edmond W. Caldwell, Jr., for the State.

Appellate Defender Adam Stein and the Appellate Defender Clinic of the University of North Carolina School of Law, by James R. Glover, for defendant appellant.

WEBB, Judge.

[1] Defendant assigns as error the admission into evidence of his post-arrest statement that his address was 624-D Billingsly Road. This evidence was admitted over objection and after a *voir dire* hearing. The trial court ruled that the question put to the defendant as to his address "was a routine preliminary question and did not constitute interrogation." Defendant contends the question did constitute interrogation and that since it was asked before defendant was advised of his constitutional rights, it was inadmissible. The State concedes that Officer Parker asked defendant his name, age, and address so that he could fill out an Adult Waiver of Rights form for defendant and that at the time defendant was asked for this information, he was in police custody and had not yet been advised of his constitutional rights. However, the State argues that these questions were routine questions normally attendant to arrest and custody and did not constitute interrogation. We agree.

In *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed. 2d 297, 308 (1980), *on remand sub nom., State v. Innis*, 433 A. 2d 646 (R.I. 1981), *cert. denied sub nom., Innis v. Rhode Island*, 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed. 2d 447, *amended*, 456 U.S. 942, 102 S.Ct. 2005, 72 L.Ed. 2d 464 (1982), the United States Supreme Court defined "interrogation" as follows:

> "[T]he term 'interrogation' under Miranda [*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)] refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Thus, the Supreme Court indicated that routine questioning attendant to arrest and custody does not constitute interrogation.

North Carolina courts have indicated their agreement with *Innis* by holding that certain preliminary, routine questions asked of a suspect are not proscribed by *Miranda v. Arizona*, *supra*. *See State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983); *State v. Young*, 54 N.C. App. 366, 283 S.E. 2d 812 (1981), *aff'd*, 305 N.C. 391, 289 S.E. 2d 374 (1982); and *State v. Sellers*, 58 N.C. App. 43, 293 S.E. 2d 226, *appeal dismissed*, 306 N.C. 749, 295 S.E. 2d 485 (1982). Most recently, in *State v. Ladd*, *supra*, our Supreme Court held "that interrogation does not encompass routine informational questions posited to a defendant during the booking process." *Id.* at 286, 302 S.E. 2d at 173. The Court quoted with approval the following explanation for such a holding:

> " 'Despite the breadth of the language used in *Miranda*, the Supreme Court was concerned with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data required for booking and arraignment.' "

State v. Ladd, *supra* at 286, 302 S.E. 2d at 173, *quoting United States ex rel. Hines v. LaVallee*, 521 F. 2d 1109, 1112-13 (2d Cir. 1975), *cert. denied sub nom., Hines v. Bombard*, 423 U.S. 1090, 96 S.Ct. 884, 47 L.Ed. 2d 101 (1976). However, our Supreme Court limited its holding to routine informational questions that are not

"reasonably likely to elicit an incriminating response" from the suspect. *State v. Ladd, supra,* at 287, 302 S.E. 2d at 173.

We hold the trial court correctly concluded that the question asked in the present case as to the defendant's address was a routine preliminary question that did not constitute interrogation as that term has been defined by both the United States and the North Carolina Supreme Courts. This question was asked solely for the purpose of obtaining basic identifying information so that Officer Parker could fill out the Adult Waiver of Rights form for defendant. The question was not asked so as to elicit an incriminating response, nor was it a question reasonably likely to elicit an incriminating response in this particular case. There is nothing in the record that shows that Officer Parker received any information connecting the robbery of the laundromat with the address given by defendant. Officer Parker testified that at one point in his investigation he had information that the robber lived at 634-D Marvin Road but that this information turned out to be incorrect. We hold defendant's statement as to his address was admissible.

[2] Next, defendant argues the trial court erred in failing to instruct on the lesser included offense of common law robbery. In *State v. Lee,* 282 N.C. 566, 569-70, 193 S.E. 2d 705, 707 (1973), the Court stated:

> "The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. . . . In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required. (Citations omitted.)"

The State's evidence in the instant case shows defendant perpetrated the robbery with the threatened use of a shotgun. There was no conflicting evidence with respect to the elements of the crime charged; therefore, this argument is without merit.

[3] Defendant assigns as error the court's refusal to give the special instructions tendered by him that made clear the nature of the element of actual danger or threat to the victim. The uncontradicted testimony of Mrs. Hodson shows that defendant was armed with a shotgun contained in a four-foot tube about two inches in diameter, that Mrs. Hodson saw the barrel of the shotgun inside the tube when defendant pointed it at her, and saw the stock of the gun protruding from the other end of the tube.

Mrs. Hodson testified that defendant pointed the shotgun directly at her when he demanded that she give him the money from the cash box and again when he discovered there was no money in the Coke machine. On the second occasion when defendant pointed the shotgun directly at her, she begged, "Please don't shoot me." At all other times during the robbery, defendant had the shotgun pointed in Mrs. Hodson's direction. Given such evidence, we do not believe the special instructions requested by defendant were warranted. We hold the court in its charge to the jury adequately explained this element of the offense.

[4] Defendant next assigns as error the court's failure to instruct the jury on alibi. In *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), our Supreme Court held that the trial court is not required to give instructions on the legal effect of alibi evidence unless the defendant makes a special request that such instructions be given. G.S. 1-181 provides that requests for special instructions to the jury must be in writing, entitled in the cause, and signed by the counsel submitting them.

In the present case, defendant's request that the court instruct on alibi was made orally, rather than in writing. Where a requested instruction is not submitted in writing and signed pursuant to G.S. 1-181 it is within the discretion of the court to give or refuse such instruction. *See State v. Spencer*, 225 N.C. 608, 35 S.E. 2d 887 (1945); *State v. Broome*, 268 N.C. 298, 150 S.E. 2d 416 (1966). We find no abuse of discretion in the court's refusal to give the requested instruction.

[5] Lastly, defendant argues the trial court erred by categorically rejecting youthful offender commitments for all persons convicted of robbery with a dangerous weapon. Defendant's counsel requested that the court sentence defendant as a committed

youthful offender pursuant to G.S. 148-49.14. The court refused such request stating, "I don't sentence armed robbers as committed youthful offenders." Defendant argues this statement reflected the court's policy of refusing to consider the possibility of youthful offender status for those convicted of armed robbery and thus demonstrated its abuse of discretion by its failure to exercise discretion.

Defendant relies on the case of *United States v. Ingram*, 530 F. 2d 602 (4th Cir. 1976) in which the Fourth Circuit held the trial judge had abused his discretion by refusing to consider armed robbers for treatment under the Federal Youth Corrections Act (hereinafter F.Y.C.A.), 18 U.S.C. § 5010(d). In *Ingram*, the trial judge stated that he had never considered armed robbers for treatment under F.Y.C.A. and never intended to because he did not believe such persons would benefit from the program. We are not bound by this decision, nor do we find it dispositive of the present case.

G.S. 148-49.14 provides in part:

> "As an alternative to a sentence of imprisonment as is otherwise provided by law, when a person under 21 years of age is convicted of an offense punishable by imprisonment . . . the court may sentence such person to the custody of the Secretary of Correction for treatment and supervision as a committed youthful offender. . . . If the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such 'no benefit' finding on the record."

This statute does not say how a judge should exercise his discretion or what factors he must consider when imposing a sentence. We do not believe we can hold that because a judge has a policy of not sentencing those convicted of armed robbery as committed youthful offenders that he has committed error under the statute.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

EVON W. GEBB v. DAVID M. GEBB

No. 8329SC285

(Filed 6 March 1984)

1. **Rules of Civil Procedure § 56.3— summary judgment—materials properly considered**

In an action in which the trial court entered summary judgment finding a purchase money resulting trust in plaintiff's favor upon a parcel of property, there was no merit to defendant's arguments that the trial court should not have considered the contract of sale, which was attached to an unfiled deposition of defendant, or that entry of summary judgment was premature because discovery had not been completed, since the trial court may consider any material which would be admissible in evidence at trial and the record does not indicate that defendant objected to the presentation of the contract of sale at the hearing, and since there was no motion for a continuance in the record and the facts which would have raised a genuine issue of material fact were within the defendant's knowledge. G.S. 1A-1, Rule 56(c) and (f).

2. **Trusts § 19— purchase-money resulting trust—sufficiency of evidence**

The trial court properly entered summary judgment for plaintiff finding a purchase money resulting trust on property where plaintiff's forecast of evidence showed that $10,000.00 paid at the closing of the property came from a joint bank account of the parties; the next day defendant withdrew $9,000.00 from another of their joint accounts, of which $5,000.00 was used, to plaintiff's knowledge, to repay defendant's mother for money borrowed as earnest money, at the closing, defendant told plaintiff to sign the deed of trust "and the property is ours"; defendant told plaintiff that he could not mortgage the property because it was in her name also; the contract of sale listed plaintiff and defendant as buyers; and plaintiff was present at about all of the meetings with the sellers other than the initial negotiations.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 15 November 1982 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 10 February 1984.

Potts & Welch by Paul B. Welch, III, for plaintiff appellee.

Riddle, Shackelford & Hyler by Robert E. Riddle for defendant appellant.

BRASWELL, Judge.

Defendant appeals from the award of summary judgment for plaintiff and the entry of judgment declaring defendant to be the beneficial owner of a one-half undivided interest in a certain tract

of real property and to be trustee, for the benefit of plaintiff, of the other one-half interest. The issues are whether summary judgment for plaintiff was proper and whether the trial court considered improper materials in ruling upon the motion for summary judgment. For the reasons that follow, we affirm the trial court.

Plaintiff instituted this action praying the court to grant three alternative grounds for relief: (1) reformation of the deed to reflect ownership of the real property as a tenant by the entirety with the defendant, her former husband; (2) damages for fraud in an amount equal to one-half of the present market value of the property; or (3) establishment of either a constructive or purchase money resulting trust in plaintiff's favor upon the property. In behalf of these claims plaintiff alleged that her name had been mistakenly omitted from the deed; that defendant fraudulently procured the execution of the deed in his name alone and fraudulently represented to plaintiff that her name was on the deed; and that defendant took advantage of her trust as his wife and paid for the property with funds from their joint bank account. Defendant filed an answer in which he denied the material allegations of the complaint and requested that plaintiff be forced to elect which cause of action she intended to pursue.

Plaintiff moved for summary judgment. Based upon an examination of the pleadings, depositions and exhibits, the court allowed plaintiff's motion.

Gleaned from the materials before the trial court, which include portions of the depositions of the seller, W. S. Pruett, and of plaintiff, a receipt of payment from defendant and his mother, Cora Gebb, are the following facts:

On 19 October 1976, plaintiff and defendant executed a contract of sale with W. S. Pruett and wife in which plaintiff and defendant agreed to purchase a 150-acre tract of land for $95,000.00, which was to be paid as follows: $5,000.00 earnest money upon the signing of the contract; $10,000.00 in cash upon the delivery of the deed and closing; and the remainder of $80,000.00 in a promissory note secured by a purchase money deed of trust. The contract also provided: "Final settlement shall be on or before January 15, 1977, with the deed to David M. Gebb and wife, Evon W. Gebb."

On 19 October 1976, W. S. Pruett received a check for $5,000.00 drawn on the Clyde Savings and Loan Association, and payable to the order of defendant or his mother, Cora Ellen Gebb. Pruett prepared a handwritten note evidencing receipt of the check. The receipt also contained this notation: "The above check is to be handed to Mr. Carl Hyldburg, Attorney, on October 20, 1976 and to be held in escrow in accordance with the mutual understanding between W. S. Pruett and Mrs. Blanche P. Pruett, as sellers, and Mr. David M. Gebb and Mrs. Cora Ellen Gebb, as buyers."

The balance of the down payment, $10,000.00 was subsequently paid in January 1977 with moneys from the parties' joint bank account in Alaska. Plaintiff and defendant thereafter executed a promissory note and deed of trust in favor of the Pruetts for the balance of the purchase price. Plaintiff's name, however, was omitted from the deed.

Plaintiff first learned that her name had been omitted from the deed on 4 September 1980, after she and defendant had separated. When defendant informed her about the omission on that date, he indicated that he had just discovered the omission two months before. Defendant subsequently claimed, however, that her name was deliberately omitted.

Plaintiff also discovered that the document she signed at the closing, which she thought was the deed, was actually a deed of trust. At the closing, defendant had told her, "Sign this [deed of trust], Honey, and the property is ours." The funds for the $10,000.00 down payment came from one of their joint savings accounts. Defendant also withdrew $9,000.00 from another of their joint savings accounts, of which $5,000.00 was used, to plaintiff's knowledge, to repay the $5,000.00 defendant's mother had loaned them for the earnest money.

At least two times after the property was purchased, defendant wanted to mortgage the property. When plaintiff objected to his proposals, defendant told her, "Well, don't get upset because I couldn't . . . mortgage the property, anyway, because it's in your name, too."

A party is entitled to 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." G.S. 1A-1, Rule 56(c).

The party moving for summary judgment has the burden of showing the lack of genuine issue of material fact and that it is entitled to judgment as a matter of law. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *rehearing denied*, 281 N.C. 516 (1972). If the movant is the party bringing the action, he must establish his claim beyond any genuine dispute with respect to any of the material facts. *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980). A material fact is one which would constitute or irrevocably establish any material element of a claim or a defense. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981). If the movant establishes that he is entitled to summary judgment, his motion should be granted unless the non-movant responds and shows either the existence of a genuine issue of material fact or that he has an excuse for not so showing. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

[1] Defendant argues that the trial court erroneously considered matters which were not of record and arguments of counsel in granting plaintiff's motions. More specifically, he argues the trial court should not have considered the contract of sale, which was an attachment to the unfiled deposition of defendant. He also argues that entry of summary judgment was premature because discovery had not been completed. We reject these arguments.

On a motion for summary judgment the court may consider the pleadings, depositions, answers to interrogatories, affidavits, admissions, oral testimony, *documentary materials*, facts which are subject to judicial notice, such presumptions as would be available upon trial, *and any other material which would be admissible in evidence at trial. Koontz v. City of Winston-Salem, supra*, at 518, 186 S.E. 2d at 901; *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). The court may consider the arguments of counsel as long as the arguments are not considered as facts or evidence. There is nothing in the record to indicate that the arguments of counsel were considered as evidence. Moreover, the record does not indicate that defendant objected to the presentation of the contract of sale at the hearing. *See Insurance Co. v. Bank*, 36 N.C. App. 18, 244 S.E. 2d 264 (1978).

Ordinarily, a court errs when it hears and rules upon a motion for summary judgment while discovery is pending and the party seeking discovery has not been dilatory in doing so. *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979). However, here, as in *Conover*, the court's action did not constitute reversible error. "Rule 56(f) provides ample opportunity for the opposing party to move for a continuance of the motion in order to obtain more facts through discovery, or, in the alternative to move for a continuance on the grounds that the party is not, at that time, able to obtain the relevant facts in time to file opposing affidavits." *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 154, 296 S.E. 2d 302, 308 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E. 2d 221 (1983). There is no motion for a continuance in the record. Moreover, the facts which would have raised a genuine issue of material fact were within the defendant's knowledge.

[2] The trial court's judgment tends to indicate that it entered judgment for plaintiff on the basis of either a resulting or constructive trust, without specifying which. The following discussion of the law of resulting and constructive trusts is particularly instructive:

> Whenever one obtains legal title to property in violation of a duty he owes to another who is equitably entitled to the land or an interest in it, a constructive trust immediately comes into being. Such a trust ordinarily arises from actual or presumptive fraud and usually involves an abuse of a confidential relationship. Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. *See Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Davis v. Davis, supra;* 13 Strong's North Carolina Index 3d *Trusts* § 14 (1978); V Scott, Law of Trusts § 461-462.4 (3d Ed. 1967).
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> * * * *
>
> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is

> taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes. *See Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Rhodes v. Baxter*, 242 N.C. 206, 87 S.E. 2d 265 (1955); *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321 (1954); V Scott, Law of Trusts §§ 440-440.1 (3d Ed. 1967); Bogert, Trusts and Trustees § 455 (2d Ed. 1977) (hereinafter cited as Bogert). *See generally* 13 Strong N.C. Index 3d Trusts §§ 13-13.5 (1978).
>
> If A and C pay for a parcel of land, but only C takes title, the theory of the law is that at the time title passed A and C intended that both would have an interest in the land. "A resulting trust is a creature of equity, and arises by implication or operation of law to carry out the presumed intention of the parties, that he, who furnishes the consideration for the purchase of land, intends the purchase for his own benefit." *Waddell v. Carson*, 245 N.C. 669, 674, 97 S.E. 2d 222, 226 (1957).

Cline v. Cline, 297 N.C. 336, 343-45, 255 S.E. 2d 399, 404-05 (1979).

The forecast of evidence presented by plaintiff shows that the $10,000 paid at closing, at the time of passing of title, came from a joint bank account of the parties. The next day defendant withdrew $9,000.00 from another of their joint accounts, of which $5,000.00 was used, to plaintiff's knowledge, to repay defendant's mother. At the closing, defendant told plaintiff to sign the deed of trust "and the property is ours." Defendant also told the plaintiff that he could not mortgage the property because it was in her name also. The contract of sale listed plaintiff and defendant as the buyers. Plaintiff was present at about all of the meetings with the Pruetts other than the initial negotiations.

The forecast of evidence that the moneys for the down payment at closing came from a joint bank account of the parties and that plaintiff signed a note for the balance of the purchase price and signed the deed of trust to secure payment of that note was sufficient to establish a prima facie case of a purchase money resulting trust. This prima facie case was reinforced by the con-

tract of sale, the defendant's assurances that the property was "ours," and plaintiff's presence at the meetings, which tends to show an intention of the parties that plaintiff was to be a one-half owner of the property.

The burden then shifted to defendant to present materials which would negate plaintiff's showing or raise a triable issue of fact. Defendant failed to do so. He could not rest upon the mere denials in his pleadings. G.S. 1A-1, Rule 56(e).

Since the plaintiff carried her burden of showing that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law, summary judgment for her was proper. The court properly imposed a purchase money resulting trust on the property. The judgment of the trial court is accordingly

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ELTON WAYNE WALSTON

No. 836SC860

(Filed 6 March 1984)

1. Criminal Law § 98.2— refusal to sequester witnesses

The trial court did not abuse its discretion in denying defendant's motion to sequester the six State's identification witnesses.

2. Criminal Law § 87.1— leading questions

The trial court did not abuse its discretion in permitting the prosecutor to ask State's witnesses leading questions as to whether they had seen defendant on a certain day.

3. Forgery § 2.2— forgery and uttering—sufficiency of evidence

The State's evidence was sufficient to support an inference that defendant knew that checks were forged so as to support his conviction for forgery and uttering where it tended to show that defendant attempted to obtain money or goods with the forged checks.

4. False Pretense § 1— transfer of title not element of crime

A transfer of title is not a necessary element of the offense of obtaining property by false pretenses. G.S. 14-100(a).

5. False Pretense § 2.1— sufficiency of indictment

An indictment alleging that defendant rented a typewriter with the promise to return it in an hour but failed to return it at any time thereafter was sufficient to charge the offense of obtaining property by false pretenses without an allegation that defendant had no intention of returning the typewriter.

APPEAL by defendant from *Brown, Judge.* Judgments entered 21 April 1983 in Superior Court, HALIFAX County. Heard in the Court of Appeals 10 February 1984.

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

Jesse E. Shearin, Jr., for defendant appellant.

BRASWELL, Judge.

Defendant was indicted, tried, and convicted on five charges of forgery and uttering, and one charge of obtaining property by false pretenses. He was sentenced to a total of 11 years in prison. The issues on appeal concern the denial of his motion to sequester the State's identification witnesses, the denial of his motion to dismiss the charges, the trial court's failure to instruct on the necessity of transfer of title as an element of obtaining property by false pretenses, and the sufficiency of the indictment charging defendant with obtaining property by false pretenses.

The State's evidence tends to show that on 21 and 23 February 1983, a man, identified as defendant, went into five businesses in Roanoke Rapids, and made purchases by presenting and endorsing checks made payable to Johnny Streeter, drawn on the account of Tau Valley Estates in Rocky Mount, and signed by Nell Byrd. In each instance but one, defendant presented a North Carolina driver's license with the name and photograph of Johnny Streeter on it as identification.

On 21 February 1983, defendant also went to Pruden's Office Equipment in Roanoke Rapids. There he again represented himself to be Johnny Streeter. He paid the manager $5.00 to rent a manual typewriter for an hour. Defendant took the typewriter and never returned it.

Johnny Streeter testified that he had lost his driver's license, that he did not know defendant, and that he had never given defendant permission to use his name. Nell Byrd, resident manager of Tau Valley Estates, testified that thirty-four checks were missing from the Tau Valley Estates' checkbook. Ms. Byrd further stated that Tau Valley Estates never had a tenant named Johnny Streeter, and that she had never signed the checks or given anyone permission to sign the checks for her.

Defendant presented evidence tending to show the lack of resemblance between the defendant and the photograph on the driver's license.

[1] Defendant's first argument is that the trial court erred in denying his motion to sequester six of the State's witnesses because their identification of the defendant was crucial. It is interesting to note that there were six totally separate identifications involved, and not six persons viewing the defendant in any type lineup or location which was common to all or suggestive by the presence of all. A motion to sequester witnesses is addressed to the discretion of the trial judge and the trial court's ruling denying the motion will not be disturbed absent a showing of an abuse of discretion. *State v. Woods*, 307 N.C. 213, 220, 297 S.E. 2d 574, 579 (1982). No abuse of discretion has been shown.

[2] Defendant next assigns as error the trial court's allowing the State to question each of its identification witnesses whether he or she had seen the defendant on a certain day. Defendant argues that these leading questions were unduly suggestive.

An exception to leading questions will not be sustained when the testimony is competent unless the defendant can show an abuse of discretion or that he was prejudiced by the court's allowing the leading question. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). The testimony identifying defendant was competent and relevant. The questions did not connect defendant to the passing of the checks to the witnesses, but merely asked the witnesses whether they had seen defendant that day. The questions were, therefore, not unduly suggestive. We conclude that defendant has failed to show an abuse of discretion or that he was prejudiced by the admission of the testimony. We note that although defendant made only one objection on the ground of leading, it was not followed by a motion to strike. To the other six

exceptions that appear in the record as to alleged leading questions, the defendant failed to object at trial and has thereby waived his right to take an exception on appeal. *See State v. Oliver*, 309 N.C. 326, 333, 307 S.E. 2d 304, 310-11 (1983).

[3] Defendant's third argument is that the trial court erred in denying his motions to dismiss the forgery and uttering charges because there was no evidence that defendant knew that the checks were forged. This contention is without merit.

"In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense." *State v. Smith*, 307 N.C. 516, 518, 299 S.E. 2d 431, 434 (1983). All the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be derived from the evidence. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982).

Taken in the light most favorable to the State, the evidence was sufficient to show the offer of a forged check to another, with knowledge of the falsity of the instrument, with the intent to defraud or injure another. *State v. Hill*, 31 N.C. App. 248, 229 S.E. 2d 810 (1976). The mere offer of the false instrument with fraudulent intent constituted an uttering or publishing. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968). Moreover, there is a presumption that one in possession of a forged instrument who attempts to obtain money or goods with a forged instrument either forged or consented to the forging of the instrument. *See State v. Roberts*, 51 N.C. App. 221, 275 S.E. 2d 536, *review denied*, 303 N.C. 318, 281 S.E. 2d 657 (1981); *State v. Prince*, 49 N.C. App. 145, 270 S.E. 2d 521 (1980).

[4] Defendant next contends that the trial court erred by refusing to instruct the jury that transfer of title is a requirement for the offense of obtaining property by false pretenses.

At common law, a fine distinction was made between the crimes of obtaining property by false pretenses and larceny by trick which revolved around whether the victim was induced to part with title and possession, or possession only, by the accused's false pretense or deception. If the accused deceived the victim into

relinquishing possession of the property, the crime was larceny by trick. 3 Wharton's Criminal Law § 355 (14th ed. 1980). If the victim was induced to relinquish title to the property by the deception, the crime was obtaining property by false pretenses. *Id.* at § 441. To further complicate matters, if the defendant, having lawful possession of the property, wrongfully misappropriated or converted the property to his own use with the intent to permanently deprive, the crime was embezzlement. *Id.* at § 355.

The distinction between larceny and obtaining property by false pretenses has been abolished by statute in several jurisdictions. 32 Am. Jur. 2d *False Pretenses* § 4 (1982). Several states have held that it is not necessary to acquire title or ownership to commit the offense of obtaining property by false pretenses and hold that "obtaining" merely means securing possession. *Id.* at § 36.

In North Carolina, the crime of obtaining property by false pretenses is codified at G.S. 14-100, which provides in pertinent part:

> § 14-100. *Obtaining property by false pretenses.*
>
> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be punished as a Class H felon: . . .

The crime of obtaining property by false pretenses, therefore, is committed when an accused (1) makes a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. *State v. Cronin,* 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980). Nowhere in the statute or in the elements is it stated that a transfer of title is necessary for the commission of the offense. Defendant does not cite nor can we find any case in North

Carolina in which it is stated that a transfer of title is a necessary element of obtaining property by false pretenses. Furthermore, because of the existence of our statute on the crime of false pretense we are not called upon to apply the common law to the events in this case. We therefore conclude that the trial court did not err in refusing to give the requested instruction.

Having just concluded that a transfer of title is not a necessary element of the offense of obtaining property by false pretenses, we reject defendant's argument that the court erred in denying his motions to dismiss the obtained property by false pretenses charge because of lack of evidence of transfer of title to a typewriter leased but never returned. Defendant nonetheless further argues that the denial of his motions to dismiss the charge were improperly denied on the ground that there was no evidence the misrepresentation resulted in the defendant obtaining the typewriter. We also reject this argument. The crime of obtaining property by false pretenses may be committed when a defendant obtains goods by a willful misrepresentation of his identity. *State v. Tesenair*, 35 N.C. App. 531, 241 S.E. 2d 877 (1978); *State v. Clontz*, 4 N.C. App. 667, 167 S.E. 2d 520 (1969). Moreover, not only does the evidence show that defendant misrepresented his identity, it shows that defendant told Mr. Pruden, the manager of the office supply store, that he was a student at Halifax Community College; that he wanted to rent a typewriter for approximately an hour in order to type a resume; and that he was an expert typist, having been a typist in the service. Mr. Pruden thereupon agreed to rent the typewriter to defendant for five dollars with the understanding that defendant would return the typewriter within one hour.

[5] Defendant's final contention is that the indictment is insufficient to charge defendant with the offense of obtaining property by false pretenses because the indictment lacked an allegation that defendant had no intention of keeping his promise to return the typewriter. This contention is without merit. The indictment, in pertinent part, is as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to

cheat and defraud obtain and attempt to obtain a Royal typewriter from Pruden's Office Supply, Inc., a Corporation by means of a false pretense which was calculated to deceive and did deceive.

The false pretense consisted of the following: the said defendant rented the said typewriter from Pruden's Office Supply, Inc., a Corporation with the promise to return same within one hour when in fact the said defendant did not return the said typewriter at any time thereafter.

An indictment under G.S. 15-153 is sufficient if it expresses the charge in a plain, intelligible, and explicit manner, and will not be quashed if sufficient matters appear in the bill to enable the court to pronounce sentence in the event of a conviction and to give the defendant notice of the charge against him. *State v. Russell*, 282 N.C. 240, 192 S.E. 2d 294 (1972). Generally, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). The indictment here meets those tests.

In the trial of defendant, we find

No error.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. BOBBY MITCHELL ADAMS

No. 832SC802

(Filed 6 March 1984)

Bills of Discovery § 6— State's failure to comply with order of discovery—dismissal of charges against defendant—no abuse of discretion

The trial court did not abuse its discretion in dismissing the charges against defendant for the State's failure to comply with an order for discovery where defendant filed a request for voluntary discovery on 18 June 1982, and following the State's failure timely to respond, defendant filed a motion for discovery on 8 July 1982 pursuant to G.S. 15A-902(a); where on 12 January 1983 this motion came on for hearing and the trial judge stated that defendant appeared entitled to everything he had requested and ordered that the State

furnish the items sought within ten days; and where the motion to dismiss for noncompliance was heard and determined 50 days later. At that time the assistant district attorney did not assert that the State had formally complied with a portion of the order regarding defendant's statements, and he did not assert that the State had complied in any way with other portions of the order. Further, the record clearly established that defendant is mentally retarded and illiterate; that the district attorney's office could hardly have been unaware of this, and that defense counsel argued that defendant's retarded and illiterate state rendered the long delay in obtaining discovery severely prejudicial to counsel's ability to confer with his client and to secure his client's assistance in his own defense. Dismissal under G.S. 15A-910 as written in 1982 and dismissal under G.S. 15A-910 as revised in 1983 was a permissible sanction for failure to comply with criminal discovery orders.

APPEAL by the State from *Beaty, Judge.* Order entered 3 March 1983 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 7 February 1984.

Pursuant to G.S. 15A-1445(a)(1), the State appeals from an order dismissing criminal charges, "for failure of the State to provide items subject to discovery."

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

Charles M. Vincent and Stephen R. Ward for defendant appellee.

WHICHARD, Judge.

The issue is whether the court abused its discretion in dismissing criminal charges against defendant upon the State's failure to comply with an order for discovery. We hold that it did not.

Defendant was charged with assault with a deadly weapon upon a law enforcement officer, resisting a public officer, and failing to stop for a blue light and siren. On 18 June 1982 he filed a request for voluntary discovery. Following the State's failure timely to respond, on 8 July 1982 he filed a motion for discovery. *See* G.S. 15A-902(a).

On 12 January 1983 this motion came on for hearing before Judge Giles Clark. Defense counsel represented that he had "not received any response whatsoever" to the request or the motion.

The assistant district attorney did not indicate the contrary. Judge Clark stated that defendant appeared entitled to everything he had requested, and ordered that the State furnish the items sought within ten days.

On 1 March 1983 defendant moved to dismiss the charges due to prosecutorial misconduct. *See* G.S. 15A-909 to -910. The motion alleged that Judge Clark's order "ha[d] been completely disregarded and no discovery ha[d] been provided as ordered by the Court." At a 3 March 1983 hearing on the motion before Judge Beaty, defense counsel represented that the State had disregarded Judge Clark's order. He called to the court's attention the allegation in his motion "that matters of discovery in the Second Prosecutorial District are systematically disregarded in that [items sought to be discovered] are not furnished the defense attorneys." He also called to the court's attention the defendant's low I.Q. and illiteracy, both of which evidence in the record clearly established. He then stated:

> [I]n this particular case, with this man's illiteracy and with his I.Q. the way it is, the fact that so much time has gone by without any discovery being furnished, puts defense counsel in the posture of not being able to effectively represent this man because you're dealing with someone as time goes by you can't undo . . . you can't put in his mind and talk to him and deal with him about facts and events as they might have occurred at that time; that they [the State] are aware of his mental situation and of his illiteracy and by denying, or by refusing to comply with the Orders of the Court, even if they were to come up and say, "here's your discovery," I don't know that I could go back and sit down with this man now that so much time has passed and put these things back together.
>
> . . . .
>
> [Y]ou have discretion as to what you can do in this matter, and what we're asking for is a dismissal . . . . [B]ecause they have disregarded this Order, . . . it wouldn't be unusual to dismiss, especially with the fact situation as it is with [the defendant] in this condition. In other words, just to give us the information now, and I've got to go back with him with

his mind . . . or being retarded, and try to piece together events which happened last May, I don't believe we can do it.

In response the assistant district attorney acknowledged the existence of Judge Clark's order. He indicated that he had verbally told defense counsel there were no written or oral statements by the defendant "other than the statements that were made to the officer during the process of the crime being committed, the res gestae." He did not even argue, however, that the State had formally complied with the request for discovery of defendant's statements or had complied, either formally or informally, with other aspects of the discovery order.

After hearing defense counsel and the assistant district attorney, Judge Beaty requested that the record show that the file contained both a request for voluntary discovery and a motion for discovery filed by defendant; that Judge Clark had ordered the State to "provide discovery as requested by the defendant"; and that "as of this date discovery has not been provided pursuant to Judge Clark's Order." He then stated: "Based upon the above findings in this case as applied to the facts of this case, the Court orders that the matters of State of North Carolina versus Bobby Mitchell Adams . . . be dismissed." He subsequently entered a written order of dismissal.

The State contends the court abused its discretion in imposing the sanction of dismissal, because this sanction "was not contemplated by the Legislature and was inappropriate under the particular circumstances of this case." When this matter was before the trial court, the statute entitled "Regulation of discovery—failure to comply" read as follows:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders.

G.S. 15A-910 (1978). Dismissal of charges was not an expressly authorized sanction, and was permissible, if at all, under the rubric of "other appropriate orders."

The legislature has since amended the statute to allow the court, in addition to the foregoing, to:

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice . . . . Act of August 26, 1983, ch. 6 § 3, 1983 N.C. Ex. Sess. Laws --- (effective upon ratification). The sanction of dismissal thus has now been expressly authorized.

Our Supreme Court has stated:

> "An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as where the act amended is ambiguous." . . . "Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision." In such case, the purpose of the variation may be "to clarify that which was previously doubtful."

Taylor v. Crisp, 286 N.C. 488, 496-97, 212 S.E. 2d 381, 386-87 (1975). We believe clarification was the purpose of the 1983 amendment to G.S. 15A-910. It thus should not be construed to have changed the law so as to permit a previously prohibited sanction, but rather to have made explicit a previously implicit intent that the sanction of dismissal be among those which could be implemented by "other appropriate orders."

We thus reject the argument that when the order in question was entered dismissal was not a sanction contemplated by the legislature. We hold that dismissal was then and is now a permissible sanction for failure to comply with criminal discovery orders.

"Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court. [Its] decision . . . will not be reversed absent a showing of abuse of that discretion." *State v. Alston*, 307 N.C. 321, 330, 298 S.E. 2d 631, 639 (1983); *see also State v. Brown*, 306 N.C. 151, 168, 293 S.E. 2d 569, 580 (1982); *State v. Dukes*, 305 N.C. 387, 390, 289 S.E. 2d 561, 562-63 (1982). The statute "gives the judge broad and flexible powers to rectify the situation if a party fails to comply with discovery orders." G.S. 15A-910 official commentary.

Dismissal of charges is an "extreme sanction" which should not be routinely imposed. *See United States v. Sarcinelli*, 667 F. 2d 5, 7 (5th Cir. 1982). Here, however, Judge Clark's order to permit discovery was clear and unequivocal. It afforded the State ten days for compliance. The motion to dismiss for noncompliance was heard and determined fifty days later. At that time the assistant district attorney asserted only that the State had verbally responded to defense counsel regarding the portion of the order on statements given by defendant. He did not assert that the State had complied in any way with the other portions of the order, or that it had formally complied with the portion regarding defendant's statements.

Further, the record clearly establishes that defendant is mentally retarded and illiterate. In view of proceedings which occurred before the hearing on the motion to dismiss, and of the materials in the case file, the district attorney's office could hardly have been unaware of this. Defense counsel argued that defendant's retarded and illiterate state rendered the long delay in obtaining discovery severely prejudicial to counsel's ability to confer with his client and to secure his client's assistance in his own defense. He contended that the State's noncompliance thus impacted significantly upon his ability to represent his client effectively. The validity and persuasiveness of defense counsel's argument in light of the circumstances presented was for the trial court, in the exercise of its discretion, to determine.

The court made findings only as to defendant's request for voluntary discovery and motion for discovery, Judge Clark's order for discovery, and the State's noncompliance with that order. In addition to such findings, orders dismissing charges for

noncompliance with discovery orders preferably should contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed. *See United States v. Sarcinelli, supra,* 667 F. 2d at 7. The perceived prejudice in this case, and its potentially irreparable nature, is apparent, however; and the failure to make such findings here thus does not merit reversal or remand.

Under the circumstances presented, we decline to hold that the trial court abused its discretion in dismissing the charges for the State's failure to comply with the order for discovery. The order of dismissal is thus

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. LINWOOD HARDY

No. 838SC380

(Filed 6 March 1984)

1. **Criminal Law § 92.3; Weapons and Firearms § 2— possession of firearm by convicted felon—consolidation with other related charges**

The statute requiring separate indictments on charges of unlawful possession of a firearm by a convicted felon and other related offenses, G.S. 14-415.1(c), does not preclude the consolidation of these offenses for trial.

2. **Criminal Law § 92.3— consolidation of charges against same defendant**

The trial court did not abuse its discretion in consolidating for trial charges against defendant for possession of a firearm by a convicted felon and for breaking or entering and larceny of the firearm where the evidence tended to show that defendant had constructive possession of the firearm so soon after it was stolen and under such circumstances as to raise an inference that he was guilty of the breaking or entering and the larceny. G.S. 15A-926.

3. **Burglary and Unlawful Breakings § 5.4; Weapons and Firearms § 2— possession of firearm by convicted felon—breaking or entering and larceny—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of unlawful possession of a firearm by a convicted felon and his conviction of felonious breaking or entering and felonious larceny under the doctrine of possession of recently stolen property where it tended to show that a televi-

sion set and a .38 caliber pistol were stolen in a break-in at a residence between 6:00 a.m. and 3:00 p.m.; at about 4:30 p.m. on the same day the stolen pistol was found under the hood of a vehicle driven by defendant which was under his personal and exclusive control and which had not been driven by anyone else on the date in question; and defendant had been convicted in 1980 of attempted common law robbery.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 4 November 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 November 1983.

On 20 September 1982, defendant was indicted in case No. 82CRS12214 for the crime of the unlawful possession of a firearm by a convicted felon. Also on 20 September 1982, in a separate six count bill of indictment designated under the separate case numbers 82CRS5356A and 82CRS5357A, defendant was charged with felonious breaking or entering, felonious larceny, felonious receiving of stolen goods, felonious possession of stolen property, unlawful alteration and removal of the permanent serial number from a firearm, and the unlawful possession of a firearm of which the permanent serial number had been destroyed or removed.

The trial court denied defendant's pre-trial motion to sever the offense in case No. 82CRS12214 from the offenses contained in the six count indictment for purposes of trial. The jury returned guilty verdicts on the charges of felonious breaking or entering, felonious larceny, felonious possession of stolen property and felonious possession of a handgun by a convicted felon. Upon its own motion, the trial court set aside the verdict of felonious possession of stolen property and dismissed the charge. From the verdicts and entry of judgments in the other convictions, defendant appeals.

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

Hulse & Hulse, by Donald M. Wright, for defendant appellant.

JOHNSON, Judge.

The State's evidence tended to show that on 26 April 1982 between 6:15 a.m. and 3:30 p.m., the home of Clara Johnson was

broken into and a .38 caliber revolver and a black and white TV set were stolen. Officer Flannagan arrived at the Johnson's residence to investigate the break-in at about 4:00 p.m. the same day. After taking a report from Ms. Johnson, Officer Flannagan received a telephone call from Officer W. C. Goodman regarding the crimes. On the basis of the phone call, Officer Flannagan went to the Bob's Supermarket parking lot to look out for a vehicle being driven by defendant. At about 4:30 p.m., Officer Flannagan observed defendant operating a vehicle which defendant then parked in front of the Gold Wayne Grocery Store, located across the street from Bob's Supermarket. Defendant's brother, Ricky Hardy and two other persons were passengers in the vehicle. Defendant emerged from the vehicle, walked to the front and then opened and raised the hood. Officer W. C. Goodman arrived and joined Officer Flannagan. They approached defendant, explained their reason for being there and requested permission to search the vehicle. Defendant consented to a search of the interior and under the hood of the vehicle. Between the battery and the grill of the car, Officer Flannagan found the revolver taken from the Johnson residence. The serial number of the firearm had been removed.

Defendant testified that the car belonged to his mother and that he knew nothing about the crimes he was charged with. Defendant further testified he knew nothing of the presence of the gun under the hood of the vehicle and that to his knowledge no one else drove the car on the date in question. Ricky Hardy testified that he found the gun in a dumpster near the victim's residence, hid it under the hood of the car and told no one about the existence of the gun or where he hid it.

In rebuttal, Officer Goodman testified that both defendant and Ricky Hardy denied any knowledge of the presence of the gun.

[1] Defendant first contends the trial court erred in the denial of his pre-trial motion to sever the indictment charging defendant with the unlawful possession of a firearm by a convicted felon from the charges contained in the other indictment for the purposes of trial. Defendant argues that the requirement of G.S. 14-415.1(c) for separate indictments on the charges of unlawful possession of a firearm by a convicted felon and other related of-

fenses also precludes consolidation of these offenses for trial and that the consolidation was prejudicial as a matter of law. G.S. 14-415.1(c) provides that an indictment charging the defendant with the crime of unlawful possession of a firearm by a convicted felon shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under that section. Defendant cites no authority for his contentions, but simply states that the General Assembly must have intended a preclusion of consolidation by requiring a separate bill of indictment. We disagree. Had the General Assembly also intended to preclude consolidation of the related offenses for trial by the requirement of a separate bill of indictment, we believe the General Assembly would have so stated.

Defendant's argument as to the desirability of separate trials in cases such as this is properly one for the lawmakers in the legislature rather than the courts. The principle is well settled that a statute must be construed as written and where the language of the statute is clear and unambiguous, there is no room for judicial construction. The courts must give the statute its plain and definite meaning and are without power to interpolate or to superimpose provisions not contained therein. *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974). G.S. 14-415.1(c) is clear and unambiguous. It is silent as to the question of consolidation and it simply requires a separate indictment. The mere fact of a requirement of separate indictments constitutes no bar, in and of itself, to consolidation.

[2] G.S. 15A-926 permits joinder of offenses[1] for trial which are based (1) on the same act or transaction or (2) on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Accordingly, while courts may disallow consolidation upon a finding of prejudice to the defendant,[2] the

1. The term "offense" has also been construed to mean indictment. *See State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980).

2. 15A-927(b) provides that, "[t]he court on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses whenever: (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or (2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense."

question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. *State v. Bracey,* 303 N.C. 112, 277 S.E. 2d 390 (1981). The transactional connection between the two indictments in this case is demonstrated by evidence which tended to show that defendant had constructive possession of the firearm so soon after it was stolen and under such circumstances as to raise an inference that he is guilty of the breaking and entering and larceny of the pistol. Defendant has failed to show any prejudice by the consolidation, nor has he shown an abuse of discretion by the trial judge. We find that the trial judge's decision to consolidate the charges was consistent with the guidelines set forth in G.S. 15A-926 and did not constitute an abuse of discretion. Accordingly, defendant's assignment of error is without merit.

[3] Defendant next contends the trial court erred in the denial of his motions for dismissal made at the close of the State's evidence and at the close of all the evidence. Defendant argues that the State presented no direct evidence of defendant having placed the pistol under the hood.

By introducing evidence after the denial of his motion to dismiss made at the close of the State's evidence, defendant waived his exception to the denial of that motion, and only his motion to dismiss at the close of all the evidence need be considered in determining the sufficiency of the evidence to submit the case to the jury. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). Defendant's motion to dismiss presented the question of whether the State had presented substantial evidence whether circumstantial, direct or both, that defendant broke and entered into Ms. Johnson's residence and stole the pistol therefrom, and that at the time he possessed the pistol he was a convicted felon. We must consider this question in light of all the evidence and take the evidence in the light most favorable to the State. *State v. Robbins, supra.*

In this case, the evidence tended to show that on 26 April 1982, there was a break-in at Ms. Johnson's residence between 6:00 a.m. and 3:00 p.m. and that a small television set and a .38 caliber revolver were stolen; at about 4:30 p.m. on the day of the break-in the revolver was found under the hood of a vehicle

driven by defendant which was under his personal and exclusive control and to which defendant consented to have searched. Defendant testified that to his knowledge no one else drove the car on the date in question. Further, that in 1980 he was convicted of attempted common law robbery.

The doctrine of recent possession of stolen property raises the inference that defendant is guilty of the breaking and entering and of the larceny of the pistol. *See State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974 (1972). Although this presumption depends on circumstantial evidence, the evidence here was sufficient for the jury to find beyond a reasonable doubt that defendant had constructive possession of the revolver and that his possession was so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly and that defendant was guilty of committing the crimes. *See State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046 (1972) (defendant was convicted of larceny of stolen goods found in the trunk of a car to which defendant had exclusive control and defendant gave the officers the keys and consent to open and search the trunk). A consideration of all the evidence discloses facts which constitute substantial evidence, giving rise to a reasonable inference that defendant broke and entered the victim's residence and once inside stole the revolver which was later found in his constructive possession. Thus, the trial court properly denied defendant's motion to dismiss.

Our ruling on defendant's second assignment of error is dispositive of his remaining assignments of error which also questions the sufficiency of the evidence.

In defendant's trial we find

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM D. LITTLE, EZEKIAL HALL, MELVIN SURGEON

No. 8310SC409

(Filed 6 March 1984)

Convicts and Prisoners § 2; Criminal Law § 7.5; Kidnapping § 1.1— kidnapping of prison employees by prisoners—evidence of duress properly excluded

In a prosecution for kidnapping in which three prison inmates held as many as six prison employees and two other inmates as hostages at Central Prison for approximately 42 hours, the trial court properly found that duress, coercion, compulsion or necessity, based on general prison conditions, could not be raised as a defense in the case since defendants failed to show that (a) they were faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (b) there was no time for complaint to the authorities, or that such a complaint would have been futile; and (c) there was no opportunity to resort to courts to redress their grievances.

APPEAL by defendants from *Braswell, Judge.* Judgments entered 19 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 30 November 1983.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Thomas C. Manning, Robert E. Zaytoun, Appellate Defender Adam Stein, and Assistant Appellate Defender Marc D. Towler, for defendant appellants.

BECTON, Judge.

Shortly before 10:30 a.m. on Tuesday, 23 March 1982, the defendants, William D. Little, Ezekial Hall, and Melvin Surgeon, all inmates at Central Prison, seized control of the diagnostic center at Central Prison. With homemade daggers and other weapons, these defendants, for approximately 42 hours thereafter, held as many as six prison employees and two other inmates as hostages. Although neither seeking to escape nor asking to be set free, the defendants demanded that SKY 5, the Channel 5 news helicopter, be brought to Central Prison so that they could air their complaints, and that they be transferred to a federal correctional facility outside North Carolina.

Negotiations with the inmates for the release of the hostages began immediately. At various times during the ordeal, the inmates talked to Dr. Walter Venners, a clinical psychologist at Central Prison, Deputy Warden (now Warden) Nathan Rice, F.B.I. Agent Brooks Madden, Walter Johnson of the Parole Commission, Bart Rittner of WPTF Radio, and attorney Irving Joyner. On the second day of the incident, the defendants agreed to exchange four of the hostages for sandwiches, water and cigarettes. Later that day, one of the remaining hostages, Stallings, suffered a dizzy spell from high blood pressure and slumped over. Attorney Joyner and F.B.I. Agent Madden urged defendants to release Stallings to show they were negotiating in good faith. Defendants complied. During the early morning hours of Thursday, 25 March 1982, an agreement was reached by which the defendants would voluntarily surrender to the F.B.I.; Madden would personally guarantee the defendants' safety; and the defendants would be transferred from Central Prison to a federal institution outside North Carolina. In return, defendants were to surrender their weapons and release the remaining hostages. This was done at approximately 3:00 a.m. on Thursday, 25 March 1982.

On 15 October 1982, a Wake County jury found each defendant guilty of six counts of second degree kidnapping. Defendant Little received six consecutive twenty-five year prison sentences; defendant Hall received six consecutive thirty-year prison sentences; and defendant Surgeon received six consecutive fifteen-year prison sentences. Each defendant appeals.

I

All of defendants' substantive assignments of error relate to the trial court's finding that duress, coercion, compulsion or necessity, based on general prison conditions, could not be raised as a defense in this case. Defendants argue that the trial court's ruling, whether made as a matter of law or on the facts of this particular case, was erroneously relied upon in several instances. We disagree.

Defendants set forth their contentions as follows:

> Relying at least in part on that ruling, [the trial judge] quashed defendants' subpoena seeking records of the Department of Corrections relating to the defense and prohibited

> the defendants from asking questions of proposed jurors regarding the defense. Based entirely on that ruling of law, [the trial judge] barred any cross examination of State witnesses concerning the defense . . . and [excluded] even an offer of proof as to what that testimony would have been.

Coercion or duress is recognized as a defense in this State to criminal charges other than the taking of the life of an innocent person. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Kearns*, 27 N.C. App. 354, 219 S.E. 2d 228 (1975), *disc. review denied*, 289 N.C. 300, 222 S.E. 2d 700 (1976). Indeed, our Supreme Court recently held that "duress, *if proven*, would be a complete defense to the kidnapping charge" when the defendant's evidence, if believed, would have shown that his participation in a kidnapping was because another defendant required him to do so at the point of a gun. *State v. Strickland*, 307 N.C. 274, 300, 298 S.E. 2d 645, 661 (1983) (emphasis added). *Strickland* is obviously distinguishable from the case at bar. Strickland testified that he was forced to kidnap someone at gunpoint; Strickland was not in prison.

As pointed out by the United States Supreme Court, one principle remains constant in cases involving the defense of duress:

> [I]f there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail. [Citation omitted.] Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [18 U.S.C. § 751(a), which governs escape from federal custody] was his only reasonable alternative.

United States v. Bailey, 444 U.S. 394, 410-11, 62 L.Ed. 2d 575, 591, 100 S.Ct. 624, 635 (1980).

This Court, following the lead of the United States Supreme Court and several state supreme courts, has held that prison conditions can raise the defense of duress or coercion to escape charges. *State v. Watts*, 60 N.C. App. 191, 298 S.E. 2d 436 (1982). *See United States v. Bailey; State v. Horn*, 58 Hawaii 252, 566 P.

2d 1378 (1977); *State v. Baker*, 598 S.W. 2d 540 (Mo. App. 1980); *People v. Trujillo*, 41 Colo. App. 223, 586 P. 2d 235 (1978); *People v. Pelate*, 49 Ill. App. 3d 11, 363 N.E. 2d 860 (1977); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); *People v. Unger*, 66 Ill. 2d 333, 362 N.E. 2d 319 (1977).

In *Watts*, the defendant presented evidence that he was forced to flee the prison unit because he had been beaten and threatened with death by a correctional officer and his complaint to the prison superintendent had been ignored. Although the *Watts* Court, based on the ruling in *United States v. Bailey*, held that the trial court had properly refused to charge on the defense of duress, because the defendant had failed to show that he had immediately reported to the proper authorities upon attaining a position of safety from the immediate threat, we left little doubt that the trial court would have been required to instruct on duress, had the defendant shown a justification for his continued absence.

So we state the general rule in this State: "[I]n 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." *State v. Kearns*, 27 N.C. App. at 357, 219 S.E. 2d at 230-31 (emphasis added); *see also State v. Brock*.

In the case before us, there is not a scintilla of evidence that any of the three defendants was subject to any duress or coercion which was either "present, imminent or impending," and certainly no evidence to suggest that any of them expected death or injury if they failed to kidnap prison officials. And at no time did defendants even suggest that they were prepared to make such a showing. The "defendants' subpoena seeking records of the Department of Corrections relating to the defense" required the production of all records concerning weapons found and/or confiscated, incident reports concerning assaults on inmates by other inmates, and records containing complaints by inmates of emotional or mental problems related to abuse or injury suffered by those inmates as a result of the actions of other inmates. Yet, at the hearing on the State's motion to quash defendants' subpoena, the defendants presented no evidence to establish their personal

connection with the incidents in the subpoenaed records. None of the defendants testified at the hearing. And the prison officials called by the defendants to testify about the records they maintained were not asked if the defendants themselves had made any complaints.

It is true that *Watts*, and several of the other cited cases, involved the defense of duress or coercion in escape cases as opposed to kidnapping cases. *Watts* is nevertheless instructive, however, because the prison conditions in *Watts*—assaults and threats upon the life of Watts—directly and personally affected Watts himself. We, therefore, in support of our analysis, find the following requisites from *Watts*, that must be met in order for an inmate to raise the defense of duress or coercion, helpful:

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any relief from such complaints illusory;
>
> (3) There is no time or opportunity to resort to courts;
>
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
>
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

60 N.C. App. at 193, 298 S.E. 2d at 437 (quoting *People v. Lovercamp*, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115 (1974)).

It is true that defendants' acts of kidnapping and holding hostage prison officials do not fit neatly into the scheme of things envisioned by *Watts*. For example, the fourth and fifth conditions set forth in *Watts* are clearly inapplicable to the facts of this case. We need not decide if judicial surgery or alchemy is necessary to transform conditions four and five into useful requisites when inmates kidnap and hold prison officials hostage because the defendants, in this case, did not even satisfy the first three condi-

tions of *Watts*. The defense of duress or coercion is not available to the defendants because they failed to show that (a) they were faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (b) there was no time for complaint to the authorities, or that such a complaint would have been futile; and (c) there was no opportunity to resort to courts to redress their grievances.

We hold further that the trial court did not err in quashing defendants' subpoena, in prohibiting the defendants from asking questions of proposed jurors regarding the defenses, and in barring any cross examination of State's witnesses concerning the defenses. Simply put, the trial court did not rule as a matter of law that coercion or duress may never be a defense in a kidnapping case. When defendants sought a subpoena requiring production of information about the existence of weapons in certain cell blocks, prisoners' assaults on other prisoners, and emotional and psychiatric complaints of prisoners, all with the apparent aim of showing "deplorable conditions" at Central Prison as justification for the three defendants taking prison employees hostage, the trial court held that "there is no law to allow the defense of duress or coercion *in this case on this charge* of kidnapping in violation of G.S. 14-39. The general prison conditions at Central Prison, the general atmosphere at Central Prison, is not a defense in this case." The trial court made similar statements (a) when it refused to allow defense counsel to question prospective jurors about the defense of duress or coercion and (b) when it sustained the State's objection to defense counsel's question to a hostage about whether defendants, as a reason for wanting to leave Central Prison, mentioned the deplorable conditions there. The trial court correctly held on the facts of this case that the general prison conditions at Central Prison provided defendants with no defense to the charge of kidnapping and holding hostage prison officials and inmates.

II

We have upheld the trial court's decision to grant the State's motion quashing defendants' subpoena to produce documents because defendants failed to meet their threshold burden of demonstrating that, given the imminence of the threat, kidnapping was their only reasonable alternative. We, therefore, need not decide

(1) if the subpoena was vague and overly broad; (2) if the subpoena would place an unreasonable burden on the Department of Correction; and (3) if the production of the material would violate the privacy of the inmates to whom the records pertained. We merely point out that when a defendant has met the threshold requirements, a subpoena of records showing the availability of knives to inmates in defendants' section of prison and the pervasiveness of fear of physical harm on the part of inmates in that section of the prison, may be relevant. *See State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979).

In this trial, we find

No error.

Chief Judge VAUGHN and Judge HILL concur.

STATE OF NORTH CAROLINA v. ROBERT GLENN JOYNER

No. 833SC798

(Filed 6 March 1984)

1. **Robbery § 4.3— rifle without firing pin—use of firearm**

Defendant's evidence that a rifle used in a robbery was found unloaded and without a firing pin several hours after the robbery did not preclude a finding that defendant perpetrated the robbery with a firearm but did require the trial court to submit the lesser included offense of common law robbery. G.S. 14-87(a).

2. **Criminal Law § 163— failure to object to charge—no "plain error"**

The trial court's failure in an armed robbery case to define "firearm" and the court's use of "twenty-two caliber rifle" for "firearm" in its final mandate to the jury did not constitute "plain error" requiring a new trial although defendant failed to object to the charge prior to the retirement of the jury. App. Rule 10(b)(2).

Judge EAGLES dissenting.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 1 March 1983 in Superior Court, PITT County. Heard in the Court of Appeals 7 February 1984.

Defendant was charged in a bill of indictment with armed robbery in violation of G.S. 14-87. He entered a plea of not guilty.

The State's evidence tended to show that on 7 December 1982 at about 2:45 a.m., defendant, armed with a rifle, approached three employees of Domino's Pizza as they were closing for the night. Defendant pointed the rifle at the head of one of the employees and demanded the money bag he was carrying under his arm. The employee threw the bag on the ground and ran. Defendant picked up the bag and left the scene of the crime.

Defendant admitted to police officers that he robbed Domino's Pizza, and told the police where he hid the rifle he had used. The rifle was not loaded when the police found it, nor did it have a firing pin.

Defendant did not testify. The jury returned a verdict of guilty as charged, and defendant appealed from judgment imposing a sentence of fourteen years.

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

Assistant Public Defender Robert L. Shoffner, Jr. for defendant appellant.

HILL, Judge.

[1] Defendant contends that the trial court erred in denying defendant's motion for a directed verdict at the close of the State's evidence. Defendant argues that since the rifle was found unloaded and missing a firing pin, the State failed to prove the rifle allegedly used in the commission of the robbery was a firearm. We hold that defendant's evidence did not preclude the finding that defendant perpetrated a robbery with a firearm.

Defendant was convicted of armed robbery in violation of G.S. 14-87(a) which provides in pertinent part as follows:

> Any person . . . 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 . . . shall be guilty of a Class D felony.

In determining whether a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of G.S. 14-87, "the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Alston*, 305 N.C. 647, 650, 290 S.E. 2d 614, 616 (1982). We feel that under the circumstances of the instant case, the purpose of G.S. 14-87(a) would be frustrated or defeated if we accepted defendant's contention that in the absence of a firing pin, a rifle is not a firearm under the statute. The robbery victim should not have to force such issues of whether the instrument actually possesses a firing pin, whether the instrument is loaded, or whether the instrument is real. See *State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979).

The evidence in the instant case established that the rifle was unloaded and missing a firing pin several hours after the robbery. It is still possible that the gun was loaded and operable at the time of the robbery, as defendant could have unloaded it and disengaged its firing pin after committing the offense. Furthermore, the weapon was an actual rifle and was held close to the victim's head; it could have been used as a bludgeon. Using the determinative test of *State v. Alston, supra*, we find that an employee's testimony that an actual rifle was pointed at his head during the robbery was sufficient to support a jury finding that the lives of the employees were in fact endangered or threatened by use of the rifle. Defendant's evidence, on the other hand, that the weapon possibly was unloaded and incapable of firing due to a missing firing pin indicated that the employees' lives were not endangered or threatened by use of the rifle. Defendant's evidence tended to prove the absence of an element of the offense charged and required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous implements. *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972). The trial court correctly submitted both issues to the jury. This assignment of error is overruled.

[2] Lastly, defendant contends the trial court erred in instructing the jury by failing to define "firearm" and by substituting the phrase "twenty-two caliber rifle" for "firearm" in its final

mandate to the jury. By failing to object to the charge prior to the retiring of the jury and before the verdict, defendant failed to adhere to the dictates of Appellate Rule 10(b)(2). Nevertheless, having reviewed the instruction, we hold that the challenged jury instruction was not "plain error" such as to require a new trial. Permitting the jury to consider possible verdicts of guilty of robbery with firearms or other dangerous weapons and the lesser included offense of common law robbery, properly defining the elements of both offenses, and recapitulating the contentions of both parties rendered the charge as a whole adequate. A trial court's instructions must be read contextually as a whole, and isolated erroneous portions will not be considered prejudicial error on appeal when the instruction read as a whole is correct. See *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. McCall*, 31 N.C. App. 543, 230 S.E. 2d 195 (1976).

Defendant received a fair trial free from prejudicial error.

No error.

Judge HEDRICK concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent from the portions of the majority opinion which permit a defendant to be convicted of robbery with a firearm or other dangerous weapon when the "firearm" in question was a rifle which was incapable of firing because it had no firing pin. The majority cites and relies upon *State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979), and *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982), neither of which require this result.

State v. Thompson stands for the proposition that:

> [W]hen the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous

> weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, *in the absence of evidence to the contrary,* the law will presume the instrument to be what his conduct represents it to be—a firearm or dangerous weapon.

297 N.C. at 289, 254 S.E. 2d at 528 (emphasis added). Here, as distinguished from *Thompson,* there was evidence to the contrary, i.e., testimony from the defendant and from the officers who seized the weapon that it contained no firing pin, that it was not capable of being fired, and that the firing pin removal process for this weapon was an intricate procedure which involved "stripping" the weapon.

The logic of *State v. Alston,* cited by the majority, is that a BB rifle, no matter what it looked like to the victims, was not a firearm or dangerous weapon in the sense contemplated by G.S. 14-87, because the victim's "life was (not) in fact endangered or threatened." 305 N.C. at 650, 290 S.E. 2d at 616. Here, as in *Alston,* there was affirmative evidence that this rifle was the one used, that it had no firing pin, that it could not be fired in that condition, and that the technique for removal of the firing pin was intricate and required "stripping" the weapon. From these facts it is clear that the rifle without a firing pin could not in fact endanger or threaten the *life* of the victim. While defendant here intended for the victim to believe mistakenly that the weapon was fully operable, the fact remains that it was less capable of use as a rifle than the BB rifle used in *Alston.*

I would vote to reverse the conviction for failure of the court to instruct the jury as requested on the definition of a firearm and the failure to instruct the jury as to the offense of common law robbery.

STATE OF NORTH CAROLINA v. BARBARA JEAN YOUNG

No. 834SC169

(Filed 6 March 1984)

1. **Parent and Child § 2.2— felonious child abuse—failure to instruct on misdemeanor child abuse error**

In a prosecution for felonious child abuse under G.S. 14-318.4, the trial court erred in failing to submit an issue and instruct the jury with respect to misdemeanor child abuse under G.S. 14-318.2 where defendant placed her child in a hot bath and the child suffered skin burns covering 35-40% of her body, and where the State's evidence tended to show that she intended to injure the child while her evidence tended to show that she did not.

2. **Parent and Child § 2.2— child abuse—instructions erroneous**

In a prosecution for felonious child abuse, the trial judge committed prejudicial error in charging the jury that if defendant placed her daughter in a tub with the knowledge that it was hot enough to "cause pain" and intended to cause her pain, "then that would be proof beyond a reasonable doubt of an intentional burning or scalding," since intending to cause a child *pain* is not tantamount to intending to scald, burn, or seriously injure a child.

3. **Criminal Law § 138— aggravating factors improperly considered**

In a prosecution for felonious child abuse in which defendant placed her child in a hot tub causing burns, the record did not support the aggravating factor that the crime was especially heinous, atrocious, or cruel, and since the crime of which defendant was convicted was based on the relationship of parent and child, the court erred in considering as an aggravating factor that defendant took advantage of a position of trust and confidence which she held as a parent of the child. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Bruce, Judge.* Judgment entered 25 June 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 21 October 1983.

Defendant, after trial, was convicted of felony child abuse and sentenced to four years in prison. The child allegedly abused was defendant's fourteen month old daughter.

The State's evidence, the central portion of which was based on conversations that defendant had with two social workers and a deputy sheriff, tended to show that: During the middle of the night on the date charged defendant was awakened by the child, who had soiled herself and her crib because of diarrhea. Defendant got out of bed, ran water into the bathtub, found it was too hot, added some cold water, then bathed the child with a wash

rag for two or three minutes. When first placed in the water the child made some sounds, but then sat quietly until the bath was completed, after which defendant wrapped her in a towel and cleaned the crib. When the towel was removed skin from the child peeled off with it and defendant and her husband immediately took the child to the hospital emergency room. The doctors there diagnosed the child as having suffered partial thickness epidermal or skin burns, which covered 35 to 40 percent of her body, including the lower buttocks, legs, genital area and tops of her feet. The child stayed in the hospital three weeks or so, during which time antibiotic cremes were applied to the burned areas, but no surgery or skin grafts were done or recommended. One treating doctor testified that a child's skin is more sensitive than an adult's and expressed the opinion that water at a temperature of 130 to 140 degrees Fahrenheit for a period of two or three minutes would cause the child's injuries and that the child will be scarred permanently to some extent. Another doctor expressed the opinion that the child would have cried out immediately when placed in water hot enough to injure her and would have attempted to get out of it. The child's body bore no indication of previous abuse and no evidence of prior abuse of any kind was presented.

Defendant's evidence, which included her testimony and that of her husband and some neighbors, tended to show that: She loved her child, had always cared for her properly, had not intended to hurt the child, and the burning was an accident. For several days before the night involved defendant had been ill with a virus and was taking medications which made her drowsy and very tired, and those conditions, along with being awakened from deep and needed sleep, caused her not to check the water more carefully.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Timothy E. Merritt for defendant appellant.

PHILLIPS, Judge.

[1] Defendant, indicted for felonious child abuse under G.S. 14-318.4, requested the trial judge to also submit an issue and instruct the jury with respect to misdemeanor child abuse under

G.S. 14-318.2. The judge denied the request and submitted only the felony child abuse issue, which the jury answered against defendant. Since the felony child abuse indictment against defendant embraced the lesser included offense of misdemeanor child abuse and the evidence as to a distinctive element of felony child abuse was conflicting, it was prejudicial error not to submit an issue as to the lesser charge, for which defendant is entitled to a new trial.

A lesser included offense is one that has some, but not all, of the essential elements of the greater offense, and has no element that the greater offense does not have. *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). Whenever the evidence as to one or more elements of a greater offense is in conflict, or is deficient, and the jury can therefore properly find that the lesser offense was committed but the greater offense was not, a defendant is entitled to have the jury consider the lesser charge under proper instructions from the court. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

Under the part of G.S. 14-318.2 that concerns defendant—[the other parts relate to two other separate and independent offenses against children not involved in this appeal; *see State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973)]—a parent or custodian of a child less than 16 years of age who inflicts physical injury upon or to the child by other than accidental means is guilty of a misdemeanor. The word "inflict" means to lay on or impose, and is aptly used in connection with punishment. 43 C.J.S. *Inflict* p. 707 (1978). Thus, to violate the statute, an intentional, rather than accidental, act causing physical injury is required; but an intent to injure is not required. The phrase "accidental means" has been interpreted by our Supreme Court many times. Though the decisions have not made entirely clear what all falls within its compass, they clearly establish, we think, that injuries which result from intentional acts do not. *Henderson v. Hartford Accident & Indemnity Co.*, 268 N.C. 129, 150 S.E. 2d 17 (1966). Thus, since the child was injured because defendant intentionally put her in the water, *if* one of defendant's purposes in doing so was to punish the child, defendant would be guilty of misdemeanor child abuse, even though she may not have intended to cause an injury. The parts of G.S. 14-318.4 that are pertinent to this case provide, on the other hand, that any parent or custodian of a child less than

16 years of age who *intentionally injures* the child physically to a *serious extent,* resulting *in permanent disfigurement* or *substantial impairment* of function *of any organ* of such child, is guilty of a felony. Thus, *for the purposes of this case,* both crimes involve a parent or custodian physically injuring a child under 16 years of age; and the only distinction between the two crimes is that the felony requires that the injury be serious, permanent and intentionally inflicted, while the misdemeanor requires only that the injury be inflicted by an intentional act. Clearly, therefore, the felony child abuse charge that defendant was tried for embraced the lesser included offense of misdemeanor child abuse; and it is equally clear that because of conflicts in the evidence that the jury should have been permitted to consider both offenses.

Though the evidence as to the other elements of felony child abuse—the parent child relationship, the age of the child, that she was seriously injured and one of her bodily organs, the skin, was permanently disfigured to some extent—was all one way, the evidence as to whether the defendant *intentionally* injured the child was not. The State's evidence tended to show that she intended to injure the child; but her evidence tended to show that she intended no such thing, though it did show that the child was injured by her intentional act in placing her in water that was hotter than she thought it was. That defendant intentionally placed the child in the water is not decisive—for her to be guilty of the felony, she must have also known that the water was hot enough to cause serious injury, and her testimony was that she did not know that. According to the evidence and the common experience of mankind, hands are less sensitive to hot water than other portions of the body and a child's skin is more sensitive to hot water than that of an adult. And defendant, whose hands were in the water, testified that she did not think that the water was hot enough to hurt the child and did not intend to hurt her. If the next jury believes that, it will be their duty to acquit her of the greater offense; and if they also find that in putting the child into the water defendant was not undertaking to punish the child, but was in good faith only undertaking to bathe her, it would be their duty to acquit her of the lesser offense, as well. But the defendant's contention that misdemeanor child neglect under G.S. 14-316.1 is likewise a lesser included offense of felony child abuse and that the jury should have been permitted to also consider

that offense is without merit, as a comparison of the two statutes plainly shows.

[2] The judge also committed prejudicial error in charging the jury as follows:

> The State must prove beyond a reasonable doubt that the defendant, with the actual knowledge that the water in the bathtub was hot enough to cause pain to Shanna Young, placed Shanna Young in the tub with the intent to cause Shanna Young pain. The placing of a child in water hot enough to cause pain, with the knowledge that the water is hot enough to cause such pain is an intentional burning or scalding within the meaning of the law as applied to this case.
>
> . . . .
>
> If however, the State of North Carolina has proved beyond a reasonable doubt that the defendant, knowing that the water in the tub was hot enough to cause pain to Shanna Young, with that knowledge placed Shanna Young in the tub with the intent to cause pain to Shanna, then that would be proof beyond a reasonable doubt of an intentional burning or scalding and you could return a verdict of guilty as charged.

Intending to cause a child *pain* is, of course, not tantamount to intending to scald, burn, or seriously injure a child, the crime defendant was being tried for; and a verdict so based, as this one probably is, cannot be permitted to stand.

[3] In sentencing the defendant to a term of imprisonment longer than the presumptive sentence, the court found two aggravating factors authorized by G.S. 15A-1340.4(a)(1)—that the crime was especially heinous, atrocious or cruel, and that advantage was taken of the position of trust and confidence which she had as parent of the child. Applying the principles set forth in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), we are of the opinion that neither finding was justified. The evidence recorded does not show that excessive brutality which especially heinous, atrocious or cruel conduct imports; and since the crime that she was convicted of is based on the relationship of parent

and child, that relationship cannot be used again to exceed the presumptive sentence.

New trial.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. JULIUS WILLIAMS, III

No. 8312SC632

(Filed 6 March 1984)

Criminal Law § 75.2— voluntariness of confession—officer's promise to talk with district attorney

An officer's statements that, if defendant gave a statement, the officer would "recommend to the District Attorney's Office that he had made a statement" and "would make a recommendation that he had cooperated and gave a statement" could not have aroused in defendant any reasonable hope of reward if he confessed and thus did not render his confession involuntary.

APPEAL by defendant from *Farmer, Judge.* Judgments entered 10 February 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 January 1984.

Defendant appeals from judgments of imprisonment entered upon his convictions on two counts of felonious breaking or entering, felonious larceny, and safecracking.

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

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

WHICHARD, Judge.

Defendant objected to introduction of evidence regarding a confession. The court treated the objection as a motion to suppress and, after hearing evidence on *voir dire,* summarily denied it. Defendant contends the confession "was induced by a promise which gave [him] hope for lighter punishment if he confessed," and that the court thus erred. We find no error.

Whether conduct of investigating officers constitutes such promises as to render a subsequent confession involuntary is a question of law and is reviewable on appeal. *State v. Pruitt*, 286 N.C. 442, 454, 212 S.E. 2d 92, 100 (1975); *State v. Fox*, 274 N.C. 277, 292, 163 S.E. 2d 492, 502-03 (1968). In determining whether a confession was voluntary, the court looks at the totality of the surrounding circumstances. *State v. Corley*, 310 N.C. 40, 47, 311 S.E. 2d 540, 544 (1984) (statement by officer to defendant that "things would be a lot easier on him if he went ahead and told the truth" held, under totality of circumstances, not to have induced confession); *see also State v. Jackson*, 308 N.C. 549, 581, 304 S.E. 2d 134, 154 (1983); *State v. Schneider*, 306 N.C. 351, 355, 293 S.E. 2d 157, 160 (1982).

The pertinent circumstances here follow. At the *voir dire* hearing, one officer testified: "I did not promise [defendant] anything. I told him I could not promise him anything. The only thing I told him, if he made any statements, the only thing we could do was recommend to the District Attorney's Office that he had made a statement." He further testified: "I told [defendant] I would make a recommendation that he had cooperated and gave a statement. That is all I could tell him." Defense counsel asked this officer: "So the only promises you made were you were going to talk to the District Attorney about him if he made a statement?" The officer responded in the affirmative.

The prosecuting attorney asked another officer, also on *voir dire*, if he had at any time promised defendant anything if defendant would give a statement. The officer responded in the negative. He also testified that defendant did not ask what the officer could do for him if he would give a statement, and that he did not threaten or coerce defendant in any way to get a statement from him.

Defense counsel asked this officer: "Did you tell [defendant] if he gave you a statement . . . you might be able to work something out for him in the District Attorney's Office later on?" He responded, "No, sir." He further testified: "We did not promise him anything and we did not threaten him in any way."

Defendant argues that his confession given under the foregoing circumstances was involuntary. He relies on the following cases: *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v.*

Fuqua, 269 N.C. 223, 152 S.E. 2d 68 (1967); and *State v. Williams*, 33 N.C. App. 624, 235 S.E. 2d 869 (1977).

In *Pruitt*, officers repeatedly told defendant "they knew . . . he had committed the crime and . . . his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' " *Pruitt, supra*, 286 N.C. at 458, 212 S.E. 2d at 102. They also told him that they "considered [him] the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' " *Id.* The Court found that under these circumstances the defendant's confessions "were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody." *Id.* at 458, 212 S.E. 2d at 103.

In *Fuqua*, an officer told defendant that "if he wanted to talk to [the officer] then [the officer] would be able to testify that [defendant] talked to [him] and was cooperative." *Fuqua, supra*, 269 N.C. at 228, 152 S.E. 2d at 72. The Court held that "[t]he total circumstances . . . impel[led] the conclusion that there was aroused in [defendant] an 'emotion of hope' so as to render the confession involuntary." *Id.*

In *Williams*, an officer told defendant that

> . . . all I could say on his behalf as far as to a judge or jury was that he was cooperative, which he was at that time. . . . I told him that that would be what I—only what I could testify to and that I would. . . . I advised him that I could tell the Court, the Judge and the jury, that in his behalf at the time of this interview that he was cooperative.

Williams, supra, 33 N.C. App. at 626, 235 S.E. 2d at 870. The Court found the remarks analogous to those by the officer in *Fuqua, supra*, and held the confession involuntary. *Id.* at 627, 235 S.E. 2d at 871.

We find the above cases distinguishable from this one. The statements by the officers here, unlike those in *Pruitt*, in no way aroused fear, nor did they have the potential of those in *Pruitt* to arouse hope. In *Fuqua* and *Williams*, the officers promised to testify for the defendant in court. The officers here made no such promises. We thus do not consider those cases controlling.

We find the facts here more closely analogous to those in *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). An officer told defendant there "that the only promise we could make was that we would talk with the District Attorney if he made a statement which admitted his involvement." *Branch, supra*, 306 N.C. at 109, 291 S.E. 2d at 659. The Court stated that the officer "merely informed the defendant that the officers would talk with the District Attorney if the defendant made a statement admitting his involvement" and that "this statement . . . could not have aroused in the defendant . . . any reasonable hope of reward if he confessed." *Id.* The Court further stated that "any suspect of similar age and ability would expect that the substance of any statement he made would be conveyed to the District Attorney in the course of normal investigative and prosecutorial procedures." *Id.*

The words "recommend" and "recommendation" render the statements here more connotive of hope of reward than those in *Branch*. There was, however, no evidence of any specific promise or suggestion of reward. On the contrary, both officers expressly testified that they did not promise defendant anything.

Defense counsel asked the first officer if the only promise he made was that he was going to talk to the District Attorney if defendant made a statement. The officer responded in the affirmative. Counsel asked the second officer whether he told defendant that he might be able to work something out for him later if defendant gave a statement, and the officer responded in the negative.

We believe the statements here, like those in *Branch*, could not have aroused in the defendant any reasonable hope of reward if he confessed. He instead "would expect that the substance of any statement he made would be conveyed to the District Attorney in the course of normal investigative and prosecutorial procedures." *Branch, supra*, 306 N.C. at 109, 291 S.E. 2d at 659. We thus hold that, considering the totality of the surrounding circumstances, evidence of the confession was properly admitted.

We deem it appropriate, nevertheless, to reiterate Justice Mitchell's statement for the Supreme Court in *Branch*:

> We caution the law enforcement officers of the State . . . that they should always be circumspect in any comment they make to a defendant, particularly in connection with any confession the defendant is to give or has given. The better practice would be for law enforcement officers not to engage in speculation of any form with regard to what will happen if the defendant confesses.

Branch, supra, 306 N.C. at 110, 291 S.E. 2d at 659-60. The better practice also would be for law enforcement officers to avoid entirely use of words such as "recommend" and "recommendation," which in some circumstances that we do not find present here could render a confession involuntary.

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. MYRTLE ADAMS FOREHAND AND HUSBAND WILLIAM T. FOREHAND; LOUISE BADHAM; EMMA BADHAM GARDNER; HELEN HOUSE; HENRY C. HOUSE, III AND WIFE, MARY O. HOUSE; J. MEREDITH JONES AND WIFE, ELVIRA JONES; BURTON H. JONES AND WIFE, JEAN JONES; KNOWN AND UNKNOWN, BORN AND UNBORN HEIRS OF W. H. JONES, DECEASED; UNKNOWN PARTIES, DEFENDANTS v. JOHN POOL AND WIFE, ELIZABETH POOL, INTERVENORS v. MIRIAM F. MCFADDEN, ET AL., INTERVENORS v. SOUTHHOLD REALTY CORP., INTERVENORS

No. 821SC1315

(Filed 6 March 1984)

1. State § 2.1— prohibition on sale in fee simple of State lands under navigable waters

An intervenors' deed based on a 1909 State grant was void on its face to convey a fee title in land since the grant purported to convey 33 acres of submerged lands "covered by water of Roanoke and Albemarle Sounds," and since almost from statehood, North Carolina policy has leaned toward a prohibition on the sale in fee simple of State lands under navigable waters. Intervenors' "title" was to an exclusive *easement* to erect wharves on the submerged lands, but did not convey fee title; therefore, intervenors had no standing to contest a trial court's decision denying intervenors a share of condemnation proceeds.

2. Eminent Domain § 7.1— immediate possession of condemned land vesting in DOA as soon as DOA filed complaint

Pursuant to G.S. § 136-104, title to condemned land and the right to immediate possession vests in the DOA as soon as the DOA has filed a complaint and declaration of taking and deposited with the court the estimated compensation; therefore, where intervenor first acquired a quitclaim deed almost two years after DOA had filed the requisite papers and deposited money in court, intervenor had no right to compensation and no right to intervene in the present action. G.S. 146-24(c).

3. Eminent Domain § 14— insufficient findings as to area affected by taking

In a condemnation case, where one of the issues raised by the pleadings was the area affected by the taking, the DOA was required to describe in its declaration of taking the area affected as well as the area taken, G.S. 136-103; therefore, the case must be remanded to the trial court for findings of fact and conclusions of law regarding whether three tracts constituted a single tract for the purposes of assessing condemnation damages. G.S. 136-112(1) and G.S. 1A-1, Rule 16.

APPEAL by defendant from *Battle, Judge.* Judgment entered 22 June 1982 in Superior Court, DARE County. Heard in the Court of Appeals 15 November 1983.

Dwight H. Wheless and Battle, Winslow, Scott & Wiley, P.A., by Robert L. Spencer, for defendant appellant, Southhold Realty Corporation.

Pritchett, Cooke & Burch, by Stephen R. Burch and W. W. Pritchett, Jr., for defendant appellees, Forehand and Jones heirs, except J. Meredith Jones and wife, Elvira Jones.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen and Assistant Attorney General Roy A. Giles, Jr., for the State.

BECTON, Judge.

I

Defendant, Southhold Realty Corporation (Southhold) appeals the trial court's denial of Southhold's land claim in a condemnation proceeding. We affirm.

Southhold, on 21 October 1981, filed a motion to intervene in an action by the North Carolina Department of Administration (DOA) to condemn a 3.799 acre tract adjacent to Jockey's Ridge

State Park. The condemned land borders Roanoke Sound on the west and Jockey's Ridge State Park on the east. The DOA had initiated condemnation proceedings on 5 December 1979 by filing a complaint and declaration of taking and by depositing with the court the estimated compensation. The only defendants named in the complaint, Forehand and the Jones heirs (the first group of defendants listed in the case on appeal), claimed title to the land by adverse possession. Southhold claimed title to a portion of the land based on a 1909 State grant No. 17495, to W. T. Greenleaf, for wharf purposes. The trial court allowed Southhold to intervene. Defendants Pool and McFadden subsequently intervened based on a 1903 State grant No. 16035 to W. T. Greenleaf. From a judgment in favor of Forehand, the Jones heirs, Pool and McFadden, Southhold appeals.

II

Southhold brings forward six assignments of error. Because we find Southhold's deed void on its face to convey a fee title in land, Southhold has no standing to contest the trial court's decision. *State ex rel. N.C. Utilities Comm'n v. City of Kinston,* 221 N.C. 359, 20 S.E. 2d 322 (1942).

[1] Southhold presents the Court with an ingenious argument. The 1909 State grant No. 17495 to W. T. Greenleaf conveyed 33 acres of submerged lands "covered by water of Roanoke and Albemarle Sounds for (wharf purposes) and with straight lines with [Greenleaf's] grant No. 16035 dated 5 December 1903." State grant No. 16035 had conveyed 153½ acres of land on the shore of Roanoke Sound, contiguous with the submerged lands grant. Southhold now attempts to assert fee title to a 300-600 foot wide strip of the condemned land bordering on Roanoke Sound, which falls within the metes and bounds description of the submerged lands grant. Through natural processes the land is now above the high watermark. To recognize Southhold's claim, we would first have to conclude that the original grant for wharf purposes conveyed fee title to the submerged lands. We do not.

Almost since statehood, North Carolina policy has leaned towards a prohibition on the sale in fee simple of state lands under navigable waters. Earnhardt, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis,* 49 N.C. L. Rev. 888 (1971). North Carolina

has long accepted the public trust doctrine as set forth in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892). *See Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903). Under the doctrine, the State holds title to the submerged lands under navigable waters, "but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved." Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. Rev. 1, 17 (1972); *Shepard's Point Land Co.*

In *Shepard's Point Land Co.*, our Supreme Court construed an unconditional 1856 grant of submerged lands covered by navigable waters in light of the public trust doctrine, common-law riparian rights, and statutory law. A riparian owner owns the land adjacent to a natural watercourse. The Court held that such a grant conveyed an exclusive *easement* to a riparian owner to erect wharves on the submerged lands, but did not convey fee title to the submerged lands. The easement passed as appurtenant to the riparian land. Navigable waters included "any waters, whether sounds, bays, rivers or creeks, which are wide enough and deep enough for navigation of sea vessels." *Shepard's Point Land Co.*, 132 N.C. at 531, 44 S.E. at 43 (quoting *State v. Glen*, 52 N.C. 321, 325 (1859)).

The same law is applicable to Greenleaf's 1909 State grant No. 17495, for wharf purposes. In fact, the statute construed in *Shepard's Point Land Co.*, N.C. Code § 2751 (1854-55), as amended by 1893 N.C. Sess. Laws, ch. 17, and the holding in *Shepard's Point Land Co.* are now codified at N.C. Gen. Stat. §§ 146-3 and 146-12 (1983). We, therefore, hold that State grant No. 17495 merely conveyed an appurtenant easement to erect wharves to the riparian owner. Southhold's deed was void on its face to convey a fee title interest in the strip of land built up by natural processes above the high tide line.

III

Had the Greenleaf grant conveyed a fee title, Southhold's claim would still be barred on statutory grounds.

[2] N.C. Gen. Stat. § 146-24(c) (1983) empowers the DOA to employ the procedures in Article 9 of Chapter 136 of the General

Statutes to acquire land by condemnation. Pursuant to N.C. Gen. Stat. § 136-104 (1981), title to the condemned land and the right to immediate possession vests in the DOA as soon as the DOA has filed the complaint and declaration of taking and deposited with the court the estimated compensation. The right to just compensation vests in the person who owned the land or any compensable interest therein immediately before the filing of the complaint, the declaration of taking and deposit of the money in court. G.S. § 136-104; *N.C. State Highway Comm'n v. York Indus. Center, Inc.*, 263 N.C. 230, 139 S.E. 2d 253 (1964). That person has nothing he can sell pending ascertainment of just compensation. *York Indus. Center, Inc.*

The DOA filed the requisite papers and deposited the money in court on 5 December 1979. Title to the condemned land vested in the DOA immediately. Southhold first acquired an arguable interest in 16 September 1981 when it received a quitclaim deed. But, at that point, Southhold's grantor had nothing to convey. Consequently, Southhold had no right to compensation and no right to intervene in the present action.

We affirm the trial court's denial of Southhold's land claim.

IV

[3] The State cross-assigns error to the breadth of the trial court's fact finding. We disagree and remand for additional findings of fact and conclusions of law.

Forehand and the Jones heirs presented evidence at trial as to their adverse possession of three contiguous tracts: tracts one and two and the home lot, as shown on the plat entitled "Land Claimed by Mrs. Myrtle A. Forehand . . .," prepared by D. R. Smith, R.L.S., 4 August 1978. Tract one represents the condemned land. The DOA failed to object to the evidence. The trial court found as fact that Forehand and the Jones heirs had adversely possessed all three tracts for over eighty years. The State argues that the pretrial order limited the trial court's fact finding to the "question of ownership of the tract condemned in this cause."

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 (1983). N.C. Gen. Stat. § 136-108 (1981) provides that the trial court, in a condemnation proceeding "shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of . . . title to the land . . . and area taken." One issue raised by the pleadings is the area affected by the taking. The DOA is required to describe in its declaration of taking the area *affected* as well as the area taken. N.C. Gen. Stat. § 136-103 (1981). N.C. Gen. Stat. § 136-112 (1981) clarifies the legislative intent behind G.S. § 136-103. G.S. § 136-112 provides, in pertinent part, that:

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

To recover under G.S. § 136-112(1) the area affected and the area taken must constitute a single tract. Unity of ownership is an important criterion. *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E. 2d 390 (1978); *see also City of Winston-Salem v. Davis*, 59 N.C. App. 172, 296 S.E. 2d 21, *disc. review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982).

A determination of ownership of the area affected is a prerequisite to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. The State's right to exercise the power of eminent domain is "limited by the constitutional requirements of due process and the payment of just compensation for property condemned." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E. 2d 385, 388 (1969).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. Since the pre-trial order was erroneously prejudicial on statutory and constitutional grounds, the trial court correctly found facts as to the ownership of the affected tracts of land. These findings are necessary to determine just compensation.

We remand the case to the trial court for findings of fact and conclusions of law regarding whether the three tracts constituted a single tract for the purpose of assessing condemnation damages. The major factors for the trial court to consider are "unity of ownership, physical unity and unity of use." *Board of Transportation v. Martin*, 296 N.C. at 25, 249 S.E. 2d at 394 (quoting *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E. 2d 219, 224-25 (1959)).

V

We affirm as to defendant Southhold and remand for additional findings of fact and conclusions of law on the single tract requirement.

Affirmed in part and remanded.

Judges HEDRICK and WHICHARD concur.

PATTIE A. WILKINSON (JOHN A. WILKINSON, EXECUTOR OF THE ESTATE OF PATTIE WILKINSON), DECEASED v. WEYERHAEUSER CORPORATION; E. A. WILLIAMS AND WIFE, LUCY FARROW WILLIAMS; JUANITA C. GIBBS, DIVORCED, J. T. TAYLOR AND WIFE, DORA TAYLOR; ZACHARY TAYLOR; GRATZ SPENDER AND DICK TUNNELL

No. 832SC106

(Filed 6 March 1984)

Deeds § 25— Torrens proceeding—failure to certify issues for jury trial

In this Torrens proceeding, the trial court erred in refusing to certify for trial by jury the issues of fact arising from the title examiner's report upon proper demand by defendants.

Judge JOHNSON concurs in the result.

APPEAL by defendants from *Peel, Judge.* Judgment entered 28 October 1982. Heard in the Court of Appeals 10 January 1984.

Plaintiff brought this Torrens proceeding to register title to real property pursuant to Chapter 43 of the North Carolina General Statutes on 22 July 1977. On 12 April 1978, the matter was referred to William P. Mayo as Examiner of Titles. Mayo conducted a hearing on 30 May 1980 and filed a report on 29 June 1981. Defendants filed numerous exceptions to the report on 13 July 1981.

On 23 September 1982, the trial court considered the matter by examining the "entire file," including "the transcript of the hearing before the Examiner of Titles and the exhibits introduced into evidence at such hearing, together with the report of the Examiner of Titles." The court subsequently "affirmed" the report along with "each and every Finding of Fact and Conclusion of Law therein contained." In addition, the court found that plaintiffs held title to the land in question and found that there were no issues of fact arising from the title examiner's report which could be certified for trial. From the order of the trial court defendants appeal.

Henderson and Baxter, by David S. Henderson and Nelson W. Taylor, III, for defendant-appellants.

Wilkinson and Vosburgh, by James R. Vosburgh and Steven P. Rader, for plaintiff-appellees.

ARNOLD, Judge.

Defendants first contend that the trial court erred in not certifying for trial by jury issues of fact arising out of the title examiner's report. This contention is based on the language of G.S. 43-11(c), which provides in part:

> Any of the parties to the proceeding may, within 20 days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a

trial of such issue by jury, and *he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding* . . . (emphasis added).

Defendants maintain that G.S. 43-11(c) *requires* the trial judge to certify the issues of fact for trial by jury upon the demand of any party. We agree and order this case remanded to superior court.

Although it has been in effect in North Carolina since 1913 the Torrens system for land registration is seldom used in this state and, consequently, is not often the subject of North Carolina case law.

"The general purpose of the Torrens system is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles. The basic principle of this system is the registration of the official and conclusive evidence of the title of land, instead of registering, as the old system requires, the wholly private and inconclusive evidence of such title." *State v. Johnson*, 278 N.C. 126, 144, 179 S.E. 2d 371, 383 (1971) (citing McCall, *The Torrens System—After Thirty-Five Years*, 10 N.C. L. Rev. 329, 330 (1932). Moreover, the Torrens Act should be liberally construed according to its intent. *Perry v. Morgan*, 219 N.C. 377, 14 S.E. 2d 46 (1941).

Plaintiffs urge a narrow construction of G.S. 43-11(c), apparently contending that the language is permissive since it states that the judge *may* by his own motion certify issues of fact for a jury trial, and further, that if he does, by his own initiative, determine that there *are* issues of fact, then he must certify these issues for trial upon demand of a party. They contend that since the judge did not initially find any issues of fact, he was not required to certify any issues for trial, in spite of demand by defendants.

This interpretation of G.S. 43-11(c) fails to effectuate the purpose of the statute. The aim of the Torrens Act is to allow a complete, judicially enforced, determination of title. The proceeding,

therefore, should give great deference to a party who in good faith questions the validity of that title. By simply "affirming" the report of the title examiner without certifying for jury trial issues of fact raised by a party, the court precludes that party from having a jury consider his exceptions. The final effect is that the trial judge himself determines title, in spite of what may be substantial factual questions as to its validity. We believe that the court erred in refusing to certify for trial by jury the issues of fact arising out of the title examiner's report which were requested by defendants.

In the case at bar, defendants make at least two exceptions of some note to the chain of title purportedly shown by plaintiffs. One conveyance involves a will dated 1925 where Pink F. Credle is said to have devised the property in question to Alice L. Adams, wife of Esty Adams, Mollie L. Credle, Ottie L. Selby and John T. Credle as tenants in common. The next link in the chain is a deed from Esty Adams, et al. to Bernice Selby. This deed states that "Grantors are all of the heirs of Alice L. Adams, Mollie L. Credle, Ottie L. Selby and John T. Credle, deceased." Defendants complain that there was no evidence establishing that the grantors were indeed all of the heirs of those taking under the 1925 will.

A second problem area alleged by defendants involves the very next conveyance in plaintiffs' chain. A trustee's deed dated 1977 from George T. Davis, Trustee, and John A. Wilkinson, Assignor, deeds the property to Pattie A. Wilkinson. Defendants find fault in the fact that no evidence of foreclosure or any other proceeding authorizing a sale was introduced. These examples, of course, do not encompass all of defendants' objections to the proceedings below. They are representative, however, of their good faith objections to the finding of the title examiner that plaintiffs hold title to the property in question.

Defendants' exceptions to the title examiner's report were filed within the prescribed 20-day period. Included was their final exception, in which defendants stated that they demanded "trial by jury on all issues arising upon the pleadings and the exceptions filed herein pursuant to the provisions of G.S. 43-11(c) all in accordance with the provisions of said Statute." The clerk then transmitted the record to the trial judge for his determination.

After considering the record, the judge found that there were no issues of fact to certify for jury trial. Defendants then requested that the following issues be certified:

1. Is the petitioner, John A. Wilkinson, the exclusive owner and entitled to possession and to registration of said title pursuant to Chapter 43, General Statutes of North Carolina?

2. Are the defendants, J. T. Taylor and wife, Dora Taylor, or Zachary Taylor, or any of them, the owner and entitled to possession of the land described in the petition herein or any interest therein?

3. If the answer to issue number 2 above is "yes," what interest, if any, are the defendants, J. T. Taylor and wife, Dora Taylor, and Zachary Taylor, or any of them, entitled?

Plaintiffs contend that these issues submitted by defendants are not issues of fact, but are issues of law and, therefore, may not be submitted to a jury. We disagree. North Carolina case law provides that it is the duty of the trial judge to submit to the jury those issues "which are raised by the evidence, and which, when answered, will resolve all material controversies between the parties." *Wooten v. Nationwide Mutual Insurance Co.*, 60 N.C. App. 268, 298 S.E. 2d 727 (1983). We hold that the trial court erred in refusing to certify for trial those issues submitted by defendants and remand this case for trial in superior court.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge JOHNSON concurs in result.

Geitner v. Townsend

DAVID ROYER GEITNER, AN INCOMPETENT, BY AND THROUGH HIS GUARDIAN, FIRST NATIONAL BANK OF CATAWBA COUNTY v. MARCIA TOWNSEND, ALSO KNOWN AS MARCIA TOWNSEND GEITNER AND DAVID ROYER GEITNER, BY AND THROUGH HIS GUARDIAN, ROGER MANUS

No. 8325DC98

(Filed 6 March 1984)

1. **Marriage § 4— marriage by incompetent as voidable—failure to direct verdict for plaintiff proper**

In an annulment action instituted by plaintiff bank purporting to act on behalf of its ward against his wife, the trial court properly denied plaintiff's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial since a marriage of a person incapable of contracting for want of understanding is not void, but voidable, and prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. G.S. 51-3 and G.S. 50-4. Therefore, where there was conflicting evidence as to whether plaintiff's ward did have adequate mental capacity and understanding of the special nature of a contract to marry, there was sufficient evidence presented to support a jury's verdict in favor of defendant.

2. **Marriage § 5— burden of proof that husband lacked mental capacity upon plaintiff**

In an annulment action initiated by plaintiff bank purporting to act on behalf of its ward, the trial judge properly placed the burden of proof on plaintiff to prove that its ward lacked the mental capacity and understanding sufficient to contract a valid marriage since when the fact of marriage has been established by evidence, "the burden of persuasion on the issue of invalidity is on the party asserting such."

APPEAL by plaintiff from *Noble, Judge.* Judgment entered 23 March 1982 in District Court, CATAWBA County. Heard in the Court of Appeals 10 January 1984.

This is an annulment action initiated by plaintiff, First National Bank of Catawba County, purporting to act on behalf of its ward, David Royer Geitner, against Marcia Townsend Geitner, to have declared void *ab initio* the marriage between David Royer Geitner and Marcia Townsend Geitner which took place on 29 May 1980.

David Royer Geitner is 49 years old and is an adjudicated incompetent with a long history of mental illness. Mr. Geitner has been diagnosed as a chronic paranoid schizophrenic and has re-

ceived extensive psychiatric treatment. Mr. Geitner has been a patient at various mental institutions for much of his adult life.

In May of 1961, First National Bank of Catawba County filed an Application for Guardianship of Mr. Geitner's estate, listing the total value of that estate as $45,000.00. On 19 May 1961, Letters of Guardianship, appointing First National Bank of Catawba County as Guardian, were issued by the Clerk of Superior Court of Catawba County. Since that time, Mr. Geitner has inherited approximately $900,000.00 from his father, which became part of the estate managed by the guardian bank.

In June of 1975, Mr. Geitner was conditionally released from confinement at Broughton Hospital at Morganton, North Carolina, pursuant to a judicial finding that he was not imminently dangerous to himself or others. The conditions of his release, as recommended by his physician and the court, included provision for a structured environment with attendants to do his cooking, cleaning, driving, etc. Mr. Geitner has lived in that environment in a house purchased by the guardian bank with funds from his estate and has continued to receive psychiatric treatment since his release from Broughton Hospital in 1975.

Mr. Geitner met Marcia Townsend in April of 1980 at the Carolina Friendship House, an outpatient mental health facility in Boone, North Carolina. Marcia Townsend suffers from no mental disability but is confined to a wheelchair as a victim of Friedreich's ataxia, a disease of the nervous system resulting in the loss of muscular coordination and control. She attended Friendship House to take cooking lessons. The couple found themselves attracted to each other and spent a great deal of time together. On 28 May 1980, Mr. Geitner proposed to Marcia Townsend. She accepted the next day. Mr. Geitner arranged transportation to Watauga Hospital where the couple had blood tests and physical examinations. They then went to the Register of Deeds Office to obtain a marriage license. They were married that day, 29 May 1980, at the magistrate's office.

Since their marriage, David Royer Geitner and Marcia Townsend Geitner have continued to live together in the house purchased by the guardian bank for Mr. Geitner, with certain domestic duties being provided by an attendant employed by the guardian bank. The guardian bank has refused to provide any

funds for the benefit of Marcia Townsend Geitner and, in fact, reduced David Royer Geitner's allowance from $160.00 per week to $50.00 per week in May of 1980.

This annulment action was initiated by the guardian bank on 23 October 1980. At that time, David Royer Geitner's only surviving relatives were an elderly aunt and several cousins, among whom were the chairman of the board and the wife of a member of the trust committee of the bank.

Upon Mr. Geitner's application, a guardian ad litem was appointed on 28 May 1981 to represent Mr. Geitner's interests. Mr. Geitner, through his guardian ad litem, was permitted to intervene in this action as a party defendant. The case came on for trial, and on 22 March 1982, a jury returned a verdict finding that David Royer Geitner had sufficient mental capacity and understanding on 29 May 1980 to enter into a marriage contract with Marcia Townsend Geitner. Judgment was entered accordingly. Plaintiff appeals.

Sigmon, Clark and Mackie, by E. Fielding Clark, II, for plaintiff-appellant.

Legal Services of the Blue Ridge, by Bruce L. Kaplan, for Marcia T. Geitner, defendant-appellee.

Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr., for David R. Geitner, intervenor-appellee.

EAGLES, Judge.

[1] Plaintiff guardian bank asks us to find that the trial judge erred in denying its motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Plaintiff contends that a marriage with a legally declared incompetent is void as a matter of law. We do not agree.

A voidable marriage is valid "for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time." *Ivery v. Ivery*, 258 N.C. 721, 726, 129 S.E. 2d 457, 461 (1963). Our Supreme Court has held that, under the common law as modified by G.S. 51-3 and G.S. 50-4, a marriage of a person incapable of contracting for want of understanding is not void, but voidable. *Id.* at 730, 129

S.E. 2d at 463. We find that prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry.

The mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity. 1 Lee, North Carolina Family Law § 24 (4th ed. 1979). As to what constitutes mental capacity or incapacity to enter into a contract to marry, "the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage, and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case." *Ivery*, 258 N.C. at 732, 129 S.E. 2d at 464-65 (quoting 55 C.J.S. *Marriage* § 12). In Lee's treatise on North Carolina family law, it is noted that "unlike other transactions, an insane person's capacity to marry is not necessarily affected by guardianship. . . . (R)easons why guardianship removes from the insane person all capacity to contract do not apply to marriage." 1 Lee, *supra*, § 24 n. 119 (quoting McCurdy, *Insanity as a Ground for Annulment or Divorce in English or American Law*, 29 Va. L. Rev. 77 (1943)). In fact, "tests judicially applied for a determination of incompetency in guardianship matters differ markedly from those applied for the determination of mental capacity to contract a marriage, for even though under guardianship as an incompetent, a person may have in fact sufficient mental capacity to validly contract marriage." 4 Am. Jur. 2d ANNULMENT OF MARRIAGE § 28.

We find that, here, sufficient evidence was presented to support a jury's verdict. Defendants presented both expert and lay witnesses who testified that Mr. Geitner did have, on 29 May 1980, adequate mental capacity and understanding of the special nature of a contract to marry. The fact that plaintiff guardian bank offered conflicting evidence merely required the jury to consider the credibility of the witnesses and evidence on each side. The fact that there was conflicting evidence does not require a directed verdict, judgment notwithstanding the verdict, or a new trial.

[2] Plaintiff guardian bank also assigns as error the trial judge's charge to the jury that the burden of proof was on the plaintiff to prove that David Royer Geitner lacked the mental capacity and understanding sufficient to contract a valid marriage. We find no

error. When the fact of marriage has been established by evidence, "the burden of persuasion on the issue of invalidity is on the party asserting such." 2 Brandis, N.C. Evidence § 244 (2d rev. ed. 1982). And even if a party's insanity is proved to be of such a chronic nature that it is presumed to continue, it does not shift the burden of the issue. 2 Brandis, N.C. Evidence § 238 (2d rev. ed. 1982). The plaintiff had the burden of proof on Mr. Geitner's capacity to contract a valid marriage.

The rest of plaintiff's assignments of error concern the admissibility of certain evidence. Several of these assignments of error concern testimony to the effect that Mr. Geitner had the capability to understand the nature of marriage. We note that both expert and lay witnesses may testify as to mental capacity or condition under an exception to the rule that a witness may not give an opinion on the very question for the jury to decide. 1 Brandis, N.C. Evidence § 126 (2d rev. ed. 1982). We hold that since the testimony complained of by plaintiff was based on the witnesses' observations and reasonable opportunities to form opinions as to Mr. Geitner's mental condition, there was no error in admitting this testimony. We have carefully examined the remaining assignments of error and find them to be without merit.

No error.

Judges HEDRICK and BRASWELL concur.

FORSYTH CITIZENS OPPOSING ANNEXATION, HENRY BREWER, ROBERT M. BURCHAM, PHILIP DEMARKO, JOY M. McNAB, GLADYS NORMAN, SAM POPE, JAMES A. SNEED, CORNELIUS F. SPACH, RAY W. SIZEMORE AND R. J. BALL v. CITY OF WINSTON-SALEM, A MUNICIPAL CORPORATION, AND MAYOR WAYNE A. CORPENING, IN HIS OFFICIAL CAPACITY, AND VIVIAN H. BURKE, MARILY S. HARPE, LARRY D. LITTLE, VIRGINIA K. NEWELL, ROBERT S. NORTHINGTON, JR., ERNESTINE WILSON, LARRY W. WOMBLE AND MARTHA S. WOOD, ALDERMEN, IN THEIR OFFICIAL CAPACITIES

No. 8321SC213

(Filed 6 March 1984)

1. **Municipal Corporations § 2— annexation statutes—due process**

The annexation statutes set forth in Ch. 160A, art. 4A, p. 3, do not violate due process because they fail to provide for judicial review to determine whether the conduct of municipal officials in an annexation proceeding was arbitrary, capricious or unreasonable, since the effect of G.S. 160A-50(f) is to give substantial protection against arbitrary, capricious and unreasonable acts by a municipality. Petitioners failed to show that the annexation statutes were unconstitutionally applied in this proceeding where they made no contention that the statutory procedure set out in G.S. 160A-49 was not followed or that the service requirements of G.S. 160A-47 and the character of the area requirements of G.S. 160A-48 were not met.

2. **Constitutional Law § 23; Municipal Corporations § 2— challenge to annexation statutes and ordinances—failure to state claim under due process clause**

Petitioners' challenge to annexation statutes and ordinances failed to state a claim for relief under the due process clause of the Fourteenth Amendment where it was not based upon allegations of racial discrimination, voting rights, or other suspect classification or infringement of fundamental rights.

APPEAL by petitioners from *Wood (William Z.), Judge.* Judgment entered 12 November 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 February 1984.

Petitioners appeal from a judgment of the Forsyth County Superior Court dismissing their petition challenging the actions of the Winston-Salem Board of Aldermen in adopting ordinances annexing two areas to the City of Winston-Salem. In its judgment, the court concluded that North Carolina's annexation statutes contained in G.S. Chapter 160A, art. 4A, part 3 are constitutional and were constitutionally applied in this case, and that the City of Winston-Salem met the requirements of G.S. 160A-47, 160A-48, and 160A-49 in annexing the areas. Petitioners appealed.

Rosbon D. B. Whedbee for petitioner appellants.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr.; and City of Winston-Salem Attorney's Office, by Ronald G. Seeber and Ralph D. Karpinos, for respondent appellees.

WEBB, Judge.

The question presented by this appeal is whether North Carolina's annexation statutes are constitutional and were constitutionally applied in this case. Petitioners contend that (1) G.S. Chapter 160A, art. 4A, part 3 violates the due process clause of the Fourteenth Amendment to the United States Constitution because it prohibits judicial review of the conduct of municipal officials in annexation proceedings alleged to be arbitrary, capricious, unreasonable or abusive, and (2) that the annexation involved herein is arbitrary, capricious, unreasonable, and an abuse of discretion by the City in violation of the due process clause of the Fourteenth Amendment.

G.S. 160A-50(f) provides that a court, in reviewing annexation proceedings, may take evidence intended to show either that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of either G.S. 160A-47 or 160A-48 were not met. The statutory procedure outlined in G.S. 160A-49 requires notice of a public hearing and sets out guidelines for the hearing which is to be held prior to annexation. G.S. 160A-47 requires the annexing city to prepare maps and plans for the services to be provided to the annexed areas. G.S. 160A-48 sets out guidelines for the character of the area to be annexed.

[1] The North Carolina Supreme Court and the Fourth Circuit Court of Appeals have made it clear that G.S. 160A-50(f) limits the scope of judicial review to the determination of whether the annexation proceedings substantially comply with the requirements of the statutes referred to in G.S. 160A-50(f). *See In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974); *Food Town v. City of Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980); *Raintree Homeowners Assoc. v. City of Charlotte*, 543 F. Supp. 625 (W.D.N.C. 1982), *aff'd*, 710 F. 2d 132 (4th Cir. 1983). A separate test of the reasonableness of an annexation is not included within the limited scope of judicial review, *see In re Annexation Or-*

dinance, 303 N.C. 220, 230, 278 S.E. 2d 224, 231 (1981); however, G.S. 160A-50(f) and the provisions incorporated therein amount to a requirement that the courts determine whether an annexation is reasonable. *See Raintree Homeowners, supra* at 629. In *Raintree*, the Court stated that even though the language of the statute does not speak in terms of arbitrariness, capriciousness or unreasonableness, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by a municipality. *Id.*

Assuming, *arguendo*, that the annexation involved herein is subject to review under the Fourteenth Amendment to the United States Constitution, we find that the protection afforded by the North Carolina statutes is sufficient to comport with due process. Our Supreme Court and the Fourth Circuit Court of Appeals have repeatedly upheld our annexation statutes against constitutional attack and we find nothing in this case convincing us to hold differently. Furthermore, petitioners have not argued on appeal that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of G.S. 160A-47 and 160A-48 were not met; therefore, they have failed to show that the annexation statutes were unconstitutionally applied in this case.

[2] More importantly, it appears petitioners' challenge must fail because it is not actionable under the Fourteenth Amendment. The Fourth Circuit Court of Appeals rejected these same arguments presented by petitioners with respect to the annexations concerned herein, holding that petitioners' allegations, even if true, do not entitle them to relief under the Fourteenth Amendment. *See Baldwin, et al. v. City of Winston-Salem*, 710 F. 2d 132 (4th Cir. 1983). Relying on the cases of *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907) and *Berry v. Bourne*, 588 F. 2d 422 (4th Cir. 1978), the Court stated that "the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications." *Id.* at 135.

In *Hunter v. Pittsburgh, supra*, the seminal case in this area, the Supreme Court declared that annexation by a city or town is purely a state political or legislative matter, entirely within the

power of the state legislature to regulate. Thus, by *Hunter*, the Supreme Court made it clear that a state's discretion in determining its annexation policies is beyond the reach of the Fourteenth Amendment. However, subsequent decisions have indicated that municipal annexations are subject to review under the Fourteenth Amendment if the challenge to an annexation is based upon allegations of racial discrimination or infringement of voting rights. *See Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110 (1960); *Hayward v. Clay*, 573 F. 2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed. 2d 351 (1978). But these are the only recognized exceptions to the general rule that annexations are to be accorded considerable deference. *See Berry v. Bourne, supra; Baldwin v. City of Winston-Salem, supra.*

Because the petitioners' challenge does not concern racial discrimination, voting rights, or other suspect classification or infringement of fundamental rights, the Fourth Circuit concluded that petitioners had not stated a claim entitling them to relief under the due process clause of the Fourteenth Amendment. In accordance with the Fourth Circuit's decision in *Baldwin, supra*, and the decisions cited therein, we hold the superior court did not err in dismissing petitioners' action.

Next, petitioners contend that North Carolina's annexation statutes are unconstitutional because they only permit owners of real property to challenge annexations. Three of the petitioners do not own real property in either of the annexed areas yet they were permitted to challenge the annexations without objection by the respondents. We do not believe it is necessary for us to pass on the question of whether the annexation statutes unconstitutionally deny personal property owners the right to challenge annexations because in this case such persons were in fact permitted to proceed with their challenge. The judgment of the superior court is

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. JOSEPH R. BYRD

No. 8311SC782

(Filed 6 March 1984)

1. **Criminal Law § 98.2— failure to sequester witnesses—no abuse of discretion**

In a prosecution for attempting to take indecent liberties with a child in violation of G.S. 14-202.1(a)(2), there was no abuse of discretion in a trial judge's denial of defendant's motion to sequester juvenile witnesses at the probable cause hearing. G.S. 15A-611 and G.S. 15A-1225.

2. **Criminal Law § 169.6— exclusion of evidence—failure to show prejudice**

In a prosecution for attempting to take indecent liberties with a child, defendant failed to show prejudice from the exclusion of testimony apparently intended to challenge a witness's credibility where there was nothing in the record to indicate the answer the witness would have given had he been permitted.

3. **Rape and Allied Offenses § 19— attempts to take indecent liberties with a child—sufficiency of evidence**

A trial court properly denied defendant's motion to dismiss a charge of attempting to take indecent liberties with a child in violation of G.S. 14-202.1(a)(2) where the evidence tended to show that defendant pulled down the pants of a youngster under the age of 16, and said, "let me play with you," and defendant did not complete the crime because, at that minute, a friend of the youngster's walked in and the youngster ran out of defendant's house.

4. **Criminal Law § 163— failure to object or timely request instructions—waiver of right to complain on appeal**

Defendant's failure to request limiting instructions and failure to timely request instructions on certain definitions, as required by G.S. 15A-1231, precluded defendant from complaining about the instructions on appeal.

5. **Criminal Law § 138— sentence of presumptive term—aggravating or mitigating factors not required**

Where defendant was convicted of attempting to take indecent liberties with a child in violation of G.S. 14-202.1(a)(2) and sentenced to the presumptive term of three years, the trial judge was not required to find aggravating or mitigating factors. G.S. 15A-1340.4.

APPEAL by defendant from *Battle, Judge.* Judgment entered 15 December 1982 in Superior Court, HARNETT County. Heard in the Court of Appeals 6 February 1984.

Defendant was convicted of attempting to take indecent liberties with a child in violation of G.S. 14-202.1(a)(2).

Attorney General Edmisten, by Charles H. Hobgood, Associate Attorney General, for the State.

Bain and Marshall, by Elaine F. Marshall, for the defendant-appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the trial court erred in denying defense counsel's motion to sequester witnesses at the probable cause hearing. We find no error. Generally, the trial judge has discretion regarding sequestration of witnesses and his decision is reviewable only upon a showing of abuse of discretion. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980). This rule applies regardless of whether the motion to sequester is made at trial or at the probable cause hearing. *See* G.S. 15A-611 (official commentary); G.S. 15A-1225. The fact that the prosecution witnesses were juveniles does not mandate sequestration. We find no evidence in the record that the witnesses were influenced by one another or that their testimonies were less than candid. *See State v. Keaton*, 61 N.C. App. 279, 300 S.E. 2d 471, *review denied*, 309 N.C. 463, 307 S.E. 2d 369 (1983); *see also Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976).

[2] Defendant's next assignment of error concerns the following exchange between defense counsel and the prosecution witness, Jeffrey Holmes:

> Q. Are you pretty good friends with Chief Parker?
>
> A. Yes, ma'am.
>
> Q. How many times a week do you see him?
>
> A. I see him a lot.
>
> Q. Before school went in, did you see him just about every day?
>
> A. Yeah, sometimes.
>
> Q. Did he help you get ready for testifying today?

The trial judge sustained the prosecutor's objection to this question and Holmes was not allowed to answer. Defendant cites error in the exclusion of this testimony.

Generally, in this state, we adhere to a " 'wide-open' rule of cross-examination," recognizing thereby that a defendant always has the right to challenge the credibility, through cross-examination, of witnesses who testify against him. *State v. Penley*, 277 N.C. 704, 708, 178 S.E. 2d 490, 492 (1971); *see State v. Wilson*, 269 N.C. 297, 152 S.E. 2d 223 (1967). Although we find that the trial judge erred in excluding testimony apparently intended to challenge the witness' credibility, defendant has failed to show prejudice from the exclusion of this testimony. We find nothing in the record to indicate the answer the witness would have given had he been permitted. Defendant has the burden not only of showing error but of showing that such error was prejudicial. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *motion for reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1977); *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972).

[3] Defendant next contends that the trial court erred in denying defense counsel's motion to dismiss. We find no error. A conviction, like the one here, for *attempting* to commit a crime, requires a showing of two elements, to wit, intent to commit the substantive offense and an overt act which, in the ordinary and likely course of events, would result in commission of the crime. *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *affirmed*, 308 N.C. 804, 303 S.E. 2d 822 (1983). The act must be more than mere preparation but less than the completed offense. *State v. Eure*, 61 N.C. App. 430, 301 S.E. 2d 452 (1983).

The evidence in this case showed that defendant pulled down the pants of Jeffrey Holmes, a youngster under the age of sixteen, and said, "Let me play with you." Defendant did not complete the crime because, at that moment, Holmes' friend walked in and Holmes ran out of defendant's house.

On a motion to dismiss, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). With this rule in mind, we hold the evidence in this case to be sufficient to establish the elements of both intent and overt action necessary to withstand defendant's motion to dismiss. It was properly left to the jury to infer from the circumstances whether defendant

had the requisite intent. *See State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

[4] Defendant's next three exceptions relate to the jury charge. First, defendant contends that the trial judge's failure to define "lewd or lascivious" constituted prejudicial error. We find no merit in this contention. The record reveals that defense counsel had the opportunity, at trial, out of the jury presence, to request an appropriate definition and did not do so. Defendant, therefore, has no grounds to appeal. Rule 10(b)(2) Rules of Appellate Procedure. Moreover, we have previously held "lewd or lascivious" to be ordinary words a jury is presumed to understand. *State v. Stell*, 39 N.C. App. 75, 249 S.E. 2d 480 (1978).

Defendant next cites prejudicial error in the trial judge's failure to define intent. At trial, after the jury had been instructed and had retired, defense counsel orally requested an instruction on the definition of intent. Defense counsel's request was not timely, nor in writing, as required by G.S. 15A-1231. The decision, therefore, whether to instruct the jury as requested was within the discretion of the trial judge. *State v. Matthews and State v. Snow*, 299 N.C. 284, 261 S.E. 2d 872 (1980). We find no abuse of discretion. "Intent," a word of common usage, is self-explanatory and does not require elaboration. *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980).

The testimony at trial related to two charges of taking indecent liberties with children, one of which was dismissed at the close of the State's evidence. Defendant contends that the trial judge erred by failing to give a limiting instruction and by stressing that the jury consider all of the evidence. Specifically, defendant objects to the following portion of the judge's charge.

> Now members of the jury, I have not summarized all of the evidence in this case. However, it is your duty to remember all of the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from that of the Court or of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations. I have not reviewed the contentions of the State or of the defendant, but it is your duty not only to consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the at-

torneys in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense, and as best you can, to determine the truth of this matter.

We have reviewed the charge in its entirety and conclude that the judge properly instructed the jury on the evidence and law applicable thereto. Defendant, not having requested a limiting instruction at trial, cannot complain on appeal.

[5] Defendant lastly contends that the trial judge erred in failing to find mitigating factors during sentencing. Defendant was convicted pursuant to G.S. 14-201.1, an offense punishable as a Class H felony. Because defendant was sentenced to the presumptive term of three years, the trial judge was not required to find aggravating or mitigating factors. G.S. 15A-1340.4.

No error.

Judges WEBB and JOHNSON concur.

JUNIOR ALONZO NEWTON v. EARLENE ABEE NEWTON

No. 8325DC318

(Filed 6 March 1984)

Trusts § 19— constructive trust in marital home—sufficiency of evidence

Plaintiff's evidence was sufficient to establish a constructive trust in her favor in the marital home where it tended to show that the parties discussed the purchase of land upon which to build a marital home, and plaintiff wife understood that the land would be titled jointly; defendant husband breached the confidential marital relationship by intentionally causing plaintiff's name to be omitted from the deed; both parties borrowed money to build a home on the land and both signed the note and deed of trust securing the loan; plaintiff contributed money payments on the home; and defendant never told plaintiff that her name was not on the deed until several years later.

APPEAL by defendant from *Crotty, Judge.* Judgment entered 11 August 1982 in District Court, BURKE County. Heard in the Court of Appeals 15 February 1984.

Mitchell, Teele, Blackwell, Mitchell & Smith by Thomas G. Smith, for plaintiff appellee.

Simpson, Aycock, Beyer & Simpson by Richard W. Beyer, for defendant appellant.

BRASWELL, Judge.

Mr. Newton sued Mrs. Newton for an absolute divorce in September 1981. Mrs. Newton counterclaimed and sought to have the court impose a resulting trust or a one-half undivided interest in the marital homeplace in her favor. Although title was in her husband's name only, she alleged that she had made money payments on the home.

At trial, she amended her pleading to conform to the evidence to allege a constructive trust. The jury found that a resulting trust was not shown by the evidence but that a constructive trust was shown. The trial court, however, disagreed that a constructive trust was shown and allowed Mr. Newton's motion for judgment notwithstanding the verdict. Contrary to the jury verdict the trial court entered judgment for Mr. Newton on the counterclaim. The issue on appeal is whether the trial court erred in allowing Mr. Newton's motion for judgment notwithstanding the verdict.

In passing upon a motion for judgment notwithstanding the verdict, the court must consider the evidence in the light most favorable to the non-movant, resolving all conflicts in the evidence in the non-movant's favor and giving the non-movant the benefit of every reasonable inference which can be drawn from the evidence. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

We now inquire into the law of constructive trusts.

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83; *Garner v.*

Phillips, 229 N.C. 160, 47 S.E. 2d 845; Strong, N.C. Index 2d, Trusts, § 14. Unlike the true assignment for benefit of creditors, which is an express trust, intended as such by the creator thereof, a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. See: *Electric Co. v. Construction Co.*, 267 N.C. 714, 148 S.E. 2d 856; *Speight v. Trust Co.*, 209 N.C. 563, 183 S.E. 734; *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188; Lee, North Carolina Law of Trusts, § 13a (3rd ed. 1968); 54 Am. Jur., Trusts, § 218; 89 C.J.S., Trusts, §§ 139, 142. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

Wilson v. Development Co., 276 N.C. 198, 211-12, 171 S.E. 2d 873, 882 (1970). A constructive trust often involves an abuse of a confidential relationship. *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979).

In *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965), the husband bought a tract of land in 1937 with funds belonging to both parties and placed title in his name only. The next year, the husband built a combination store/dwelling on the property. In 1951, the parties decided to remodel and enlarge the dwelling. The husband and wife agreed that each would pay half the costs of the remodeling. Husband also promised the wife that he would change the title on the deed to include her. During remodeling, the husband repeatedly assured the wife that he was going to change the deed. After the remodeling was completed, the wife said "let's fix the deed," to which the husband responded, "You don't think I am a damn fool, do you?" *Id.* at 22, 140 S.E. 2d at 711. Justice Sharp, writing for the Court, held that the wife's evidence was "insufficient to establish either a resulting or a constructive trust in the land described in the complaint, for defendant acquired no *title* to realty with the use of plaintiff's money." (Emphasis in original.) *Id.* Justice Sharp went on to state that the

wife's evidence was sufficient to establish an equitable lien on the property based upon the wife's advancement of money for improvements in reliance upon the husband's promise to convey her a half interest in the land.

In *Cline v. Cline, supra*, the husband's parents bought a farm in 1950. Shortly after the purchase, in December 1950, after having made one payment on the note, the husband's father died. After a family caucus was held to determine who would farm the land, the husband told the wife, "We'll have to live up there and farm the land and finish payment for the place, then it will be ours." *Id.* at 338, 255 S.E. 2d at 401. The wife agreed to and did move on the farm in early 1951. On 15 January 1951, after they had moved on the farm, the husband's mother conveyed the property to husband in his name only. The wife did not learn of this conveyance until 1975. In the meantime, the parties had built a house on the land in the mid-to-late 1950's. She had contributed part of her earnings from her non-farm job towards the repayment of the home loan. She had also signed deeds to purchasers of lots of the land. The Court held that the evidence was sufficient to establish a constructive trust or resulting trust. A constructive trust was established when the husband breached the confidential marital relationship by taking title in his name alone after representing that the property would be theirs.

The facts of our case show that in 1959, while the parties were married, Mr. Newton bought an acre and a half tract of land from his brother for a nominal amount. Mrs. Newton contributed nothing towards the purchase price of the land. Title to the land was placed solely in Mr. Newton's name. In 1960, the parties borrowed some money to build a house on the land. Both parties signed the note and deed of trust securing the loan.

Considering the evidence in the light most favorable to Mrs. Newton, we further find that the evidence showed that Mr. and Mrs. Newton discussed the purchase of the land for the purpose of building a home upon it, and it was "[her] understanding" that the land would be titled jointly. When the deed was prepared, Mr. Newton intentionally had Mrs. Newton's name omitted. In 1960 they went to borrow money to build the house. Mr. Newton had her sign the note and the deed of trust. Mr. Newton never told her that her name was not on the deed until several years later.

This evidence provided a sufficient basis for a jury finding of a constructive trust. The marital relationship is the most confidential of relationships, and for transactions between spouses to be valid, they must be fair and reasonable. *Cline v. Cline, supra; Fulp v. Fulp, supra.* The jury could have reasonably inferred from the evidence that Mr. Newton led Mrs. Newton to believe that her name was to be on the deed. It was natural for Mrs. Newton, having discussed with her husband the purchase of land upon which to build a marital home, to assume that her name would be on the deed. She trusted her husband to include her name on the deed. Instead, Mr. Newton breached that trust by intentionally causing her name to be omitted from the deed. The breach of trust was further aggravated by his having his wife sign the note and deed of trust and using her money to pay for the house, without telling her that she had no title to the land. Although Mrs. Newton had access to the deed and could have read it, there was no reason compelling her to do so because she trusted her husband. The transaction was not fair and reasonable to Mrs. Newton.

Since the jury's verdict was supported by the evidence, the trial court erred in allowing Mr. Newton's motion for judgment notwithstanding the verdict. The case is accordingly remanded to Burke County District Court for the entry of a judgment in accordance with the jury's verdict.

Reversed and remanded.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ETHEL MARIE JOE'L

STATE OF NORTH CAROLINA v. SAMUEL WILSON, III

No. 8326SC889

(Filed 6 March 1984)

Searches and Seizures § 15— seizure of buried cylinder containing cocaine—denial of motion to suppress proper

The trial court properly denied defendants' motions to suppress evidence of cocaine which officers seized without a warrant from a film container where the findings established that defendants were on the grounds of a building located in Charlotte; there was no evidence that defendants had any possessory or ownership interest in the building or its accompanying grounds; they were outdoors in the daylight on a clear day; there were no obstructions, and defendants' activities were readily observable from a nearby apartment building; these activities included approaching an area in the yard, reaching into a hole in the ground and removing therefrom an item which appeared to be black in color, removing something from the container, and delivering it to another person in exchange for money.

Judge BECTON concurring in the result.

APPEAL by defendants from *Griffin, Judge.* Judgments entered 21 April 1983 (defendant Joe'l) and 26 April 1983 (defendant Wilson) in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 February 1984.

After the trial court denied their motions to suppress evidence of cocaine which officers had seized without a warrant from a film container, defendants pled guilty to possession of cocaine with intent to sell and deliver. They appeal, pursuant to G.S. 15A-979(b), from judgments of imprisonment (suspended with probation in defendant Joe'l's case; active in defendant Wilson's case).

Attorney General Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

Prosser D. Carnegie for defendant appellant Joe'l.

Haywood, Carson, Merryman, by James H. Carson, Jr., for defendant appellant Wilson.

WHICHARD, Judge.

Defendants' sole contention is that the court erred in denying their motions to suppress. We find no error.

The court made the following findings of fact:

1. That on or about the 13th day of October, 1982, Officer L. E. Welch of the Charlotte Police Department Vice Section was on duty in his capacity as a vice officer in a section of Charlotte known as the Fairview Homes, and primarily working in the 1200 block of Person Street.

2. That Officer Welch, by the use of binoculars from 1915 Edwin Street, Apartment 156, was observing the grounds of a building bearing the address of 1216 Person Street.

3. That at said time, Officer Welch, by use of said binoculars, observed Ethel Marie Joe'l approach a location in the yard of 1216 Person Street where she went to the rear of a tree and to the left of said tree, some twelve inches from same, at which time she was observed to reach into a hole in the ground and remove therefrom an item which appeared to be black in color, round or cylindrical, measuring approximately one inch long and one inch in diameter.

4. That thereafter Officer Welch observed Ms. Joe'l remove something from said container, deliver it to one Ms. McFadden in exchange for money, this being approximately 2:40 p.m. in the afternoon of said date.

5. That at approximately 2:50 p.m., Officer Welch, by the use of said binoculars, observed Mr. Samuel Wilson, III, approach the same location in the yard and he removed something from the ground which the officer could not see, removed something from the container, which Officer Welch could not see, but he did see and observe Mr. Wilson exchange it for money with a black male wearing a tan cap, tan jacket, and bluejeans.

6. That at said time and place the weather conditions were clear, daylight. There were no obstructions, and Officer Welch was located some seventy-five to a hundred feet from the place of surveillance to the location in the ground.

7. That the location in the ground is found to have been an indentation which was covered by tall grass, umbrella fashion, said indentation being large enough to conceal the cylinder, opaque, gray capped container.

8. That there is no evidence before the Court as to the ownership of the grounds as described hereinabove.

9. That during Officer Welch's observation, only Ethel Marie Joe'l and Samuel Wilson, III, went to said location of said opaque cylindrical container.

10. That thereafter, Officer Welch, through radio communications, had Sgt. Wallace of the Charlotte Police Department come to the location and, by radio, directed him to the location of the cylindrical container, which the Court finds as a fact was opaque and contained a gray lid that was in place on said container. And Sgt. Wallace removed the lid and discovered six plastic bags containing a white powdered substance which he suspected to contain cocaine. Sgt. Wallace was advised by Officer Welch as to his observations of Samuel Wilson, III, Ethel Marie Joe'l, and Jeanette McFadden, and, as a result of said communications, Sgt. Wallace was given probable cause to arrest Samuel Wilson, III, and Ethel Marie Joe'l for possession with intent to sell a controlled substance, to wit, cocaine.

11. That when Sgt. Wallace arrived at the scene and was directed to the place where said cylinder was discovered, there were approximately six police officers and six or seven other persons who had not been detained or arrested.

12. The Court finds as a fact that, from the evidence, Ethel Marie Joe'l and Samuel Wilson, III, had actual possession of the cylindrical container and its contents, but the Court cannot find from the evidence any possession in the location of said opaque cylindrical container or where it was hidden by the tall grass.

Defendants concede that these findings are supported by competent evidence and thus are binding on appeal. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982); *State v. Williams*, 303 N.C. 142, 145, 277 S.E. 2d 434, 437 (1981).

The court also made the following conclusions of law:

> [T]hat Samuel Wilson, III [and Ethel Marie Joe'l were] in possession of said container, but had no Constitutional rights . . . to . . . expectation of privacy in and to [it]. That, although said search and seizure was without a warrant, the officers had probable cause to make said search and seizure under the totality of the evidence, and that the same did not violate any of the Constitutional rights of the defendant[s].

These conclusions of law must be supported by the findings of fact. Great deference, however, must be accorded to the trial court's determination in this respect. *Cooke, supra*, 306 N.C. at 134, 291 S.E. 2d at 619-20. Applying the reasoning and authorities set forth in *State v. Teltser*, 61 N.C. App. 290, 300 S.E. 2d 554 (1983), we find the result reached by the trial court here permissible.

In *Teltser* the defendant, in full view of witnesses and without taking any precaution to prevent observation by them, removed a suitcase from his automobile, carried it into a wooded area, and buried it there. He had no ownership or possessory interest in the wooded area, and the area was as accessible to the public at large as it was to defendant. This Court held that under these circumstances it had no basis for overruling the trial court's conclusion that defendant had no reasonable expectation of privacy in the suitcase. *Teltser, supra*, 61 N.C. App. at 294, 300 S.E. 2d at 556.

Here, the findings establish that defendants were on the grounds of a building located in Charlotte. There was no evidence that defendants had any possessory or ownership interest in the building or its accompanying grounds. They were outdoors in the daylight on a clear day. There were no obstructions, and defendants' activities were readily observable from a nearby apartment building. These readily observable activities clearly were "such as would actuate a reasonable man acting in good faith" to believe that defendants possessed and were selling illegal drugs. *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971).

Under these circumstances, like those in *Teltser*, we have no basis for overruling the conclusion that defendants "had no Constitutional rights . . . to . . . expectation of privacy in and to [the

seized] container." The place invaded was not an area in which defendants had a reasonable expectation of freedom from governmental intrusion. *State v. Alford*, 298 N.C. 465, 471, 259 S.E. 2d 242, 246 (1979). We thus hold that the court did not err in overruling the motion to suppress and admitting the evidence of the cocaine seized from the container.

No error.

Judge ARNOLD concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Because of this Court's opinion in *State v. Teltser*, 61 N.C. App. 290, 300 S.E. 2d 554 (1983), I concur in the result.

STATE OF NORTH CAROLINA v. DONNIE JOE McMAHON

No. 8318SC685

(Filed 6 March 1984)

Criminal Law § 87— defense witness not on list furnished to State—discretion of court to permit testimony

There is no statutory or common law requirement that the defendant in a criminal case furnish the State a list of his witnesses. When a defendant calls a witness whose name was omitted from the list of potential witnesses furnished to the State, permitting such witness to testify is a matter within the discretion of the trial judge, and the trial judge in this case erred in refusing to permit a defense witness to testify because her name was not on the list furnished "as the law requires." G.S. 15A-905.

APPEAL by defendant from *Walker, Hal H., Judge.* Judgment entered 16 December 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 January 1984.

Defendant appeals from a judgment of imprisonment entered upon his conviction of second degree rape.

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

Nora Henry Hargrove for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in refusing to allow a witness to testify on his behalf for the purpose of impeaching the character of the alleged victim. Because the refusal may have resulted from a misapprehension of law, and because the possibility that defendant was prejudiced thereby is substantial, we award a new trial.

Defendant called one Christine Mills as a witness, but the court refused to allow her to testify. The record does not contain the precise testimony the witness would have given. However, the district attorney and defense counsel at trial (not present counsel) have in effect stipulated to the substance of the proffered testimony. Each has filed a sworn affidavit in the stipulated record on appeal. Defense counsel's affidavit avers "that he told the trial judge that Mills would testify that the victim's character and reputation in the community was bad and that the victim had engaged in specific acts of misconduct which impeached her credibility." The district attorney's affidavit avers "that the defense counsel indicated that . . . Mills would testify that she was familiar with the prosecuting witness' character and reputation in the community and that it was bad and that she would testify regarding certain specific acts of misconduct of the prosecuting witness." The substance of the excluded testimony thus brought forward in the record on appeal suffices to enable this Court to pass upon the question presented.

When the witness stated her name, the district attorney immediately objected and requested a bench conference. After conferring at the bench with the district attorney and defense counsel, the court refused to allow the witness to testify, stating: "Name was not on the list furnished *as the law requires.* She will not be allowed to testify." (Emphasis supplied.)

"No right of discovery in criminal cases existed at common law." *State v. Carter,* 289 N.C. 35, 41, 220 S.E. 2d 313, 317 (1975), *death sentence vacated,* 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct.

3212 (1976). We are aware of no common law requirement that the defendant in a criminal case furnish the State a list of his witnesses. The criminal discovery statutes contain no such requirement. *See* G.S. 15A-905.

Our Supreme Court has clearly stated that "[n]either statute nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call." *State v. Tatum,* 291 N.C. 73, 85, 229 S.E. 2d 562, 569 (1976). Elementary fairness, if not constitutional proscription, dictates that the same rule in this regard apply to both the State and the defendant.

Where the State calls witnesses whose names were omitted from the list of potential witnesses furnished defendant prior to trial, permitting those witnesses to testify is a matter within the discretion of the trial judge. *State v. Davis,* 290 N.C. 511, 534, 227 S.E. 2d 97, 111 (1976). Clearly, the same rule should apply when a defendant calls a witness whose name was omitted from the list he or she furnished to the State.

The court's inaccurate statement that "the law requires" the witness' name to be on the list indicates that it may have excluded the witness on the basis of a misapprehension of law rather than in the exercise of its discretion. The victim and defendant testified to very different versions of the facts. According to defendant, he and the victim engaged in consensual intercourse. According to the victim, defendant raped her. The general setting and the circumstances under which the incident occurred were such as to give some credence to defendant's account of it. The victim's credibility with the jury thus was clearly crucial to the State's case. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his [or her] testimony in arriving at the ultimate facts in the case." *State v. Nelson,* 200 N.C. 69, 72, 156 S.E. 154, 156 (1930). The excluded impeaching evidence might well have diminished the victim's credibility with the jury and tilted the scales in defendant's direction. The possibility of prejudice from exclusion of this evidence is thus substantial.

Under these circumstances assurance of fairness dictates the award of a new trial. The other errors asserted by defendant are

unlikely to recur, and we thus deem it unnecessary to discuss them.

New trial.

Judges ARNOLD and BECTON concur.

IN RE: ERICA RENEE WILLIAMSON, DOB: 1-3-81, C/O COLUMBUS COUNTY DEPARTMENT OF SOCIAL SERVICES, WHITEVILLE, NORTH CAROLINA

No. 8313DC233

(Filed 6 March 1984)

Infants § 6.1— inability of paternal aunt to appeal award of custody

In an action in which custody of a minor child was sought by the juvenile's paternal aunt and the juvenile's maternal first cousin once removed, the paternal aunt had no right to appeal from an order placing custody with the maternal first cousin once removed since appeal from final orders in juvenile matters "may be taken by the juvenile; the juvenile's parent, guardian or custodian; [and] the State or county agency." G.S. 7A-667 and G.S. 7A-666.

APPEAL by Charles E. Britt and Fredrickia W. Britt from *Gore, Judge.* Juvenile order entered 20 September 1982 (*nunc pro tunc* 10 September 1982) in District Court, COLUMBUS County. Heard in the Court of Appeals 7 February 1984.

C. Franklin Stanley, Jr., for Charles E. Britt and Fredrickia W. Britt, appellants.

George M. Anderson for Arthur Clark and Melissa Brown Clark, appellees.

Lee & Lee, by Junius B. Lee, III, for Junius B. Lee, III, guardian ad litem, appellee.

WHICHARD, Judge.

When this matter was heard in the trial court, the father of the subject juvenile was in jail without bond awaiting trial on a charge of murdering the mother. The juvenile had been judicially declared to be dependent, and temporary custody had been placed with the Columbus County Department of Social Services.

The dispositional hearing which resulted in the order from which this appeal is taken was attended by the juvenile's paternal aunt, Fredrickia Williamson Britt, and the juvenile's maternal first cousin once removed, Melissa Brown Clark. Each, together with her respective spouse, sought custody of the juvenile.

The trial court determined that placement with Melissa Clark and her husband was in the child's best interest. It entered a Juvenile Order placing custody with the Clarks and appointing them as the juvenile's guardians. Fredrickia Williamson Britt and her husband have appealed from this order.

Appeals from final orders in juvenile matters "may be taken by the juvenile; the juvenile's parent, guardian, or custodian; [and] the State or county agency." G.S. 7A-667; *see also* G.S. 7A-666. The Britts fall within none of these categories. The only ones in which they conceivably could fall are those of guardian or custodian; and the record does not establish that they have at any time been appointed guardians for, or awarded custody of, the juvenile.

We thus hold that the Britts did not have the right to appeal from the challenged order, and that the appeal should therefore be dismissed. *See In re Wharton*, 305 N.C. 565, 569, 290 S.E. 2d 688, 690 (1982); *In re Brownlee*, 301 N.C. 532, 546-48, 272 S.E. 2d 861, 869-70 (1981).

We note the following:

This Court can take judicial notice of its own records. *See In re Trucking Co.*, 285 N.C. 552, 557, 206 S.E. 2d 172, 176 (1974); *Swain v. Creasman*, 260 N.C. 163, 164, 132 S.E. 2d 304, 305 (1963). These records reveal that on 24 January 1984 the trial court, acting on a motion pursuant to G.S. 7A-664 for review of the order in question here, transferred custody of the juvenile to the Britts and appointed them as her guardians. On 21 February 1984 another panel of this Court entered an order denying the Clarks' Petition for a Writ of Supersedeas staying the enforcement of the 24 January 1984 order. This appeal is thus subject to dismissal on the further ground of mootness, in that the Britts now have the relief they sought to obtain by this appeal. *See Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 288, 221 S.E. 2d 322, 324 (1976); *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C.

675, 679, 170 S.E. 2d 473, 476 (1969); *Stewart v. Stewart,* 47 N.C. App. 678, 679-80, 267 S.E. 2d 699, 700 (1980).

The statute pursuant to which the 24 January 1984 change of custody was made provides that where, as here, the court has found a juvenile to be dependent, "the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile or until terminated by order of the court." G.S. 7A-664(c). It is, however, the "longstanding general rule that an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio.*" *Bowen v. Motor Co.,* 292 N.C. 633, 635, 234 S.E. 2d 748, 749 (1977). The modification here occurred while an appeal from the order modified was pending in this Court.

Because we dismiss the appeal due to the Britt's lack of statutory standing, we need not pass upon the question of whether G.S. 7A-664(c), which gives the trial court continuing jurisdiction "during the minority of the juvenile or until terminated by order of the court," operates to exclude application of the general rule that the trial court has no jurisdiction and is *functus officio* pending an appeal. We also need not pass upon the effect on operation of that general rule of the Britts' lack of standing to bring this appeal. These issues could be raised in the event the Clarks, as custodians of the juvenile, G.S. 7A-667, perfect an appeal from the order of 24 January 1984.

Appeal dismissed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. ERNEST McLEOD

No. 8315SC727

(Filed 6 March 1984)

1. Criminal Law § 90— failure to declare witness to be hostile

In a prosecution for assault with a deadly weapon inflicting serious injury in which three defense witnesses testified on voir dire that they had overheard a third person say he had cut a "white dude" on the night in ques-

tion, and the third person denied on voir dire that he had cut the victim or made any statements that he had cut a "white dude," the trial court did not abuse its discretion in refusing to declare the third person a hostile witness and to permit defendant to impeach him since defendant had examined the witness in the absence of the jury, knew what the witness would testify, and thus was not misled and surprised or entrapped to his prejudice.

2. Criminal Law § 138— mitigating factor—good character and reputation—insufficient evidence

Testimony by defendant's father did not require the trial court to find as a mitigating factor that defendant was a person of good character or that he had a good reputation.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 9 February 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 19 January 1984.

Defendant appeals from a judgment of imprisonment entered upon his conviction of assault with a deadly weapon inflicting serious injury.

Attorney General Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

Winston, Blue & Rooks, by David M. Rooks, III, for defendant appellant.

WHICHARD, Judge.

GUILT PHASE

On *voir dire,* three witnesses testified for defendant that one Jerry Rogers had told them, or they had overheard him say, that he had cut a "white dude" on the night of the assault with which defendant was charged. Rogers, however, denied making these statements, and stated that he had never seen the victim prior to trial.

[1] Defendant requested that Rogers, who was to be his next witness, be declared hostile. The court denied the request, and refused to allow defendant to impeach Rogers. Rogers then, before the jury, denied that he cut the victim or made any statements that he had cut a "white dude."

Defendant contends the court erred in denying his request and refusing to allow him to impeach Rogers' testimony. General-

ly, a defendant in a criminal case in this jurisdiction cannot impeach his own witness. *State v. Austin*, 299 N.C. 537, 263 S.E. 2d 574 (1980). A "recognized exception" allows impeachment " 'where the party calling the witness has been misled and surprised or entrapped to his prejudice.' " *Id.* at 539-40, 263 S.E. 2d at 575, *citing State v. Pope*, 287 N.C. 505, 512-13, 215 S.E. 2d 139, 145 (1975).

Whether to allow defendant to impeach the witness was in the court's discretion. *Austin, supra; Pope, supra.* Here, as in *Austin*, defendant was not misled and surprised or entrapped to his prejudice. He had examined the witness in the absence of the jury, and he thus knew what the witness would say before he presented him. Under these circumstances the court did not abuse its discretion in denying defendant's request. *Austin, supra.*

Defendant cites and relies on *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973). There, another person had confessed orally to three different people on three separate occasions that he had committed the murder with which defendant was charged. He also had made, but later repudiated, a written confession. The Court held that exclusion, as hearsay, of the testimony of persons to whom the oral confessions were made—together with refusal, on the ground that a party may not impeach his own witness, to permit defendant to cross examine the person whom these witnesses said had confessed—deprived defendant of a fair trial.

In *Chambers*, the other person had confessed to the specific crime with which the defendant was charged. Here, Rogers was alleged to have said only that he had cut a "white dude," not the specific victim. In *Chambers*, all of the witnesses who would have testified to the other person's statements were close acquaintances of that other person. Here, two of the witnesses were defendant's brothers, and the third testified only that he was "acquainted with . . . Rogers." In *Chambers*, each confession was corroborated by other evidence. Here, no corroborating evidence appears.

In our view these and other factual differences render *Chambers* distinguishable and defendant's reliance thereon misplaced. This assignment of error is therefore overruled.

SENTENCING PHASE

[2] Defendant contends the court erred in not finding his good character and reputation in the community as a mitigating factor. The only evidence in this regard was the testimony of defendant's father that

> he is in contact with [defendant] on a continuous basis and . . . to his knowledge [defendant] does not hang around on the street, that he stays home with his wife, that [he] is not involved in violence, that [he] has been working at landscaping when work is available and that he supports his wife.

While uncontradicted, this testimony was from a member of defendant's family and, under decisions of our Supreme Court, was less than manifestly credible. Further, it did not rise to the level which would entitle defendant to a finding in mitigation that he was a person of "good character" or that he had a "good reputation." It was thus within the trial court's prerogative to accept or reject it. *See State v. Benbow*, 309 N.C. 538, 547-48, 308 S.E. 2d 647, 652-53 (1983); *State v. Taylor*, 309 N.C. 570, 575-78, 308 S.E. 2d 302, 306-08 (1983).

No error.

Judges ARNOLD and BECTON concur.

WILLIAM STACY ERHART v. PATSY HOWARD ERHART

No. 8326DC40

(Filed 6 March 1984)

Divorce and Alimony § 19.5— inability of court to alter terms of deed of separation

In an action in which defendant sought specific performance of plaintiff's obligations to defendant under the terms of a deed of separation, the court was incorrect in its conclusion that because the order of specific performance was enforceable by contempt, the "Court has the equitable power to modify provisions regarding the amount of child support or alimony originally contracted for." The court cannot alter the terms of the contract even though the court can, in the exercise of its powers in equity, order specific performance of only such amount as it finds to be proper. This, however, does not alter defendant's rights at law under the agreement.

Erhart v. Erhart

APPEAL by defendant from *Brown, Judge.* Judgment entered 22 September 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 5 December 1983.

In June 1982 an order was entered in this action ordering specific performance of plaintiff's obligation to defendant under the terms of a deed of separation entered into on 27 May 1977, which, in pertinent part, is as follows:

> 8. The Husband agrees to pay to the Wife for her support, maintenance and alimony as follows:
>
> (a) The Husband shall pay to the Wife for her support, maintenance and alimony the sum of $400.00 per month on or before the 5th day of each month with the first said payment being due and payable on or before the 5th day of June, 1977, with a like amount being due and payable for so long as the Wife may live or until she remarries.

This appeal stems from an order entered 22 September 1982, wherein, among other things, the Court held:

> 1. That a Court Order ordering specific performance against one party of a contractual provision is enforceable by the contempt powers of the Court.
>
> 2. An Order of specific performance being enforceable by the contempt power of the Court, the Court has the equitable power to modify provisions regarding the amount of child support or alimony originally contracted for, if the necessary facts to justify a modification are found by the Court.

The Court then ordered that plaintiff's monthly payment to defendant be reduced from $400.00 per month to $100.00.

Wade and Carmichael, by R. C. Carmichael, Jr., for plaintiff-appellee.

Erwin and Beddow, by Fenton T. Erwin, Jr., for defendant-appellant.

VAUGHN, Chief Judge.

The Court was without authority to alter the terms of the deed of separation and the order must be vacated.

The Court was incorrect in its conclusion that because the order of specific performance was enforceable by contempt, the "Court has the equitable power to modify provisions regarding the amount of child support or alimony originally contracted for."

The Court cannot alter the terms of the contract. The Court can, in the exercise of its powers in equity, order specific performance of only such amount as it finds to be proper. This, however, does not alter defendant's rights at law under the agreement. "We hold that the Court in the exercise of its powers in equity could modify the prior judgment ordering specific performance of the separation agreement of the parties but that this modification did not affect the parties' rights at law under the agreement." *Harris v. Harris*, 307 N.C. 684, 685-86, 300 S.E. 2d 369, 371 (1983).

"Had the District Court modified the separation agreement we would affirm the Court of Appeals' opinion vacating that order. However, the District Court did not modify the separation agreement. Instead the court only modified the previous performance." *Id.* at 687, 300 S.E. 2d at 372.

For the reasons stated, the order from which defendant appealed is vacated.

Vacated.

Judges HILL and BECTON concur.

HOUSING AUTHORITY OF THE CITY OF HIGH POINT v. RUTH M. CLINARD; MARY ALAN CLINARD FLINN; HENRY I. FLINN, JR.; GILBERT H. CLINARD; MILDRED S. CLINARD; JOHN W. CLINARD, JR.; LELIA T. CLINARD; TENNESSEE PRODUCTION COMPANY; DIRECT OIL CORPORATION; CITY OF HIGH POINT; AND, COUNTY OF GUILFORD

No. 8318SC355

(Filed 6 March 1984)

1. **Appeal and Error § 57.1— review of findings—necessity for exceptions**

Where appellant failed to except in the record on appeal to the findings of fact in either order from which it appealed, such findings are deemed as a matter of law to be supported by competent evidence and are conclusive on appeal.

2. **Attorneys at Law § 7.5; Costs § 3.1— condemnation for urban renewal—voluntary dismissal—award of counsel fees**

A municipal housing authority was properly required to pay an award of counsel fees to respondents after the housing authority voluntarily dismissed and abandoned its condemnation proceeding for an urban renewal project. G.S. 160A-503(2); G.S. 1-209.1.

APPEAL by petitioner, Housing Authority of the City of High Point, from *Washington, Judge.* Order entered 29 October 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 February 1984.

Hugh C. Bennett, Jr., for petitioner appellant.

Wyatt, Early, Harris, Wheeler & Hauser by Frank B. Wyatt for respondent appellees.

BRASWELL, Judge.

The appeal of the Housing Authority of the City of High Point questions the propriety of its having to pay an award of attorney's fees to respondents after the Housing Authority took a voluntary dismissal of its condemnation proceeding for an urban renewal project. Finding no error, we affirm.

The present action, 78SP339, was begun on 6 April 1978. The dismissal occurred on 7 June 1982, the same date the case had been calendared for jury trial on the issue of damages. The notice of voluntary dismissal without prejudice said: "this proceeding having been abandoned upon the commencement of pro-

ceedings by the CITY OF HIGH POINT on or before July 19, 1979, (79CVS5825)."

The respondents duly petitioned the Clerk of Superior Court for attorney's fees. In a hearing on 15 September 1982, reduced to a written order dated 28 September 1982, the Clerk, after hearing the evidence, made extensive findings of fact and conclusions of law and awarded reasonable attorney's fees to respondents in the sum of $7,443.75, based upon approximately 99¼ hours of work from 6 April 1979 until 7 June 1982. Ten additional hours were rejected in an effort by counsel to make the total hours as accurate as possible.

On the Housing Authority's appeal from the Clerk's order a hearing in Superior Court was held on 25 October 1982, with final order dated 29 October 1982 affirming the Clerk's award of reasonable attorney's fees.

[1] The brief of the Housing Authority words the question for review thusly: "Whether the award of attorney fees, as concluded and ordered by the clerk and affirmed by the court below, is supported by the facts or contrary to the applicable law." Our standard of review is controlled by an inquiry into whether the facts found and conclusions drawn support the orders entered. Our review is limited because there are no objections and no exceptions in the record to the final order of the Superior Court of 29 October 1982. We note also that there were no objections or exceptions taken to any of the Clerk's findings or conclusions. In its notice of appeal of 8 November 1982 the Housing Authority inserted this language: "exceptions to said Order and rulings to be hereafter assigned." In its subsequent assignments of error counsel purports to set out two exceptions: one is to the Clerk's order "on the grounds that the Conclusions of Law are not supported by the Findings of Fact," and the second is to "[t]he entry of the Order" of 29 October 1982. These words do not get the appellant past the statement of the scope of appellate review found in Rule 10(a) of the Rules of Appellate Procedure, which provides that our duty on review is to determine whether the order is supported by the findings of fact and conclusions of law. For a recent and thorough analysis, and restatement of these rules, *see State v. Oliver*, 309 N.C. 326, 333-36, 307 S.E. 2d 304, 310-12 (1983). Here, the Housing Authority failed to except in the record on ap-

peal to the findings of fact in either order from which it appealed, and such findings are deemed as a matter of law to be supported by competent evidence and are conclusive on appeal. *In re Smith*, 56 N.C. App. 142, 149, 287 S.E. 2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982). *See In re Rumley v. Inman*, 62 N.C. App. 324, 302 S.E. 2d 657 (1983).

[2] The statutory law allows an award of attorney's fees to be made in condemnation proceedings under Urban Redevelopment. *See* G.S. 160A-503(2). In addition, through its enactment of G.S. 1-209.1 our Legislature has declared that in this type proceeding the Clerk of Superior Court is "authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding." Having chosen to take a voluntary dismissal and abandon this case on 7 June 1982, the Housing Authority must now suffer the consequences of an award of attorney's fees as ordered by the Superior Court on 29 October 1982. The order is fully supported by the judge's findings of fact and conclusions of law.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LARRY THOMAS ARNETTE

No. 834SC869

(Filed 6 March 1984)

Criminal Law §§ 142.3, 145.5— recommendation of restitution as condition of work release or parole—no requirement for sentencing judge to inquire into defendant's ability to pay

There was no statutory requirement for the sentencing judge to inquire into defendant's ability to pay restitution of $62,500.00 where the judge merely *recommended* restitution as a condition of his parole or work release. Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as condition of parole or work release. G.S. 148-57.1(c) and (d); G.S. 15A-1343(d) and G.S. 148-33.2(d).

State v. Arnette

APPEAL by defendant from *Rouse, Judge.* Judgment entered 12 November 1980 in Superior Court, SAMPSON County. Petition for Writ of Certiorari to the Court of Appeals allowed on 27 January 1983. Heard in the Court of Appeals 14 February 1984.

Defendant entered a plea of guilty to having unlawfully, wilfully, feloniously, and wantonly set fire to and burned an uninhabited house. Defendant was sentenced, on 12 November 1980, to a term of imprisonment of not less than twenty-nine years nor more than thirty years, and the sentencing judge recommended that defendant make restitution in the amount of $62,500.00 as a condition of work release or parole. On 16 September 1982, defendant filed a motion for appropriate relief, contending that the judge's recommendations regarding restitution were improper and should be dismissed. This motion was denied in an order dated 18 November 1982. From this order, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Timothy W. Howard for defendant-appellant.

EAGLES, Judge.

G.S. 148-57.1(c) mandates that when an active sentence is imposed, "the court shall consider whether . . . restitution or reparation should be ordered or recommended to the Parole Commission to be imposed as a condition of parole." This statute further provides that such order or recommendation "shall be in accordance with the applicable provisions of G.S. 15A-1343(d)." G.S. 15A-1343(d), which pertains to "Restitution as a Condition of Probation," requires that, "[w]hen restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation."

Defendant contends that the sentencing judge erred in not considering the factors set out in G.S. 15A-1343(d) before recommending restitution as a condition of work release or parole. We do not agree. We note that the 1982 order denying appropriate relief speaks in terms of the court "ordering" restitution. But the

1980 judgment recites: "As to restitution or reparation as a condition of attaining work release privilege or parole, the Court recommends: That the defendant make restitution in the amount of sixty-two thousand five hundred dollars ($62,500.00). . . ." The judge here merely *recommended* restitution as a condition of work release or parole, as authorized by G.S. 148-57.1(c). Only if restitution was a "condition imposed" would there be a statutory requirement that the trial judge make findings as to the factors enumerated in G.S. 15A-1343(d).

Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. *State v. Lambert*, 40 N.C. App. 418, 420, 252 S.E. 2d 855, 857 (1979). When the time comes that restitution may be imposed as a condition of parole, the Parole Commission must give defendant notice that restitution is being considered as a condition of parole and an opportunity to be heard. G.S. 148-57.1(d). The Department of Correction must follow this same procedure before restitution may be imposed as a condition of work release. G.S. 148-33.2(d). Such a hearing is the proper forum for determination of defendant's ability to pay restitution. There is no statutory requirement for a sentencing judge to inquire into a defendant's ability to pay restitution when the judge merely recommends restitution as a condition of parole or work release.

The defendant further contends that the judge's recommendations regarding restitution deny him the equal protection of the laws. We do not agree. A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. *State v. Parton*, 303 N.C. 55, 74, 277 S.E. 2d 410, 423 (1981). The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. *Id.* Because restitution has not been imposed as a condition of parole or work release, there has been no equal protection violation here. The constitutionality of a reparation requirement may only be considered if and when restitution is ordered.

Affirmed.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 MARCH 1984

BOLES v. B-BOM, INC. No. 8221DC1259	Forsyth (81CVD3610)	Reversed in Part; Affirmed in Part
COMMERCIAL CREDIT v. CHALET CONSTR. No. 8226SC1308	Mecklenburg (82CVS3353)	Affirmed
ELKS v. BRADSHAW No. 8210SC1224	Wake (79CVS6166)	Affirmed
OLIVER v. WADDELL No. 8318DC164	Guilford (77CVC630)	Vacated and Remanded
PULLIAM v. PULLIAM No. 8321DC119	Forsyth (82CVD15)	Affirmed
STATE v. CARTER No. 834SC251	Onslow (82CRS10874)	No Error
STATE v. GOLDSTON No. 8311SC823	Lee (83CRS0576)	No Error
STATE v. HOWELL & STANLEY No. 832SC815	Martin (83CRS510) (83CRS511)	No Error
STATE v. LANGSTON No. 8311SC952	Johnston (83CRS1925) (83CRS1926)	No Error
STATE v. MABE No. 8317SC185	Surry (82CRS3229 through 82CRS3236)	Reversed and Remanded
STATE v. REID No. 838SC597	Wayne (82CRS8036)	No Error
STATE v. STEDMAN No. 8315SC644	Alamance (81CRS3617)	No Error
STATE v. STOWE No. 8325SC931	Caldwell (82CRS626)	No Error
TOWN OF EMERALD ISLE v. LEGGETT No. 833DC257	Carteret (81CVD347)	Affirmed
WALSTON v. WAKE ELECTRIC No. 8210IC1307	Industrial Commission (H-7372)	Affirmed

WILLIAM LEE BURWELL AND WILLIAM TAYLOR WILSON v. JAMES H. GRIFFIN, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE CITY OF OXFORD; H. T. RAGLAND, JR., INDIVIDUALLY AND IN HIS CAPACITY AS CITY MANAGER OF THE CITY OF OXFORD; STATE OF NORTH CAROLINA; AND THE CITY OF OXFORD, NORTH CAROLINA

No. 839SC289

(Filed 20 March 1984)

Municipal Corporations § 11.1— demotion of police officers—personnel policy procedures complied with

In an action for damages and injunctive relief brought by plaintiffs, after being demoted from their former positions of lieutenants to those of patrolmen, against the City of Oxford, its City Manager and Chief of Police, all procedures pertaining to the demotion of a police officer, as such procedures are contained in the Police Rules and Regulations and City Personnel Policy, were either strictly or substantially complied with, and where the procedures were substantially complied with, the purposes underlying the municipal ordinances were served and no prejudice resulted to either plaintiff.

Judge JOHNSON concurring.

APPEAL by plaintiffs from *Hobgood (Robert), Judge.* Judgment entered 3 December 1982 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 13 February 1984.

This is an action for damages and injunctive relief brought by plaintiffs after being demoted from their former positions of lieutenants to those of patrolmen against the City of Oxford, its City Manager and Chief of Police in both their individual and official capacities. Plaintiffs allege that certain written personnel policy procedures adopted by the commissioners of the defendant City of Oxford were not followed by defendants relative to the plaintiffs' demotions.

The provisions of the City of Oxford Police Department Rules and Regulations [hereinafter "Police Rules and Regulations"] and the City of Oxford, North Carolina Personnel Policy [hereinafter "City Personnel Policy"] pertinent to this action are as follows:

Police Rules and Regulations

Rule II-1, DISCIPLINARY AUTHORITY OF CHIEF:

After consulting the City Manager, the Chief of Police is authorized, upon his determination of just cause to: . . . recommend to the City Manager the dismissal or reduction in rank of any officer violating any provision of these Rules.

Rule II-8, RIGHTS OF SUSPENDED OFFICER, HEARING:

(a) An officer who has been suspended, or whose dismissal or reduction in rank is recommended to the City Manager by the Chief of Police, shall receive a letter from the Chief of Police stating:

(1) a brief summary of the facts and circumstances of any conduct constituting a violation of any provision of these Rules:

(2) the section number of the Rule violated, or reference to the Rule violated;

(3) that dismissal or reduction in rank has been recommended, if such is the case.

Rule II-8(b), dealing with an officer's right to a hearing, was rescinded and replaced by Rule IV section 15.0 of the City Personnel Policy, "The Grievance Procedure." Section 15.0 outlines a three-step grievance hierarchy, which may be initiated by an employee or employees who feel "the need to resolve a work related problem, dissatisfaction or complaint." Step one provides for an informal discussion with the immediate supervisor, step two for an appeal to the department head, and step three for an appeal to the City Manager. Step three states that the City Manager "shall review the written report" produced by step two, and then exercise the option of either appointing a grievance committee or personally conducting a hearing.

Rule II-8(c) of the Police Rules and Regulations remains in effect:

Upon any hearing before the City Manager, the affected officer shall have the right to:

(1) presence and assistance of private legal counsel.

(2) introduce evidence relevant to the issues raised.

(3) examine or cross-examine all witnesses testifying.

(4) examine any document or writing contained in his [or her] personnel file if and only if such document or writing is used by the City Manager in reaching [a] decision.

Rule II-9, DUTIES OF CITY MANAGER ON HEARING:

(a) At any hearing before a City Manager, upon timely request of an officer who has been suspended or whose dismissal or reduction in rank has been recommended, the City Manager shall:

(1) set a time and place for a hearing . . . ;

(2) advise the affected officer in writing of the time and place of the hearing . . . ;

(3) exercise all powers of a presiding officer; hear all relevant testimony and evidence and rule on the admissibility thereof; make findings of fact and conclusions relating to the merits or justification of the suspension, or decide any action upon the recommendation to dismiss or reduce in rank and furnish a copy thereof to the affected officer as soon as practicable thereafter;

(4) consider as the basis for any disciplinary action only those violations of these Rules set forth in the letter of the Chief of Police;

(5) information, documents, or written material from an officer's personnel file submitted to the City Manager shall be made available for inspection by the officer.

City Personnel Policy

[III] § 4.0, Demotion:

While it is not a common practice, the City may find it appropriate to demote an employee as a result of unusual circumstances such as—

. . . .

(b) When an employee is not satisfied with, or unable to meet the requirements of his [or her] position.

IV, § 11.0, Conduct:

This section provides for certain penalties, including demotion, against a city employee who is guilty of certain specified infractions, including "[g]ross inefficiency, insubordination or refusal to perform assigned duties" and "[i]nsufficient regard for work rules and regulations."

The facts and circumstances surrounding the plaintiffs' demotions and the bringing of this action are as follows:

On 6 January 1982 and 11 January 1982 a document entitled "City of Oxford, North Carolina, Warning Notice," signed by defendant Chief of Police, was sent to each plaintiff respectively. These documents notified plaintiffs that their overall job performance was deficient, identified areas in which improvement must be made, and stated that the potential result of a failure to improve law enforcement activities might be the termination of their jobs.

The next document germane to the demotions is another warning notice addressed to each plaintiff. These notices, dated 30 March 1982 and 31 March 1982, contain more detailed information concerning plaintiffs' misconduct and were signed by the Chief of Police and the City Manager. There is some conflict as to whether plaintiffs actually received this second set of notices or whether the Chief of Police read the notices to them; however, it is not necessary to resolve this in order to dispose of this appeal.

According to the record, there was no further communication between the parties on the subject of their misconduct until the 13 August 1982 memoranda signed by the Chief of Police and the City Manager. These documents notified the plaintiffs that they had been demoted, and made reference to the earlier communications.

After their demotions, plaintiffs, apparently through their attorneys, requested hearings before the City Manager. Although the record does not specifically state that plaintiffs were proceeding under step three of the City Personnel Policy's Grievance Procedure, presumably they were. These hearings were con-

ducted on 31 August 1982 for plaintiff Wilson and on 2 September 1982 and 9 September 1982 for plaintiff Burwell. Defendant City Manager presided over these hearings. Transcripts were made of these proceedings, although testimony of several witnesses was omitted from the transcript of plaintiff Burwell at the request of the City Manager. On 23 September 1982 the City Manager issued his decisions upholding the orders of demotion.

Plaintiffs subsequently brought this action charging defendants with numerous procedural and due process violations connected with their demotions. Upon the plaintiffs' motion, Judge Hobgood entered a show cause order ordering the defendants to show cause as to why the plaintiffs should not be reinstated. At the ensuing 22 November 1982 hearing, Judge Hobgood announced in open court that the decision of the City Manager demoting the plaintiffs would be reviewed as a petition for certiorari. In the order resulting from this hearing, Judge Hobgood affirmed the 23 September 1982 decisions of the City Manager demoting plaintiffs and denied all requests for preliminary or permanent injunctive relief. From this order plaintiffs appeal.

Edmundson & Catherwood, by John W. Watson, Jr. and Robert K. Catherwood, for the plaintiff appellants.

Haywood, Denny & Miller, by J. A. Webster, III and George W. Miller, Jr., for defendant appellees James H. Griffin, individually and in his capacity as Chief of Police of the City of Oxford, and H. T. Ragland, Jr., individually and in his capacity as City Manager of the City of Oxford.

John H. Pike, for defendant appellee James H. Griffin, individually.

Royster, Royster & Cross, by T. S. Royster, Jr., for defendant appellee H. T. Ragland, Jr., individually.

Watkins, Finch and Hopper, by Daniel F. Finch, for defendant appellee City of Oxford.

VAUGHN, Chief Judge.

Before turning to the central issue of this appeal, that is, whether defendants abided by the procedures associated with plaintiffs' demotions, we must first address the threshold question

of whether Judge Hobgood's order is currently appealable or whether plaintiffs have brought this appeal prematurely. Plaintiffs' first two assignments of error relate to appealability. Plaintiffs contend that Judge Hobgood's order is appealable because it affects a substantial right or, alternatively, because it determines the merits of the action.

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. *Investments v. Housing, Inc.*, 292 N.C. 93, 100, 232 S.E. 2d 667, 672 (1977). There seems to be some confusion among the parties over whether Judge Hobgood's order is final or interlocutory in nature. A final judgment disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court, *Atkins v. Beasley*, 53 N.C. App. 33, 279 S.E. 2d 866 (1981), while an interlocutory ruling does not determine the issues but directs some further proceeding preliminary to the final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). The order affirmed the demotion of plaintiffs. For the reasons hereinafter stated, if that order is affirmed no issues remain for trial. The order is, therefore, appealable.

We now turn to the key issue on this appeal: whether defendants committed procedural errors in demoting the plaintiffs from lieutenants to patrol officers.

Rule II-1 of the Police Rules and Regulations sets out the procedure to be followed by the Chief of Police if the Chief wishes to sanction a member of the department; the rule describes the limits of the chief's authority in these situations. The language of Rule II-1 is limiting language; it empowers a Chief of Police who wishes to demote a member of the force to recommend such action to the City Manager. The words of Rule II-1 set out the limits of a police chief's authority to achieve a demotion. According to Rule II-1, the Chief cannot unilaterally accomplish a demotion. Instead, the Chief must first consult with the City Manager and then recommend a demotion to the manager if the Chief believes such action appropriate.

We reject the construction of Rule II-1 proposed by the defendants, that the language of Rule II-1 is permissive language, and that it is optional on the part of the Chief of Police to first

recommend the demotion of a member of the force before a demotion can be effected. If this interpretation of Rule II-1 is accepted, and the recommendation of the Chief is not required to effect a demotion, then the net effect of the Police Rules and Regulations and City Personnel Policy would be to allow the City Manager to arbitrarily suspend, demote, or terminate a police officer without any input from the police department. Such a construction of the municipal ordinances is unduly harsh and finds support neither in reason nor in basic principles of contract construction. *See DeBruhl v. Highway Commission*, 245 N.C. 139, 145, 95 S.E. 2d 553, 557 (1956) (instruments should receive sensible and reasonable constructions and not ones leading to absurd consequences or unjust results). In construing a statute or ordinance a court is to avoid interpretations leading to absurd results, *Variety Theaters v. Cleveland County*, 282 N.C. 272, 275, 192 S.E. 2d 290, 292 (1972), *appeal dismissed*, 411 U.S. 911, 36 L.Ed. 2d 303, 93 S.Ct. 1548 (1973); rather, ordinances are to be given reasonable interpretations. *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 225, 261 S.E. 2d 882, 891 (1980) (noting that rules of statutory construction apply equally to ordinances). *See also Douglas v. Wirtz*, 232 F. Supp. 348, 352 (M.D.N.C. 1964), *vacated*, 353 F. 2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909, 15 L.Ed. 2d 665, 86 S.Ct. 893 (1966) (statute is presumed to have the most reasonable operation that its provisions allow). The "most reasonable" construction of Rule II-1 is one that mandates the procedural safeguards of Rules II-8 and II-9 to come into play before a police officer can be suspended, demoted or dismissed.

Rule II-8 operates in conjunction with Rule II-1 and delineates the rights of an officer whose reduction in rank has been recommended to the City Manager by the Chief of Police. According to Rule II-8, the officer is to receive a letter from the Chief of Police containing certain information connected with the officer's proposed demotion.

Plaintiffs argue that because the letters dated 13 August 1982 were letters of demotion rather than letters merely recommending demotion, that the warning and notice requirements of Rule II-8 were not observed. Undoubtedly the better route would have been for defendants to comply strictly with the formal requirements of the rules and regulations; however, we cannot say

on the instant facts that the purposes of the Police Rules and Regulations were not served.

The January letters noted that a copy was being sent to the City Manager; the March letters were signed by the City Manager along with the Chief of Police. These documents clearly functioned to provide plaintiffs with notice of problems associated with their job performance and of warning of the possibility of demotion or dismissal. The fact that the City Manager signed the March letters along with the Chief of Police indicates that disciplinary action had been recommended to the Manager in the event job performance did not improve.

On the facts at bar it is manifest that the purposes underlying Rules II-1 and II-8 were fulfilled. Plaintiffs were provided with ample notice and warning of the behavior and offenses that ultimately resulted in their demotions. The plaintiffs received written warning notices in January and again in March 1982; these notices expressly stated that dismissal or demotion would occur if immediate improvement of the listed violations was not forthcoming. In August 1982, each plaintiff received a letter demoting him from police lieutenant to police patrolman. The cumulative effect of the three prehearing communications relating to plaintiffs' demotions, the letters of January, March, and August 1982, sent to each plaintiff respectively, was to satisfy the underlying purpose of Rule II-8, that of providing notice and warning.

We disagree with plaintiffs' position that the particular violations that resulted in their demotions were not set forth with the specificity required by Rule II-8(a)(2). The case cited by plaintiffs in support of their argument, *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 274 S.E. 2d 256 (1981) is distinguishable, in that G.S. 126-35, unlike Rule II-8(a)(2), requires setting forth "the specific acts or omissions that are the reasons for the disciplinary action." In any event, the letters sent to plaintiffs in January and in March did apprise them of the acts and omissions that ultimately caused their demotions.

Any failure on the defendants' part to list the rule number violated is again cured by the fact that the letters fulfilled the underlying purpose of the ordinance, to act as a procedural safeguard to police officers to provide them with notice and warn-

ing before any disciplinary action is taken. We note that Rule II-8(a)(2) only requires "reference" to the rule violated. The March letters in particular set out in sufficient detail the offenses and complaints upon which the demotions were based. It would not be a desirable result to deprive a municipality of the power to demote employees for good cause, which power enables it to best serve its residents, where a deviation from a rule occurred but its underlying purpose was fulfilled. No prejudice resulted to plaintiffs where there was substantial, rather than formal, compliance with the provisions of Rules II-1 and II-8.

We furthermore note that the three-step grievance procedure of City Personnel Policy, Rule IV, section 15.0 was always available to plaintiffs, yet they waited until after they were actually demoted to take advantage of its provisions. The grievance hierarchy of section 15.0 is available to a dissatisfied employee at all times; it was therefore available to plaintiffs between January and August 1982, that is, from the time they received their first warning notices until they received notification of their demotion. There is no evidence in the record that either plaintiff ever requested a predetermination hearing. The march 1982 letters make it clear that some action on the part of the City of Oxford was imminent; plaintiffs never asked for any clarification or explanation from the department or the city until they were actually demoted.

The first response of plaintiffs to their situation was their postdetermination requests for hearings before the City Manager, more than eight months after they each received a "Warning Notice" from the City of Oxford signed by the Chief of Police. Plaintiffs expressed no dissatisfaction with the degree of specificity in the warning notices until they were actually demoted. In light of the above, we hold that any procedural deviations committed by defendants in the predetermination stage of this case resulted in no prejudice to the plaintiffs.

Plaintiffs' next assignments of error are concerned with whether proper procedure was followed at hearings requested by plaintiffs after their demotions and held before the City Manager. These assignments of error can be grouped into two general categories: first, the failure of the trial court to review the "whole record" of the hearings, in particular, the court's refusal to admit

the affidavits of two officers whose testimony was omitted from the transcript of plaintiff Burwell's hearing; second, the plaintiffs contend that the trial court erred in admitting certain documents where counsel for plaintiffs had not been able to examine those documents prior to the hearings. We hold that the trial court committed no error in these evidentiary rulings.

Neither the Police Rules and Regulations nor the City Personnel Policy provide for an automatic right to a postdetermination hearing. However, hearings were awarded the plaintiffs in this action upon their demotions apparently pursuant to step three of Rule IV, section 15.0, the city's grievance procedure for municipal employees. Plaintiffs maintain that these hearings were governed by the provisions of Police Department Rules and Regulations, Rule II-9, Duties of City Manager on Hearing, and argue that the two above-mentioned categories of assignments of error are violations of Rule II-9.

The provisions of Rule II-9 pertain to a hearing before the City Manager requested by an officer "whose . . . reduction in rank has been recommended." Because the hearings in question were actually postdetermination hearings, it does not appear the provisions of Rule II-9 apply to the hearings at bar. However, since the defendants' substantial, as opposed to technical, compliance with Rules II-1 and II-8 has clouded the exact moment at which the demotions were recommended, as opposed to effected, we will treat plaintiffs' assignments of error relating to Rule II-9 procedural violations.

We reject plaintiffs' argument that the whole record rule should be applied to municipal decisions such as these. The whole record rule applies specifically to the Administrative Procedures Act, an act not involved in the instant case. Under this rule, as applied to that Act, a reviewing court "may not consider evidence which in and of itself justifies . . . [a school] Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977) (distinguishing whole record rule from the "any competent evidence" standard of review).

Furthermore, North Carolina has approved a competent evidence standard rather than a whole record standard in con-

struing a city charter provision similar to Rule II-9. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E. 2d 375 (1967). In *Bratcher*, the charter required "notice, written charges, and the hearing of witnesses and the examination of pertinent documents." *Id.* at 642, 153 S.E. 2d at 379. These requirements closely resemble those of the Police Rules and Regulations. The petitioner in *Bratcher* was refused his request to have a stenographic transcript made of his hearing. The trial court reversed the Civil Service Board's order discharging petitioner from the police department, and our Supreme Court affirmed this reversal, stating:

> Court review contemplates findings of fact supported by evidence and conclusions based thereon. An aggrieved party, if [that party] so demands, is entitled to a record which discloses at least the substance of the evidence which he [or she] may challenge as insufficient to support the findings. The record in this case does not meet this minimum requirement.

Id. at 642, 153 S.E. 2d at 379.

At bar, transcripts of the hearings of both plaintiffs were made and introduced into evidence. It appears the testimony of three officers testifying at the hearing for plaintiff Burwell was omitted from the transcript by order of the City Manager who presided at the hearing. Affidavits for two of these officers were introduced at the hearing before Judge Hobgood and admitted for the limited purpose of showing that their testimony was omitted from the transcript. Plaintiffs contend that the trial court erred in declining to admit these affidavits for the substance contained therein.

We find no error on this point. As discussed, there is no ordinance or statute requiring the whole record be preserved for review at municipal hearings such as these. There was no showing made at the hearing before Judge Hobgood that the transcript did not contain "at least the substance of the evidence." The "minimum requirement" of competent evidence to support findings of fact and conclusions of law was met at bar. The omission of some testimony does not invalidate the remaining record of the postdetermination hearing. It was therefore not error for the trial court to refuse to admit the affidavits of the two officers

whose testimony was omitted from the transcript of plaintiff Burwell.

As to the assignment of error that plaintiffs were not allowed timely examination of documents, again we hold that no error was committed. Rule II-9 provides only that "upon any hearing" the aggrieved officer shall have the right to examine documents relied upon by the City Manager in reaching a decision. The rule does not provide for examination of documents at any designated interval prior to hearing. The record discloses that the plaintiffs were allowed to examine the documents in question by the time of the hearings and this assignment of error is therefore overruled.

Our holding that no procedural errors were committed by defendants regarding the demotions of plaintiffs effectively disposes of this case. It is therefore unnecessary to reach the constitutional question of whether the Police Rules and Regulations established any due process rights protected by the fourteenth amendment of the United States Constitution, for where a case can be disposed of on appeal without reaching the constitutional issue, it is to be disposed of on the nonconstitutional grounds first. *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957).

We nonetheless note that no due process rights appear to be involved. In the United States Supreme Court case of *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976) the Court held that the position held by petitioner, a police officer, was terminable at will and that he enjoyed no property interest protected by the fourteenth amendment. The Court stated:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.

Id. at 344-5, 48 L.Ed. 2d at 690, 96 S.Ct. at 2077-8 (Court also held employee has no liberty interest in a job when the job is terminable at the will of the employer). A reading of the Police Rules and Regulations in conjunction with the City Personnel Policy establishes that plaintiffs had no right to continuing employment in a particular departmental position, nor did they enjoy the guarantee of a hearing either prior or subsequent to a demotion.

In that plaintiffs' procedural rights have not been violated, this Court also declines plaintiffs' request that it exercise any inherent equitable powers to review the substantive grounds for the reinstatement of the plaintiffs.

In summary, we hold that all procedures pertaining to the demotion of a police officer, as such procedures are contained in Police Rules and Regulations and City Personnel Policy were either strictly or substantially complied with in the case at bar. Where the procedures were substantially complied with, the purposes underlying the municipal ordinances were served and no prejudice resulted to either plaintiff. The judgment is affirmed.

Affirmed.

Judges WEBB and JOHNSON concur.

Judge JOHNSON concurring.

I concur but wish to point out that although the defendants may have substantially complied with the requirements of Rules II-1 and II-8, I do not believe that the spirit of the rules requiring the granting of an impartial hearing was followed. Prior to granting the plaintiffs a hearing, the City Manager had already exercised his discretion and demoted plaintiffs in rank. Thereafter, the plaintiffs were required to submit to a hearing before the same City Manager who had previously demoted them and whose decision they were seeking relief from.

Rule IV, Sec. 15.0(3) of the City Personnel Policy, "The Grievance Procedure," provides that the City Manager *may* conduct the hearing himself or he *may* refer the matter to a special grievance committee consisting of three classified city employees; one to be appointed by the City Manager; one fellow employee ap-

pointed by the offended employee; and the third, who will act as chairman, to be appointed by the first two appointees. In this case, City Manager Ragland had considered the conduct of the plaintiffs and exercised his discretion in demoting them. Under these circumstances, upon a request for a hearing to review this action, the better practice would be for the City Manager to exercise his discretion under the City Personnel Policy and refer the hearing to a special grievance committee to preserve the appearance and substance of impartiality.

SHARON BENSON BLACK v. T. W. LITTLEJOHN, SR., M.D.

No. 8321SC181

(Filed 20 March 1984)

Physicians, Surgeons, and Allied Professions § 13— medical malpractice—statute of limitations—latent injuries

The purpose of the exception in G.S. 1-15(c) allowing a four-year limitation period in certain medical malpractice cases is to provide for latent injuries where the physical damage to a plaintiff is not readily apparent and not for those cases in which the injury is obvious but the alleged negligence of the doctor is not. Therefore, the three-year limitation period of G.S. 1-15(c) applied to plaintiff's medical malpractice action based on defendant's alleged negligence in performing unnecessary surgery on plaintiff, although plaintiff allegedly did not discover until more than two years after the surgery that defendant had negligently failed to advise her of the availability of alternative treatments, since the physical damage to plaintiff was readily apparent at the time of surgery.

Judge JOHNSON dissenting.

APPEAL by plaintiff from *Beaty, Judge.* Order entered 26 October 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 January 1984.

On 16 August 1982, plaintiff instituted this action for medical malpractice against defendant alleging that he performed unnecessary surgery on her. Defendant operated on plaintiff on 1 October 1978 at which time he removed plaintiff's ovaries and other reproductive organs. Subsequently, and perhaps as early as 17 August 1981, plaintiff contends that she began to suspect that her medical condition could have been treated without surgery,

and that defendant had negligently failed to advise her of alternative, less drastic treatments.

Defendant filed a responsive pleading which contained a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that the action was barred by the three-year statute of limitations contained in G.S. 1-15(c). By order entered 26 October 1982, the trial court allowed defendant's motion to dismiss. Plaintiff appealed.

Badgett, Calaway, Phillips, Davis, Stephens, Peed and Brown, by Herman L. Stephens, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by J. Robert Elster and Michael L. Robinson, for defendant appellee.

WEBB, Judge.

Defendant's motion to dismiss the complaint was properly allowed under G.S. 1A-1, Rule 12(b)(6) if the complaint has pled a fact that will necessarily defeat its claim. *See Powell v. County of Haywood*, 15 N.C. App. 109, 189 S.E. 2d 785 (1972). Defendant argues that the complaint shows on its face that plaintiff's cause of action accrued more than three years prior to the institution of this action and is thus barred by G.S. 1-15(c). That statute provides as follows, in pertinent part:

> "(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, . . . which originates under circumstances making the injury, . . . not readily apparent to the claimant at the time of its origin, and the injury, . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an

action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . ."

G.S. 1-15(c).

This portion of G.S. 1-15(c) sets forth both a three-year and a four-year period of limitation. The four-year statutory period applies only to those cases in which the injury to the plaintiff is not, nor should have been, discovered within two years of accrual, that is, within two years of the defendant's last act giving rise to the cause of action. *See Flippin v. Jarrell*, 301 N.C. 108, 118-119, 270 S.E. 2d 482, 489 (1980). The last act of the defendant here was the surgery performed on 1 October 1978, thus plaintiff's cause of action accrued on that date. If the plaintiff suffered any injury it was what she contends is the unnecessary surgery and the removal of her ovaries and other reproductive organs.

Plaintiff contends that the four-year limitation period, rather than the three-year period, applies to her action because she did not discover her injury until more than two years after her surgery, in that she did not discover that defendant had negligently failed to advise her of the availability of alternative treatments for her condition until 17 August 1981. We disagree. Plaintiff was aware of the physical injury she had suffered, the removal of her reproductive organs, from the time of surgery. She was not aware until 17 August 1981 of what she contends is the defendant's negligence. The clear purpose of the exception in G.S. 1-15(c) allowing for a four-year limitation period in certain cases is to provide for latent injuries where the physical damage to a prospective plaintiff is not readily apparent, and not for those cases in which the injury is obvious but the alleged negligence of the doctor is not. We do not believe our legislature intended to equate the discovery of injury with the discovery of negligence.

Furthermore, plaintiff cannot reasonably maintain that her injury originated under circumstances making the injury not readily apparent at the time it occurred. At any point before or after her surgery, plaintiff through the use of reasonable diligence could have obtained a second medical opinion as to possible alternative treatments for her condition, and thus discovered the defendant's alleged negligence.

We do not believe *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978) governs although there is some language in it favorable to the plaintiff. In that case the plaintiff contended that the defendant's treatment caused him to become addicted to narcotic drugs. The treatment did not stop until a time within the applicable statute of limitations. In this case the defendant's treatment of the plaintiff was complete more than three years before the action was commenced. We hold the trial court properly allowed defendant's motion to dismiss.

Affirmed.

Chief Judge VAUGHN concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

The discovery proviso to G.S. 1-15(c) provides that whenever there is "bodily injury" to the person which originates under circumstances making "the injury" not readily apparent to the claimant at the time of its origin, and "the injury" is discovered or should reasonably be discovered two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made. It is provided further that in no event shall an action be commenced more than four years from the aforesaid last act of the defendant. The issue presented by this appeal concerns the meaning of the phrase "the injury" as used in the nonapparent injury discovery proviso of G.S. 1-15(c). In my opinion, the majority errs in concluding that the legislature intended to equate the discovery of "the injury" with the discovery of "physical injury" and in addition errs by holding as a matter of law that plaintiff's injury did not originate under circumstances rendering it not readily apparent at the time it occurred because she failed to obtain a second medical opinion prior to consenting to undergo the surgery recommended by defendant.

I

As a preliminary matter, plaintiff's amended complaint makes it quite clear that this is an action for medical malpractice

grounded upon the defendant's breach of his duty to reasonably disclose the existence of less drastic available alternative treatments for plaintiff's condition prior to obtaining her consent for the removal of her reproductive organs. Plaintiff alleges that defendant negligently failed to exercise that degree of knowledge, skill and judgment in learning and informing plaintiff of available treatments for her condition which other specialists in his field ordinarily possess. Further, that had defendant known and informed her of the availability of less drastic alternative treatments, plaintiff would not have consented to the performance of the total abdominal hysterectomy done by the defendant on 1 October 1978.

Plaintiff's claim, therefore, is a common law action for malpractice or negligence, based upon the lack of informed consent for the surgical operation. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E. 2d 829 (1982). The aim of the doctrine of informed consent is to encourage the physician to fully inform the patient so that the patient is equipped to intelligently participate in making decisions about his or her medical care and treatment. Adherence to a minimal standard of care ordinarily requires a physician or surgeon to secure the consent of an individual before providing treatment; consent to a proposed medical procedure is meaningless if given without adequate information. *McPherson v. Ellis*, 305 N.C. 266, 287 S.E. 2d 892 (1982). The duty to disclose arises in part from the physican's superior knowledge of medicine. The *lack* of informed consent therefore presupposes some omission or failure to disclose on the part of the physician, and the consequent ignorance or lack of knowledge caused thereby on the part of the patient. To maintain the action, the plaintiff must allege and prove that the omission was a proximate cause of the injury, that is, that had she been properly informed as to available less drastic alternative treatments, she would not have consented to undergo the total hysterectomy. *See McPherson v. Ellis, supra.*

Obviously, the plaintiff was aware that she had undergone a total abdominal hysterectomy at the time of the operation. What plaintiff alleges she was not aware of, was the fact that she could have and would indeed have chosen not to undergo surgery, but instead receive the drug therapies available for her condition. Significantly, it is not plaintiff's contention that defendant per-

formed the operation negligently, but that his negligent failure to disclose the available alternatives caused her to agree to proceed with the surgery. Had the plaintiff consented to the total abdominal hysterectomy with knowledge of the alternative treatment, she would not be able to maintain her cause of action. By definition, it would appear that a plaintiff seeking recovery under the doctrine of informed consent can only learn of the "injury" suffered because of the physician's preoperative negligent failure to inform, *after* having consented to and having undergone the procedure complained of. Although the bodily injury or damage suffered by plaintiff was, as she contends, the unnecessary surgical removal of her reproductive organs, at the time of the operation it was not apparent that plaintiff had been harmed by having the operation or that defendant had negligently failed to advise plaintiff of the availability of alternative treatments.

"Discovery" means to find out something *not previously known*; it always implies the previous existence of something *not known*. A patient will usually know when a particular treatment consented to has been performed within a short time thereafter; what an informed consent plaintiff will *not know* at that time is the fact of *undisclosed information*, and hence, that she had suffered an *injury*. By the majority's construction, the discovery proviso of G.S. 1-15(c), which was designed to apply to injuries not readily apparent at the time incurred, is made entirely unavailable for a cause of action whose significant feature from the point of view of the plaintiff, is the *lack of knowledge* concerning the treatment her physician proposes to perform. It would appear unlikely that the legislature intended such a result.

Furthermore, contrary to the logic of the cause of action for lack of informed consent, the majority holds that "plaintiff cannot reasonably maintain that her injury originated under circumstances making the injury not readily apparent at the time it occurred" because she failed to obtain a second medical opinion as to possible alternative treatments for her condition at some point prior to or after her surgery. This holding effectively places the benefit of the latent injury discovery proviso beyond the reach of those patients who are insufficiently suspicious of their doctor's competence or are financially unable to seek a second medical opinion prior to consenting to undergo an advised course of treatment and only belatedly learn of their doctor's negligent failure

to inform. Such a rule is clearly unwise as a matter of public policy for it penalizes the patient who has full confidence in his or her doctor and serves to promote an atmosphere of mutual suspicion and distrust between doctor and patient. It is also contrary to the widely recognized rule that while the physician-patient relationship continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice she continues to rely. *See e.g. Hundley v. St. Francis Hospital,* 161 Cal. App. 2d 800, 327 P. 2d 131 (1958); *Jones v. Sugar,* 18 Md. App. 99, 305 A. 2d 219 (1973). Implicit in this rule is the recognition that absent actual notice of negligent medical care, the patient is entitled to place her full confidence in her physician and should not, therefore, be judicially penalized for doing just that.

II

Under G.S. 1-15(c), the definition of what constitutes "the injury" the claimant must have discovered is a question of law for the court; whether the plaintiff ought reasonably have discovered the injury before it was in fact discovered is a question of fact for the jury to decide. Three possible definitions of "injury" present themselves: (1) the allegedly negligent act or omission; (2) the physical damage resulting from the act or omission; or (3) the "legal injury," that is, all essential elements of the malpractice cause of action. *See Massey v. Litton,* 669 P. 2d 248 (Nev. 1983); Lauerman, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina;* 8 Wake Forest L. Rev. 327 (1972). I am persuaded by the reasoning of the Nevada Supreme Court in *Massey v. Litton, supra,* that adoption of the first meaning would defeat the purpose of a discovery rule and the second test of physical damage is inadequate to protect the rights of the injured tort claimant in many factual situations. The lack of informed consent cause of action presents a perfect example of this problem.

Plaintiff's total hysterectomy was apparently performed without incident; she alleges no untoward operative or post-operative complications such as pain, disability or dysfunction which would have caused her to inquire further into her physical condition or seek a second medical opinion. In fact, her "injury," whether it be considered the lack of information or, as the majori-

ty would have it, the submission to unnecessary surgery, does not actually manifest itself in a physically objective and ascertainable manner in the traditional sense in which, for example, a negligently performed operation might—by the experience of abnormal pain or the contraction of infection. Such an "injury" manifests itself in the *knowledge or awareness* that it was not necessary to consent to surgery because another less drastic treatment was available. Until the plaintiff learned of the alternative treatment, her injury was not apparent to her. The loss of plaintiff's reproductive organs constitutes the consequential bodily injury or damage she suffered as a result of the alleged malpractice. The "physical injury" interpretation of the discovery rule adopted by the majority fails to account for all the relevant factors in precisely this type of case.

The underlying rationale for rejection of both the negligent act or omission and physical injury interpretations has been summarized as follows:

> [W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not be construed to destroy a right of action before a person even becomes aware of the existence of that right. [Par.] Furthermore, to adopt a construction of § 78-14-4 that encourages a person who experiences an injury, dysfunction or ailment, and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged . . . It would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable.

Foil v. Ballinger, 601 P. 2d 144, 147-148 (Utah 1979). *Accord Massey v. Litton, supra.*

For limitations purposes, the term "injury" as used in the nonapparent injury discovery proviso should be interpreted to mean "legal injury," that is, the invasion of a legally protected interest of the claimant by the defendant. " 'Injury,' thus defined

denotes not only that the injured party has suffered a bodily injury . . . but that such harm was an invasion of his rights by the person against whom it is proposed to bring the action." Lauerman, *supra* at 354. *See also* Restatement (Second) of Torts, § 7 (1) (1965). Therefore, the one year period in which to bring suit would not start to run until the plaintiff had discovered or should reasonably have discovered both the fact of damage suffered and the realization that the cause was her physician's negligence. In this case, plaintiff's complaint alleges that her discovery of the fact that the hysterectomy was unnecessary because alternative treatments were available for her condition and plaintiff's realization that defendant had negligently failed to disclose the availability of those alternatives occurred on the same date—17 August 1981. The legally protected interest invaded by defendant was plaintiff's right to be adequately informed about the treatments available for her condition prior to giving consent to the recommended surgery.

As a practical matter, this interpretation of the "injury" to be discovered is flexible enough to cover the relevant factors that go into the lack of informed consent cause of action and so avoids the shortcomings of the "physical damage" test adopted by the majority. Moreover, this construction is in accord with the majority view in construing statutory and common law discovery rules; a construction *already* adopted by this Court in *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). *See Massey v. Litton, supra; Foil v. Ballinger, supra; Hundley v. St. Francis Hospital, supra; Kilburn v. Pineda*, 137 Cal. App. 3d 1046, 187 Cal. Rptr. 548 (1982); *Lopez v. Swyer*, 62 N.J. 267, 300 A. 2d 563 (1973); *Jones v. Sugar, supra.*

In *Ballenger*, this Court considered when a cause of action for medical malpractice accrued under the common law and held the accrual date to be the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury.[1] The plaintiff in *Ballenger* was seeking recovery for his doctor's allegedly

1. *But see Johnson v. Podger*, 43 N.C. App. 20, 257 S.E. 2d 684, *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 920 (1979) (limitations period under G.S. 1-15(b) [now repealed] runs from the *time of discovery*, not from the earlier date of termination of treatment).

negligent treatment of plaintiff's hereditary nerve disorder, Charcot-Marie-Tooth disease. The defendant treated plaintiff with drugs and plaintiff became addicted to the medication by 1962; the doctor-patient relationship continued until 1974. The facts showed that the plaintiff had knowledge of his addiction in 1962 and the defendant argued that the cause of action accrued in 1962 and was therefore time barred because it was not filed until 1976.

This Court rejected the defendant's argument and adopted the "legal injury" construction of the discovery rule of *Jones v. Sugar, supra; Lopez v. Swyer, supra* and *Hundley v. St. Francis Hospital, supra.*

> The facts in this case clearly show that the plaintiff had knowledge of his addiction in 1962. However, "the limitations period starts to run when the patient discovers . . . the negligent act which caused his injury" . . . "[The] injury may be readily apparent but the fact of wrong may lay hidden until after the prescribed time has passed." . . . Here, the plaintiff, although aware of his addiction, contends that he was not aware that the treatment provided by the defendant was not necessary to relieve the pain of Charcot-Marie-Tooth disease. There is conflicting evidence relating to whether the plaintiff knew or should have known that the medication was not necessary prior to the termination of the doctor-patient relationship in 1974. This is a question for the jury to decide. (Citations omitted.)

38 N.C. App. at 60, 247 S.E. 2d at 294. The situation presented in *Ballenger* is analogous to that presented in the cause under discussion. Here, the plaintiff, although aware of the removal of her reproductive organs, contends that she was not aware that surgery was not the only possible treatment for her condition, and therefore that the operation was unnecessary until August of 1981. Accordingly, in the absence of facts which would have put plaintiff on inquiry notice of her possible cause of action at an earlier date, the one year period would begin to run from 17 August 1981. Whether plaintiff should reasonably have discovered that the operation was performed without her informed consent at an earlier date is properly a question for the jury to decide.

This construction of G.S. 1-15(c) is in accord with the majority view mentioned earlier. For example, in *Hundley v. St. Francis*

Hospital, supra, the plaintiff underwent abdominal surgery and during the operation her ovaries were removed without her prior consent. The doctor informed her that the operation was necessary due to ovarian cysts. The patient later discovered that her ovaries had been healthy and the surgery was not necessary. The court first held that while the physician-patient relation continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice she continues to rely and that in the absence of actual discovery of the negligence, the statute does not start to run during the continued course of treatment. Further, that this is true even though the condition itself is known to the plaintiff so long as its negligent cause and its deleterious effect is not discovered. Next, the court held that the evidence presented was sufficient to support the finding that the action for malpractice accrued when the plaintiff acquired knowledge of the facts constituting her cause of action, that is, when she discovered that the defendant had unnecessarily removed her ovaries. *Accord Kilburn v. Pineda, supra* (limitations period for professional malpractice against the defendant doctor held to run from the date "a reasonable person in the plaintiff's position should have recognized there existed a basis for a malpractice action") and *Jones v. Sugar, supra* (discovery that the patient may have the basis for an actionable claim).

Similarly, in *Lopez v. Swyer, supra*, the patient and her husband commenced an action in 1967 against the defendant radiologist for medical malpractice with regard to radiation treatment administered in 1962 following a radical mastectomy for breast cancer. The plaintiff wife suffered from a severe adverse reaction to the radiation therapy for the next several years. Following a change of physicians in 1967, plaintiff overheard her examining physician state, "And there you see, gentlemen, what happens when the radiologist puts a patient on the table and goes out and has a cup of coffee." The plaintiffs sought to avail themselves of the "discovery rule" and thus avoid summary judgment in favor of defendant on the ground that the action was barred by the two year statute of limitations. The court observed that the discovery rule is essentially a rule of equity developed to mitigate the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law. "On the face of it, it seems inequitable that injured person, unaware that he has a cause of

action, should be denied his day in court solely because of his ignorance, if he is otherwise blameless." 300 A. 2d at 566. On the basis of the facts presented, the court held that a material issue of fact existed as to the date on which plaintiffs knew or might reasonably have been expected to know the nature of the injuries complained of and their relation to the alleged negligence of the radiologist.

The Supreme Court of Nevada in *Massey v. Litton, supra,* summarized the majority view of when the malpractice plaintiff "discovers" his or her legal injury.

> The discovery may be either actual or presumptive, but must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence . . . This rule has been clarified to mean that the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice . . . The focus is on the patient's knowledge of or access to facts rather than on her discovery of legal theories. (Citations omitted.)

669 P. 2d at 251-252. The *Massey* court then held that the "injury" to be discovered is a "legal injury," encompassing discovery of damage as well as negligent cause.

Accordingly, I would adopt the "legal injury" test for determining whether a claim was timely filed pursuant to G.S. 1-15(c) and hold that a patient must file the action within one year from the time when the patient discovers, or through the use of reasonable diligence should have discovered, both the fact of damage or injury suffered and facts leading to the realization that the cause was or may have been her physician's negligence. In other words, discovery—actual or presumptive—of all the essential elements of the malpractice cause of action. To hold otherwise would unfairly deprive the injured patient of her claim before she had a reasonable chance to assert it.

In conclusion, the plaintiff's complaint must be considered timely filed under the four year limitation period of G.S. 1-15(c) for the following reasons: plaintiff has alleged that she suffered

an injury which, under the circumstances, was not apparent at the time of the operation; she did not discover the fact that the operation had been unnecessary due to the defendant's allegedly negligent failure to reasonably inform her of available non-surgical treatments for her condition until more than two years after the operation was performed; this action was commenced within one year of the date of discovery of that injury; and the complaint has otherwise pled no fact that will necessarily defeat its claim. Therefore, I would reverse the trial court's dismissal of the complaint and allow plaintiff's action to proceed so that her claims may be decided upon their merits.

STATE OF NORTH CAROLINA v. THURMOND BROWN

No. 8321SC694

(Filed 20 March 1984)

1. **Constitutional Law § 40— admission of taped conversations—no denial of right to counsel**

In a prosecution of defendant upon three charges arising from his hiring of another to assault a neighbor and upon two counts of solicitation to commit murder of two persons involved in the other three cases, the admission of taped conversations between defendant and an undercover officer in which defendant solicited the officer to commit murder did not violate defendant's Sixth Amendment right to the assistance of counsel because the conversations were taped after defendant had been indicted for the three crimes arising from the assault and after defendant had been before the trial court for his first appearance with respect to those charges since (1) defendant's right to counsel with respect to the solicitation to commit murder charges had not attached at the time the conversations were taped, and (2) defendant had validly waived his right to counsel with respect to the other charges before the conversations were taped.

2. **Criminal Law § 92.4— consolidation of charges for trial—transactional basis**

Charges against defendant for conspiracy to assault with a deadly weapon inflicting serious injury, conspiracy to commit nonfelonious breaking or entering, and nonfelonious breaking or entering, which arose from defendant's hiring of another to assault a neighbor, were properly consolidated for trial with two charges of solicitation to commit murder of persons involved in the prosecution of the assault-related charges, since there was a sufficient transactional connection between the two series of offenses. G.S. 15A-926(a).

3. Criminal Law § 79.1— evidence of guilty plea by testifying co-conspirator—harmless error

The trial court erred in allowing testimony by a co-conspirator that he had been convicted of a crime committed as a part of the conspiracy, but such error was not prejudicial to defendant where the co-conspirator testified concerning his participation in the crime.

4. Constitutional Law § 65— taped statements by nontestifying informant—admission for non-hearsay purposes—no denial of right to confrontation

The admission of taped statements made by a nontestifying informant to an undercover officer did not violate defendant's right to confrontation where the statements were not offered for the truth of the matters asserted therein but were received into evidence for non-hearsay purposes, and where sufficient reliability of the informant and trustworthiness of the statements were shown. Sixth Amendment to the U.S. Constitution.

5. Criminal Law §§ 73.3, 73.4— statements by nontestifying informant—showing state of mind—part of res gestae

A nontestifying informant's taped statement to an officer that he "knew a guy that wanted a couple people killed" was admissible to explain the officer's subsequent conduct in instigating an undercover investigation, and statements made by the informant which were recorded during an undercover officer's first conversation with defendant concerning his desire to have two people killed were admissible as accompanying and characterizing an act.

6. Conspiracy § 6— conspiracy to commit felonious assault—agreement to use deadly weapon—sufficiency of evidence

The State's evidence was sufficient to permit the jury to find an agreement to use a deadly weapon so as to support conviction of defendant for conspiracy to assault with a deadly weapon inflicting serious bodily injury where a witness testified that he saw defendant hand a knife to the perpetrator of the assault on the night the assault was committed.

7. Criminal Law § 138— voluntary acknowledgment of wrongdoing mitigating circumstance—no standing to assert unconstitutionality

Defendant had no standing to assert the unconstitutionality of the mitigating circumstance set forth in G.S. 15A-1340.4(a)(2)1 that the defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage of the criminal process where the trial court did not consider such factor because there was no evidence to support it.

8. Criminal Law § 138— aggravating factors—crime committed to hinder enforcement of laws—law officer and State's witness as intended victims—no improper use of same evidence for two factors

The trial court did not improperly use the same evidence to prove more than one aggravating factor in sentencing defendants upon two convictions of solicitation to commit murder when the court found the aggravating factor set forth in G.S. 15A-1340.4(a)(1)d that each crime was committed to hinder the enforcement of laws by disrupting a prosecution against defendant, and the court also found the mitigating factor set forth in G.S. 15A-1340.4(a)(1)e that the in-

tended victims of the murders were a law enforcement officer and a State's witness against defendant.

APPEAL by defendant from *Albright, Judge.* Judgment entered 14 January 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 January 1984.

Attorney General Rufus L. Edmisten by Assistant Attorney General Richard L. Kucharski for the State.

Morrow and Reavis by John F. Morrow for defendant appellant.

BRASWELL, Judge.

The crimes for which the defendant has been convicted stem from two occasions in which the defendant hired two individuals to carry out unlawful acts against persons he wished to harm. In those crimes arising from the first instance, the defendant was convicted of conspiracy to assault with a deadly weapon inflicting serious bodily injury, conspiracy to commit non-felonious breaking or entering, and non-felonious breaking or entering. His second attempt to pay someone for criminal conduct resulted in the defendant's conviction of two counts of solicitation to commit murder. The defendant has presented eight questions for our review. From a careful consideration of the record, we have found no prejudicial error.

In the early summer of 1982, the defendant was having "trouble" with his next door neighbor, George Koubek. The defendant offered David Morrison "$50.00 to go assault [Koubek] and teach him a lesson." At first, Morrison was not interested but on 25 June 1982, after being threatened by the defendant, he carried out the defendant's offer.

Morrison testified that he and Roger Lawson on the day of the attack rode their bicycles down to the defendant's house around 9:30 p.m. The defendant then sent Lawson over to Koubek's house twice to see who was home. When he returned, he saw Morrison wearing a toboggan that the defendant had given him to use as a mask. Lawson also saw the defendant give Morrison a knife. Then the three men left the defendant's house; Mor-

rison went to Koubek's house while Lawson and the defendant went around the block to wait for Morrison.

With the mask over his face Morrison went to Koubek's home and knocked on the door. According to Koubek's testimony, Morrison pointed the knife at him and said, "This is a stickup." Morrison slashed at Koubek with the knife and they began to fight. The sixty-nine-year-old Koubek was cut, struck in the mouth, and kicked in the face and ear by Morrison.

After the struggle, Morrison ran back over to the defendant's house. The defendant arrived shortly after Morrison, paid him an additional twenty-five dollars, and gave him a ride home.

Morrison was arrested and later convicted for attempted armed robbery. Lawson was also arrested and charged with conspiracy to assault inflicting serious bodily injury. He had not yet been tried at the time of Brown's trial. The defendant was originally indicted on charges of conspiracy to assault with a deadly weapon inflicting serious bodily harm, conspiracy to commit first-degree burglary, and first-degree burglary. He appeared in open court in response to these indictments on 1 November 1982. At this time, he signed a waiver of court-appointed counsel, expressing a desire to appear in his own behalf. No attorney had entered a general appearance on the defendant's behalf and there was no attorney of record on 4 or 5 November 1982. Yet, defense counsel, John Morrow, testifying under oath, stated that the defendant was initially charged in June of 1982 for these crimes, but that the case against him was dismissed at a probable cause hearing. Morrow stated that the defendant retained him as counsel at that time. Later when the Grand Jury returned indictments for these same offenses and the defendant was arrested on 28 September 1982, the defendant called Morrow who stated that he would continue to represent the defendant. Morrow further explained:

> I did, in fact, appear in court for his first appearance when he waived counsel. I did not make an official appearance in court, because I had not fully been retained, but I did consider myself his attorney.
>
> * * * *

I never did file an appearance. I did file discovery papers in December.

Approximately one week prior to 4 November 1982 Detective R. A. Spillman was told by a paid police informant, Mark Spainhour, that he knew a man who wanted two people killed. Later, Spainhour revealed that the defendant wanted Morrison and a police detective, referred to as Carrot Top, murdered. With this knowledge, Spillman devised a plan to meet with the defendant and to record their conversation.

Posing as an ex-convict who would commit murder for hire, Spillman, through Spainhour who knew the defendant, met with the defendant on 4 November 1982 at his home. Spillman was wired with a transmitter for this and all subsequent conversations with the defendant. At this initial meeting, the defendant offered Spillman $2,500 if he would kill Carrot Top, the officer who the defendant believed was pushing the case against him in the attack on Koubek, and Morrison, the only witness against him who could testify to his part in the Koubek attack.

After one telephone call and another meeting, both of which were taped, they agreed that once Spillman killed Carrot Top he would show his body to the defendant. Morrison was to be killed shortly thereafter. On the evening of 5 November 1982, Spillman called the defendant to meet him at a particular parking lot so that he could show him Carrot Top's body. When the defendant arrived at the appointed place, Spillman showed him the body of Detective J. C. Douglas, who had been disguised to look as if he had been shot. Satisfied with Spillman's job, the defendant paid him $400 as a first installment and was immediately arrested by other officers waiting nearby. On 15 November 1982, the defendant was indicted on two counts of solicitation to commit murder. On 14 January 1983, the jury returned a verdict of guilty on all five counts charged against the defendant.

[1] The most troublesome of the defendant's assignments of error asserts that the taped conversations between Spillman and the defendant after the defendant had been indicted for the three crimes arising from the Koubek assault violated the defendant's Sixth Amendment right to the assistance of counsel made applicable to the States through the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799

(1963). As of the time his conversations were recorded on 4 and 5 November 1982, the defendant had already been indicted for crimes committed during the Koubek assault and had been before the trial court for his first appearance on 1 November 1982. Thus, with regard to these charges, the criminal proceedings against the defendant had reached a critical stage, thereby entitling him to counsel. *See Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed. 2d 411, 417 (1972). However, the criminal proceedings started against the defendant at this time with regard to the crimes of solicitation were still within the investigatory stage, a period before the defendant's Sixth Amendment right to counsel attaches. Spillman, following through on a tip given by a reliable paid informant, recorded the defendant's conversations in an effort to obtain evidence against the defendant as to whether the defendant would indeed solicit another to commit murder. Technically, on this basis alone, we could hold that the defendant's Sixth Amendment right to counsel has not been violated by Spillman's investigatory activity.

Yet, because the five offenses were joined for trial and the tape recordings did contain incriminating statements deliberately elicited from the defendant by Spillman concerning the Koubek assault after he had been indicted and in the absence of counsel, we take a closer look at this assignment of error to insure that the defendant's Sixth Amendment right has not been infringed upon in violation of the rule laid down in *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 1203, 12 L.Ed. 2d 246, 250 (1964).

"The rule of *Massiah* serves the salutory purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." *United States v. Henry*, 447 U.S. 264, 276, 100 S.Ct. 2183, 2190, 65 L.Ed. 2d 115, 126 (1980) (Powell, J., concurring). Assuming arguendo that the defendant was entitled to counsel, the essential question then becomes whether the defendant actually retained counsel or whether he voluntarily, knowingly, and intelligently waived his right to the assistance of counsel. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, *rehearing denied*, 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed. 2d 121 (1966). We hold that there has been no violation of the defendant's Sixth Amend-

ment rights because at the time of the Spillman undercover operation the defendant had validly waived his right to counsel.

During the *voir dire* proceeding to determine the admissibility of the defendant's conversations with Spillman, the prosecution introduced evidence which showed that on 1 November 1982, two days before the defendant's first conversation with Spillman and three days before he was arrested for solicitation to commit murder, the defendant had appeared in court without counsel on the charges in connection with the Koubek assault. At this time, the defendant signed a written waiver under oath, stating:

> I freely, voluntarily, and knowingly declare that I do not desire to have counsel assigned to assist me, that I expressly waive that right, and that in all respects, I desire to appear in my own behalf, which I understand I have the right to do.

John Morrow, attorney, testified that he was in the courtroom on 1 November 1982 during the defendant's first appearance "when [the defendant] waived counsel," but that he did not make an appearance on the defendant's behalf because he "had not been fully retained," and subsequently, "never did file an appearance."

In any event, the defendant had no right to appear both by counsel and by himself. *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978). The written waiver demonstrated his choice to appear in his own behalf. This waiver of counsel is good until the proceeding has finally terminated and the burden of showing a change in the desire of the defendant for counsel rests upon the defendant. *State v. Elliott*, 49 N.C. App. 141, 270 S.E. 2d 550 (1980).

The only other evidence pertaining to whether the defendant had counsel was made during the first recorded conversation by the defendant to Spillman. As the defendant tries to decide "who to go after," he states, "I've got, I think I've got an appointment Monday to talk to the lawyer on it, and I can find out what he, what he thinks about who's who in the thing." This evidence does not contradict the other evidence that he had waived counsel at this time. It is clear that he had no counsel as of 1 November 1982. He offered no evidence that he retained counsel by 4 or 5 November, the date of the relevant conversations. His statement at most only reflects the fact that he was planning to talk to an

attorney on 8 November 1982, not that he had retained him as counsel or intended to retain him at that time.

In relation to this assignment of error, the defendant also asserts that the trial court erred by failing to make the necessary findings of fact and conclusions of law in his order permitting the tapes to be admitted in evidence. We disagree. The trial court found as a fact that on 1 November 1982 the defendant had waived his right to court-appointed counsel and that as of 4 and 5 November there was no attorney of record. Since the defendant did not except to these findings which are supported by competent evidence, they are conclusive on appeal. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934, 91 S.Ct. 2266, 29 L.Ed. 2d 715 (1971). The trial court's conclusion of law reflecting these findings stated that "[i]n obtaining the tape recorded conversations with the defendant, the police violated none of the constitutional rights of the defendant." In our review of the order, we have found that these findings of fact support this conclusion of law and hold that the trial court committed no error with regard to this order.

[2] The defendant further contends that the trial court committed reversible error by granting the State's motion to join the offenses for trial arising from the Koubek assault and the undercover solicitation to commit murder operation. G.S. 15A-926(a) provides that

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

As a general rule, a motion to consolidate is addressed to the sound discretion of the trial court and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death penalty vacated*, 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976). However, "where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements." *State v. Wilson*, 57 N.C. App. 444, 448, 291 S.E. 2d 830, 832, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 375 (1982).

Case law construing the statute requires that "[i]n determining whether defendant has been prejudiced, the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused." *State v. Clark*, 301 N.C. 176, 181, 270 S.E. 2d 425, 428 (1980). Therefore, "there must be some type of 'transactional connection' between the offenses before they may be consolidated for trial." *State v. Oxendine*, 303 N.C. 235, 240, 278 S.E. 2d 200, 203 (1981).

We believe the trial court's ruling was proper because there was a transactional connection between the five offenses which were not so distinct in circumstances so as to render consolidation unjust and prejudicial. The present consolidation is not a case where several separate offenses committed independent from one another have been joined, but rather is a situation where the second group of offenses were committed by the defendant as a result of and were dependent on the commission of the earlier assault-related offenses. Also, evidence of the assault-related offenses would have been admissible in the trial of the solicitation to commit murder offenses. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

The defendant hired someone on 25 June 1982 to assault his neighbor; and when he was connected with that incident and to its related crimes, he hired another person on 4 November 1982 to kill those people who would play key roles in the prosecution against him in the assault. Although remoteness in time between offenses may often be a reason to deny a motion to consolidate, we do not believe that under these facts such a denial is warranted. There is no requirement that the "single scheme or plan" element of G.S. 15A-926(a) exists from the outset of the defendant's criminal activity. *See State v. Williams*, 308 N.C. 339, 302 S.E. 2d 441 (1983). Because the second group of crimes grew out of the earlier transaction, this causal relationship gives rise to the necessary "transactional connection" between the offenses. Furthermore, since there was no violation of the defendant's Sixth Amendment right to counsel when Spillman recorded his conversations with the defendant, we fail to see how the defendant has been prejudiced. We hold, therefore, that the trial court did not abuse his discretion by granting the State's motion to consolidate.

[3] As a third assignment of error, the defendant contends that the trial court committed prejudicial error in allowing evidence to be presented that Morrison, an alleged co-conspirator, had been convicted by a jury of a crime committed as a part of the conspiracy. "The clear rule is that neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E. 2d 228, 230 (1979). The rationale for this "clear rule" is that (1) "a defendant's guilt must be determined solely on the basis of the evidence presented *against him*" and (2) "introduction of such . . . by a co-defendant, *when he or she has not testified at defendant's trial*, would also deprive the defendant of his constitutional right of confrontation and cross-examination." *State v. Rothwell*, 308 N.C. 782, 785-86, 303 S.E. 2d 798, 801 (1983). However, the Supreme Court in *Rothwell* realized that neither of these bases for the rule would be violated "if evidence of a *testifying* co-defendant's . . . [guilt] . . . is introduced for a *legitimate* purpose." *Id.* In *Rothwell*, the plea information was elicited from the witness on direct examination. Therefore, the court indicated that this testimony "was erroneously admitted into evidence because a legitimate purpose had not yet been established for its introduction at trial," such as rebuilding the witness's credibility which had been attacked on cross-examination. *Id.* at 787, 303 S.E. 2d at 801-802. In the present case, the admission into evidence, also on direct examination, that Morrison had been convicted of attempted armed robbery was equally erroneous for we fail to see any legitimate purpose for which it was offered by the prosecution.

However, in the present case just as in *Rothwell*, since the codefendant was in fact on the witness stand and had "testified to his own participation in the crime, '[t]he jury was already fully apprized of [the testifying witness'] guilt.' " *Id.* at 788, 303 S.E. 2d at 802, *quoting, State v. Bryant*, 236 N.C. 745, 747, 73 S.E. 2d 791, 792 (1953). Therefore, we hold that the erroneous admission into evidence of Morrison's conviction was error but not prejudicial error, requiring a new trial.

[4] The defendant also assigns as error the admission into evidence a statement made by Mark Spainhour, a paid informant, to Detective Spillman concerning his knowledge of the defendant's desire to have Carrot Top and Morrison killed. In his brief,

the defendant now contends that all of the statements made by Spainhour which were recorded as a part of the taped conversations with the defendant were improperly admitted before the jury. Specifically, the defendant asserts that because Spainhour did not testify at trial the Confrontation Clause of the Sixth Amendment has been violated. We disagree.

[5] "It has been noted that the Confrontation Clause and the hearsay rule 'stem from the same roots' and are 'designed to protect similar values.' " *State v. Porter*, 303 N.C. 680, 696, 281 S.E. 2d 377, 388 (1981), *quoting Dutton v. Evans*, 400 U.S. 74, 81, 86, 91 S.Ct. 210, 216, 219, 27 L.Ed. 2d 213, 223, 225 (1970). Thus, statements which do not run afoul of the hearsay rule may be admitted against the defendant without violating the Confrontation Clause. *See State v. Porter, id.* at 696, 281 S.E. 2d at 388; *see also State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). It is clear from the record that all of Spainhour's statements were not offered as substantive evidence. The trial judge instructed the jury twice that "if you find that Spainhour made the statements, you may consider those statements only insofar as you may find that it bears upon the state of mind of the hearer of the statement and explains their later conduct." Thus, the trial court made it clear to the jury that no statement uttered by Spainhour was to be used to prove the truth of the matter in question. Since statements offered for any purpose other than proving the truth of the matter asserted are not objectionable as hearsay, they likewise do not violate the Confrontation Clause. The purpose for admitting Spainhour's statement that he "knew a guy that wanted a couple people killed" was to show its effect upon Spillman and to explain why Spillman instigated the undercover operation. Such a statement, offered to explain the subsequent conduct of the person to whom the statement was made, is admissible. *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). Similarly, the statements made by Spainhour which were recorded during Spillman's first conversation with the defendant were also admissible. In *State v. Poplin*, 56 N.C. App. 304, 289 S.E. 2d 124, *disc. rev. denied*, 305 N.C. 763, 292 S.E. 2d 579 (1982), this Court stated that it was not error for the trial court to allow an undercover agent to testify to a conversation he had with a man he had just met in the defendant's house when the two of them left the

presence of the defendant to retrieve a package of cocaine from a birdhouse on a utility pole in the defendant's backyard. The Court held that "this was properly admissible as testimony accompanying and characterizing an act." *Id.* at 309, 289 S.E. 2d at 128. Thus, the conversation was a part of the "res gestae" or "things done." Likewise, in the present case, Spainhour's role in the undercover operation was a part of the operative conduct itself by providing the defendant an opportunity to solicit Spillman to commit murder. Spainhour's statements on the tape played before the jury were not offered for the truth of any statement made and so were received into evidence for a non-hearsay purpose. *See* 1 Brandis on North Carolina Evidence § 158-159 (1982). The trial judge correctly instructed the jury that these statements were not to be considered as substantive evidence, but only in regard to how they might affect the state of mind of the defendant, the hearer of the statements. Therefore, we hold that since each of Spainhour's statements were admissible for a non-hearsay purpose there was no violation of the Confrontation Clause of the Sixth Amendment.

However, the discussion does not end there. The United States Supreme Court held in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980), that "merely classifying a statement as a hearsay exception [or as in this case simply not hearsay] does not *automatically* satisfy the requirements of the Sixth Amendment and that hearsay testimony is admissible against the accused, without violating his right of confrontation, only when it bears adequate 'indicia of reliability' to guarantee its trustworthiness." *State v. Porter, supra*, at 697, 281 S.E. 2d at 388. With regard to the Spainhour statement that the defendant wanted people killed, Detective Spillman testified during the *voir dire* examination of the tapes that he had known Spainhour for six years, that he had used him as an informant in excess of a hundred times, and that he had always found him truthful, reliable and accurate. Moreover, Spillman, through his undercover operation discovered that what Spainhour had told him was in fact true that the defendant did indeed want two people killed. Additionally, the statements made during the taped conversation were also trustworthy. Detective K. E. Peele testified that the recording equipment was working properly; that entire statements made were recorded; that no changes, deletions or additions were made on

the recordings; and that since the time the recordings were made, they have been in his possession under police property control. We hold that these statements, having met the additional *Ohio v. Roberts* criteria as bearing adequate indicia of reliability to guarantee trustworthiness, were properly admitted.

[6] The defendant's assignment of error that the trial court committed prejudicial error in overruling the defendant's motions for dismissal at the end of all the evidence and at the end of the jury charge is without merit. He contends "no evidence ever existed sufficient to permit a jury to find an agreement to use a deadly weapon to satisfy the felony conspiracy charge and conviction." Yet, Roger Dale Lawson, present at the defendant's home with Morrison on the night of the assault on Koubek testified that "[w]hen they were coming through the hall, I glanced back and saw Brown hand Morrison a knife." Therefore, we hold there was sufficient evidence before the jury to allow them to find the defendant guilty of conspiracy to assault with a deadly weapon inflicting serious bodily injury.

[7] The defendant's final assignments of error allege error in the sentencing stage of the defendant's trial. He first contends that G.S. 15A-1340.4(a)(2)l., as a mitigating factor, [that the defendant voluntarily acknowledged to a law enforcement officer prior to arrest or at an early stage of the criminal process] violates the defendant's rights under the Fifth and Sixth Amendments by compelling the defendant to testify against himself without the assistance of counsel. The purpose of this factor is to allow the defendant to benefit from any remorse he may have shown for his wrongdoing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). In the present case, the trial court did not consider this factor because there was no evidence that the defendant acknowledged his wrongdoing prior to arrest or at an early stage of the criminal process. Thus, we hold the defendant does not have standing to assert that the use of this mitigating factor and its presence within the statute is unconstitutional. A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed. 2d 353 (1982).

[8] Secondly, the defendant asserts that the trial court committed error in the sentencing phase of his trial by impermissibly using the same evidence to prove more than one aggravating factor. *See* G.S. 15A-1340.4(a)(1). In the sentencing of the first solicitation to commit murder, the trial court found factors in aggravation that "[t]he offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" (*see* G.S. 15A-1340.4(a)(1)d.) and that the intended victim of the murder was a Winston-Salem Fire Department arson investigator. (*See* G.S. 15A-1340.4(a)(1)e.) In the second solicitation conviction, the trial judge found that the offense was committed "to disrupt or hinder . . . the enforcement of the law" and that the intended victim, David Morrison, was a State's witness against the defendant. He argues that in both solicitation charges that the same evidence was used to prove both aggravating factors. For example, by soliciting the murder of a State's witness, the defendant naturally attempted to hinder the enforcement of the law.

G.S. 15A-1340.4(a)(1) states that "the same item of evidence may not be used to prove more than one factor in aggravation." We do not believe that the "same item of evidence" has been used within the meaning of the statute. The evidence shows that the defendant attempted to disrupt the enforcement of the laws through the act of paying someone to murder those people who were playing key roles in his assault prosecution. The defendant testified that "I didn't care at that time that human life, human blood, was going to be spilled and two people were going to be dead." He simply did not want to be prosecuted and possibly sent to jail for his part in the assault on Koubek. Other evidence shows that the only way the defendant was going to achieve that end was by killing the detective and Morrison, the man he had paid to commit the assault who would testify against him at trial. The purpose of G.S. 15A-1340.4(a)(1)e. is to penalize a defendant who chooses to commit an offense against this class of people: law enforcement officer, fireman, judge, prosecutor, juror, or witness against the defendant while performing his official duties. In both instances of solicitation, the defendant directed his criminal activity against a person in this class, specifically a detective and a State's witness. Therefore, the trial court correctly found this factor in aggravation. Additionally, the specific crime of murder

(rather than, for instance, robbery or burglary) he wanted committed against these particular people was intended to hinder the enforcement of laws by disrupting the assault prosecution against him. The defendant cannot be allowed to benefit by having only one aggravating factor charged against him instead of two simply because the method in which he chose to disrupt the enforcement of the law included killing two members of this statutorily protected class. We hold that the trial court committed no error within the sentencing phase and that the defendant is not entitled to a new sentencing hearing.

No error.

Judges WELLS and PHILLIPS concur.

JAMES A. DEAN, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC1355

(Filed 20 March 1984)

Master and Servant § 68— workers' compensation—finding that disease not compensable supported by evidence

In a workers' compensation case, the Commission's conclusion that plaintiff's disease was not compensable was supported by findings of fact detailing the testimony of two doctors which indicated (1) there was a small chance that plaintiff's disease was caused by his occupational exposure, and (2) that the cause of plaintiff's condition was to a certain extent speculative.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 2 August 1982. Heard in the Court of Appeals 18 November 1983.

Plaintiff filed a claim for workers' compensation benefits alleging that he suffered from an occupational disease due to his exposure to cotton dust while working for defendant employer. The evidence showed that plaintiff worked in a textile mill in 1933 and 1934 and from 1942 through 1947. In 1951 he began his

employment with the defendant. He worked in the weave room for approximately three years and was then employed in the cloth room until his retirement in 1975. Cotton cloth was brought from the weave room to the cloth room where plaintiff operated the roll-up machine. Plaintiff was treated at Watts Hospital for respiratory problems commencing in 1970. Plaintiff's coughing and shortness of breath made his job more difficult and in 1975 he retired rather than take a different job for less pay. In 1976 he had a heart attack. Plaintiff began smoking in 1930 and smoked from eight to ten cigarettes a day for 20 years. He resumed smoking in 1960 and continued for approximately one year and then ceased smoking.

Dr. George R. Kilpatrick, Jr. testified that in his opinion the plaintiff has a pulmonary impairment of approximately 35% and that he is totally disabled from his lung disease and his heart disease. In response to a hypothetical question he testified that plaintiff's exposure to cotton dust caused or significantly contributed to the chronic obstructive pulmonary disease. Dr. Kilpatrick also testified that the plaintiff's exposure to cotton dust placed him at increased risk of developing chronic obstructive pulmonary disease. On cross-examination he stated that raw cotton dust is produced from cloth before it is washed and dyed and this could cause a chronic obstructive lung disease although he could not recall any studies addressing that situation. He testified that he was not furnished dust level studies on which he could base an opinion as to the plaintiff's exposure and without such data his opinion as to the plaintiff's lung disease was to a certain amount speculation.

Dr. David Allen Hayes testified that he had not examined the plaintiff but he had reviewed the plaintiff's testimony, the deposition of Dr. Kilpatrick, and medical records of the plaintiff. In answer to a hypothetical question he testified that it was his opinion that "it was medically unlikely that Mr. Dean's occupational exposure to cotton dust contributed to his obstructive lung disease." He also testified that in his opinion his occupational exposure to cotton dust "perhaps placed him at slightly increased risk of developing obstructive lung disease. However, I do not consider the type of exposure that occurred through the vast majority of his mill employment to have placed him as an individual at much higher risk of developing obstructive lung disease."

The hearing commissioner entered an opinion and award in which he recited the testimony of Drs. Kilpatrick and Hayes. He found that the "plaintiff has failed to carry his burden of establishing that his condition has been caused or contributed to by his exposure to cotton dust in defendant's mill, that his employment placed him at an increased risk of contracting COPD, or that he was permanently or partially disabled from employment in 1975 as a result of an occupational disease." The hearing commissioner denied compensation and his opinion and award was affirmed by the Full Commission. The plaintiff appealed.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff appellant.

Maupin, Taylor and Ellis, by David V. Brooks, for defendant appellees.

WEBB, Judge.

Our review of the Commission's order is limited to determining (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the findings of fact justify the legal conclusion. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). We believe the Commission's findings of fact are supported by the evidence. The burden of proof was on the plaintiff to show he had a compensable disease. The testimony of Dr. Hayes as to the small chance that plaintiff's disease was caused by his occupational exposure and the slight risk to which work in a cloth room places a person together with the testimony of Dr. Kilpatrick that his opinion as to the cause of the plaintiff's condition was to a certain extent speculation is evidence which supports the Commission's finding that the plaintiff had not carried his burden of proof. The conclusion that plaintiff's disease is not compensable is supported by this finding of fact.

The plaintiff argues that a fair review of the record shows that the Commission did not fairly weigh and consider all the evidence. We do not believe this argument has merit. The Commission is not required to make findings on all the evidence. It is required to make findings of fact on the evidence from which we can determine that the law is correctly applied. We believe the Commission has done this. We assume they considered all the evi-

dence. We do not believe *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 262 S.E. 2d 830, *cert. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980), *later appealed*, 54 N.C. App. 582, 284 S.E. 2d 343 (1981), *petition denied*, 305 N.C. 152, 289 S.E. 2d 379 (1982); or *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977), relied on by plaintiff, are helpful to him. In *Harrell* the Commission was reversed because the Commission recited in its order that it discounted certain evidence. In *Gaines* the case was remanded because the Commission did not make sufficient findings of fact. In this case there is no indication in the Commission's order that it did not weigh all the evidence and we have held it made sufficient findings of fact.

The appellant argues that the Industrial Commission rendered its decision in this case before the cases of *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983) and *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982) were filed. He argues that the Commission did not address the issue of aggravation of his condition under the law as established in these two cases. We hold that the Commission, by finding that the plaintiff had not carried his burden of proving his condition was "contributed to by his exposure to cotton dust in the defendant's mill," has addressed the issue of aggravation under these two cases.

The appellant assigns error to the hearing commissioner's denial of his motion for a view of the premises. Assuming the hearing commissioner had the authority under G.S. 97-76 or otherwise to inspect the premises, it was in his discretion as to whether he should do so. The plaintiff last worked on the premises in 1975. The motion for an inspection of the premises was made in 1981. We hold the hearing commissioner did not abuse his discretion in denying the motion.

Affirmed.

Judge EAGLES concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the Commission's findings that plaintiff's work did not expose him to a greater risk of COPD than the general public and did not significantly contribute to his COPD are not supported by competent evidence.

These questions were addressed by the testimony of Dr. Kilpatrick and Dr. Hayes, expert medical witnesses. Dr. Kilpatrick testified: "In my opinion, individuals exposed to cotton dust tend to have a high incidence of chronic obstructive pulmonary disease compared to the average population." He also opined that plaintiff's exposure to cotton dust at work placed him at an increased risk of developing COPD compared to members of the general public. The cross-examination of Dr. Kilpatrick addressed the issue of *causation*, not the issue of plaintiff's *risk* of contracting COPD compared to the general public. Yet, based on this evidence, Deputy Commissioner Rich made the following finding:

> Dr. Kilpatrick stated in cross-examination that without information on the amount and nature of cotton dust in the cloth room where plaintiff worked most of his years in the mill, he could not determine whether plaintiff's employment at Cone placed him at an increased risk of developing chronic obstructive pulmonary disease as compared to a group of individuals not so exposed.

This critical finding of fact has absolutely no basis in the evidence and therefore constitutes error.

Dr. Hayes testified that the information suggesting increased risk of COPD among cloth room workers was scant, and opined that "the population of cloth room workers at large have a very, very unlikely possibility of developing obstructive lung disease from their occupational exposure." But specifically in regard to plaintiff, Dr. Hayes testified:

> It is my opinion his occupational exposure to cotton dust, which included both weave and cloth room exposure, perhaps placed him at *slightly increased* risk of developing obstructive lung disease. However, I do not consider the type of exposure that occurred through the vast majority of his mill

> employment to have placed him as an individual at *much* higher risk of developing obstructive lung disease. (Emphasis added.)

Deputy Commissioner Rich found from this testimony that, "Dr. Hayes opined that cloth room workers generally are not placed at an increased risk of contracting COPD than the general public not similarly employed." Although this finding is supported by some competent evidence, it does not speak to the issue of whether *plaintiff's* occupational exposure in both weave and cloth rooms placed him at increased risk. Because the finding does not address plaintiff's specific circumstances, it does not support the conclusion that he failed to carry his burden of showing he was placed at a higher risk than the general public.

Both doctors also testified as to whether plaintiff's exposure to cotton dust significantly contributed to his COPD. Dr. Kilpatrick expressed the opinion that plaintiff's total years of cotton dust exposure probably caused or significantly contributed to his COPD; and though he could not state to what extent the dust exposure contributed to the COPD, as opposed to other factors, or that he was absolutely certain that dust exposure contributed to the COPD, he consistently asserted that plaintiff's exposure to cotton dust probably did contribute to his COPD. After hearing this evidence, Deputy Commissioner Rich found that, "Dr. Kilpatrick could not state to a reasonable degree of medical certainty . . . that plaintiff's COPD was caused or permanently aggravated by an exposure to cotton dust in his employment." This finding is not supported by any of Dr. Kilpatrick's testimony.

In contrast to Dr. Kilpatrick, who was the examining physician, Dr. Hayes testified that, "it was medically unlikely that [plaintiff's] occupational exposure to cotton dust contributed to his obstructive lung disease." Dr. Hayes later qualified this testimony by stating that three different factors contributed to plaintiff's COPD: his relatively nominal tobacco consumption, his 31 years of exposure to cotton dust, and an unusual genetic susceptibility to COPD. Dr. Hayes could not separate the contribution of these causative factors but felt that the genetic predisposition was the most important. From this testimony, Deputy Commissioner Rich found that plaintiff's cotton dust exposure probably did not contribute to his COPD, and that plaintiff had an unusual genetic

susceptibility to COPD, which could have been brought on by intercurrent infection or general environmental pollutants. Part of Dr. Hayes' testimony supports these findings.

Deputy Commissioner Rich made the conclusion of law that plaintiff failed to prove his COPD was caused or contributed to by his occupational exposure to cotton dust. This conclusion was presumably based on the findings that both medical witnesses were of the opinion that plaintiff's exposure to cotton dust did not contribute to his COPD. But since the conclusion of law concerning causation of plaintiff's COPD was made under a misapprehension as to Dr. Kilpatrick's testimony and was thus based in part on an erroneous finding of fact, it should not stand.

LINDA P. GOODWIN v. THE GOLDSBORO CITY BOARD OF EDUCATION

No. 838SC273

(Filed 20 March 1984)

1. **Schools § 13.2— review of teacher dismissal—whole record test**

The applicable standard of review of the dismissal of a career teacher is the "whole record" test. G.S. 150A-51(5).

2. **Schools § 13.2— dismissal of career teacher—fair application of reduction in force policy—substantial evidence**

Substantial evidence supported a school board's determination that a career art teacher's dismissal because of declining enrollment and reductions in funding was the result of a fair and consistent application of the board's "reduction in force" policy although the evidence showed that evaluations for the three previous years were not available for the three art teachers who were being compared under the "reduction in force" policy.

APPEAL by respondent from *Stevens, Judge.* Judgment entered 17 January 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 9 February 1984.

This appeal involves a review of an administrative dismissal of a career teacher by a local school board because of a reduction in staff mandated by a revenue shortfall. Petitioner was a "career teacher," as defined by G.S. 115C-325(c), who taught art in the Goldsboro City Schools during the 1980-81 school year. In a letter dated 3 July 1981, petitioner was notified by the school superin-

tendent that he would recommend her dismissal to respondent school board due to declining enrollment and significant reductions in funding. Petitioner requested a hearing, pursuant to G.S. 115C-325(h)(3), before a panel of the Professional Review Committee.[1] Petitioner was represented by counsel at this hearing, which was held in September of 1981. The Professional Review Committee panel found that "the material presented was insufficient to substantiate the Administration's actions in dismissing Mrs. Goodwin."

After receiving the Professional Review Committee panel's report, the superintendent nevertheless recommended petitioner's dismissal. On 23 September 1981, respondent school board conducted a hearing on this recommendation. Petitioner was present and represented by counsel. Both petitioner and the superintendent presented evidence. Based on the evidence which it received, the board made findings of fact and concluded that the superintendent's decision in recommending petitioner's dismissal was "justified and proper" and that the board's written policy dealing with "reductions in force" had been applied fairly and consistently in this case. The board voted to terminate petitioner's status as a career teacher, to dismiss her from employment, but to place her name on a list of available teachers to have priority for all positions that became available for which she was qualified.

Upon petition to superior court for judicial review of the final administrative decision of the respondent school board pursuant to G.S. 150A-51, the trial judge found that the grounds for the superintendent's recommendation to dismiss petitioner were "unfounded and not substantiated." The trial judge ordered that the board's decision be reversed, that petitioner be reinstated to her status as a career teacher, and that she receive back pay. From this order, respondent school board appeals.

Taylor, Warren, Kerr & Walker, by John Turner Walston and Lindsay C. Warren, Jr., for respondent-appellant.

George R. Kornegay, Jr. and Janice S. Head, for petitioner-appellee.

1. For all cases arising after 15 July 1983, dismissals or demotions of career teachers due to reduction in funding or decreased enrollment are no longer subject to review by a panel of the Professional Review Committee. G.S. 115C-325(e)(2).

EAGLES, Judge.

Respondent school board assigns as error the trial judge's reversal of the school board's decision to dismiss petitioner. Respondent contends that there was substantial evidence in the whole record to support its decision to dismiss petitioner. We agree.

I.

[1] The applicable standard of judicial review for an appeal of a school board decision is set forth in G.S. 150A-51. *Overton v. Board of Education*, 304 N.C. 312, 283 S.E. 2d 495 (1981); *Faulkner v. Board of Education*, 65 N.C. App. 483, 309 S.E. 2d 548 (1983). G.S. 150A-51(5) allows a court to reverse or modify a school board decision "if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are . . . [u]nsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted. . . ." This standard of review, known as the "whole record" test, presents to the trial judge a task which "must be distinguished from both *de novo* review and the 'any competent evidence' standard of review." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. [Citations omitted.]

Id. "The 'whole record' test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Overton v. Board of Education*, 304 N.C. at 322,

283 S.E. 2d at 501; *Faulkner v. Board of Education*, 65 N.C. App. at 486, 309 S.E. 2d at 550.

Thus, the task before the trial court was to consider all the evidence, both that which supports the decision of the board and that which detracts from it, to determine whether the board's finding, i.e., that petitioner's dismissal was the result of fair and consistent application of the board's "reduction in force" policy, was supported by substantial evidence.

II.

[2] The evidence in the record supporting the board's finding is as follows:

Respondent school board has a written "reduction in force" policy which governs the "separation of staff from service" when loss of pupils, reduced funding, program changes, or district reorganization occurs. This policy directs that "staff and program priorities shall be set separately for grades K-5, 6-8, and 9-12," that classroom teachers shall have priority, and that noncertified teachers and teachers whose certificates have expired will be dismissed first. The policy then sets out a system to determine which other employees will be dismissed:

> 3. Employees will be divided into groups according to active certification for instructional staff and according to classification or work area for support personnel. Persons with multiple certification will be grouped in their current area of assignment.
>
> * * *
>
> 6. Subsequent separations will be determined by the rank order of all employees in the group with such rank order based on a compilation of total points earned through performance ratings, years of service in the Goldsboro City Schools, service elsewhere, certificates held, and degrees earned, with probationary teachers subject to release first then career teachers.
>
> 7. Administrative reassignment to vacancies in existing federal, state, or local funded programs for which the individual is qualified will be offered to employees in the order of

descendency based upon the total points earned through the process outlined in #6 above, or to those employees with multiple certification whose transfers will reduce or eliminate the need for nonrenewing or dismissing other employees as described in #6 above.

8. Separation of employees with the lowest number of total earned points will take place in ascending order until the necessary number of employees is reached. When identical scores occur at the point in the ranking where the necessary number of separations is reached, the superintendent will recommend which employee(s) shall be released.

Respondent school board has a staff reduction data sheet, which provides a means of computing the total points earned for each employee. This allows: one point for each area of certification; one point for a Bachelor's degree; 1.5 points for a Master's degree; 2 points for a 6th year degree; 2.5 points for a Doctor's degree; .5 points for activity working toward higher certification; .5 *negative* points for each "N" received in formal evaluations for the previous three years; 1 *negative* point for each "U" received in formal evaluations for the previous three years; 1 point for each year in the Goldsboro City Schools; and .5 points for each year in other school systems. For the 1981-82 school year, the Goldsboro School System experienced a significant reduction in funding, which resulted in eight career teachers and eleven probationary teachers being dismissed or not having their contracts renewed. Of these 19 teachers, five were rehired before school began in August of 1981 because of resignations and reassignments of other teachers. Since petitioner received notice of the superintendent's recommendation to dismiss her, no teaching vacancy in art has occurred.

Due to the necessity of reducing the number of teaching positions, the superintendent made an administrative decision to eliminate teaching of art in grades K-6 for the 1981-82 school year. The correctness or educational soundness of this decision is not at issue. There were three teachers in the Goldsboro school system with art certification. They were grouped together in order to compare their respective "points," under the reduction in force policy. Until the 1980-81 school year there was no requirement that career teachers be evaluated annually, so for com-

puting the points on the staff reduction data sheet, the most recent three evaluations were used. Uniformly applying the board's reduction in force policy resulted in the following point scores:

TEACHER "A" (12 years in Goldsboro Schools) 19.5

TEACHER "B" (12 years in Goldsboro Schools) 19.0

PETITIONER (10 years in Goldsboro Schools) 12.5

III.

There is evidence in the record which does not support the board's finding. Basically, it is: (1) that there are teachers in the Goldsboro school system who teach one or two classes out of their field of certification, and (2) that there were not teacher evaluations done in 1978-79 or 1979-80 for the three art teachers who were being compared under the board's "reduction in force" policy. The only evaluations available were for the school years 1972-73 and 1980-81. The professional review panel thought that was significant and reported:

> The panel finds that item six (6) of the Board Policy was inconsistently applied when ranking Art Teachers on the basis of performance ratings as shown in item three (3) of the "Staff Reduction Data Sheet." According to the *Reduction Data Sheet,* performance ratings are to be based on the current year and two (2) years immediately prior. The panel found that the only performance evaluations presented were for the school years 1972-73 and 1980-81. On the basis of such limited documentation, the panel feels that the material presented was insufficient to substantiate the Administration's actions in dismissing Mrs. Goodwin.
>
> Based upon the above facts, this panel unanimously disagrees with the recommendation of the Superintendent to dismiss Mrs. Goodwin.

IV.

G.S. 115C-325(e)(1)(l) authorizes dismissal of a career teacher when there is a "justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding." The trial judge here was required to (1) review the

whole record to determine whether the board's finding, i.e., that petitioner's dismissal, pursuant to G.S. 115C-325(e)(1)(l), was the result of proper application of the "reduction in force" policy, was supported by substantial evidence and (2) set out his reasons for any modification or reversal of the school board. The scope of our review is the same.

Petitioner agrees that respondent school board had the authority to make the administrative decision which resulted in her dismissal. Petitioner, however, adopts the argument of the Professional Review Committee panel to the effect that the "reduction in force" policy was not properly applied because teacher evaluations for the three previous years were not available for inclusion in the comparative evaluation. In reviewing the record, we must consider the Professional Review Committee panel's report that they found that "the material presented was insufficient to substantiate the Administration's actions in dismissing Mrs. Goodwin." *Thompson v. Board of Education*, 292 N.C. at 414, 233 S.E. 2d at 543. Nevertheless, the "substantial evidence standard is not altered because the Board and panel disagree." *Faulkner v. Board of Education*, 65 N.C. App. at 490, 309 S.E. 2d at 552.

The fact that teacher evaluations had not been conducted and were not available for the three immediately previous years could have no prejudicial impact on the petitioner's fate before the school board. Petitioner would receive the smallest number of points on the staff reduction data sheets even if teacher evaluations were totally eliminated in computing points. We find that the respondent board's evidence concerning the procedure and data used to compare the three art teachers in the school system is substantial evidence of proper application of its "reduction in force" policy.

We have considered the Professional Review Committee panel's report and recommendation, but it appears that the position advocated by the panel and adopted by petitioner would require a fiscally impractical result. To hold that petitioner could not be dismissed because evaluations were not available for the previous three years for any of the teachers would mean that none of the three art teachers could be dismissed, even though the superintendent and the respondent Board had made a policy decision that art instruction would be eliminated in grades K-6.

After considering the whole record, we conclude that the trial judge erred in reversing the board's decision to dismiss petitioner, because there was substantial evidence in the record to support the board's decision. *Thompson v. Board of Education, supra.*

Reversed.

Judges HEDRICK and HILL concur.

TERRIE ANN C. JOHNSON v. ROBIN LANE JOHNSON

No. 8311DC339

(Filed 20 March 1984)

1. Husband and Wife § 10— separation agreement—finding that entered into voluntarily and without duress, coercion or fear—supported by evidence

The evidence supported the trial court's finding that plaintiff entered into and executed a separation agreement freely, willingly, voluntarily, and without being under any duress, coercion or fear where the evidence tended to show that plaintiff met her husband in the parking lot of his attorney and advised him she was not going to sign the agreement; her husband advised her of the embarrassment which would come her way if the suit were litigated; such purported threats or duress were not new to the wife in that several threats had been made before this date and plaintiff was not afraid or intimidated thereby; the parties discussed further the cost of baby-sitting expenses, and husband agreed to pay beyond his present obligations; the two parties went into the reception room of the husband's attorney and waited some 30 minutes for a notary so that the instrument could be executed; the wife had every opportunity to discuss any duress or coercion with her friend, the notary; the parties are equally educated; and the wife was aware of the value of the house and lot at the time she signed the papers.

2. Attorneys at Law § 5— misconduct of attorney—insufficiency of evidence

In an action challenging the validity of a separation agreement, plaintiff failed to show misconduct on the part of defendant's attorney where defendant's attorney did not participate in the negotiations between plaintiff and defendant, and where, even though he had been told by plaintiff's attorney that he had advised plaintiff not to sign the agreement, defendant's attorney did not speak to either party during the 30 minutes that the parties waited for defendant's attorney's notary to witness the signing of the agreement, and where defendant's attorney's conversation with the wife after the signing was reassuring and innocuous.

3. Rules of Civil Procedure § 52; Trial § 58.1— ability of trial judge to request attorney to draft proposed judgment

In an action in which plaintiff sought to declare a separation agreement invalid, the trial judge properly directed the attorney for the defendant to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as his own when tendered and signed. G.S. 1A-1, Rule 52 does not require the manual drafting of the judgment or oral dictation thereof by the trial judge.

APPEAL by plaintiff from *Lyon, Judge.* Judgment entered 25 October 1982 in District Court, JOHNSTON County. Heard in the Court of Appeals 16 February 1984.

The parties to this lawsuit are husband and wife and have one child born 13 December 1979. On 30 December 1981 the parties separated and have lived separate and apart since that time. On 27 January 1982 plaintiff wife filed suit against defendant husband seeking *inter alia* custody of the child and support therefor, title to one motor vehicle, equitable distribution of the property, and attorney fees. Defendant was served on the same day.

During the week preceding the filing of the lawsuit, defendant had instructed his attorney to prepare a deed of separation which included a property settlement. Under the terms of the proposed agreement, custody of the child was to be held jointly in each party. Medical expenses for the child were to be divided. The plaintiff waived alimony and support. The husband agreed to pay the wife $1,000.00 for her interest in the personal property and $1,500.00 for her interest in the real estate. The plaintiff retained one of the automobiles and would pay the balance due on her automobile. The savings account became the property of the husband.

On 28 January 1982 plaintiff and defendant met at the office of defendant's attorney, Yates Dobson, where they examined the deed of separation. Plaintiff obtained a copy of the proposed agreement and took it to her attorney, Stephen Woodard, who advised her not to sign the document in its present form. Mr. Woodard made suggested changes in the margin of the document and called Mr. Dobson to advise him of the changes.

Thereafter, plaintiff returned to her automobile where she met her husband. She advised her husband that she would not sign the agreement. He said to her, "That's fine; I will take you to

court and I will get my baby. I am going to strow your name all over Johnston County and take your son from you. . . . I will tell about the abortion, and I am going to tell about all the men you have run off with. . . ." Thereafter, the wife told her husband she would sign the separation agreement, and the two parties returned to the office of defendant's attorney.

The notary was out at the time, and the parties waited for her approximately thirty minutes. The notary had taught the plaintiff in the sixth grade and the two of them were friends, being on a first name basis. Upon the notary's return, the defendant advised her that his wife was ready to sign. Defendant paid his wife $2,500.00, and she paid defendant $150.00 which she had borrowed. After the parties signed the agreement, defendant's attorney came out of his office and said to plaintiff: "Terrie, this is no big deal. You and Robin can work [it] out if you want the baby on some weekend or if you want him on holidays. . . . I feel you can sit down and work it out." Defendant's attorney prepared a receipt for $2,500.00 which plaintiff signed.

The following day plaintiff took a dismissal in the then existing lawsuit. Some four months later she brings this action seeking custody of the child, and to set aside the deed of separation signed on 28 January 1982. The defendant pleaded as a defense abandonment by plaintiff, adultery, excessive alcoholism, and the voluntary execution of the deed of separation and ratification thereof. He also sought custody of the child. At trial the parties announced that the child custody portion of the lawsuit had been settled, leaving only the question of the validity of the deed of separation concerning the real property.

The case was tried without a jury. The trial judge made the following pertinent findings of fact:

> 16. That during said conversation the parties to said Separation Agreement agreed that the Defendant would pay the costs for all babysitting or baby care services to the Plaintiff; that thereafter the Plaintiff decided to enter into and execute the Separation Agreement in question.
>
> 17. That subsequently to the conversation between the Plaintiff and the Defendant, both the Plaintiff and the Defendant returned to the offices of the said T. Yates Dobson,

Jr., and there waited for a period of time for a Notary Public before whom to sign and execute the said Separation Agreement.

18. That prior to the Plaintiff and the Defendant returning to the offices of T. Yates Dobson, Jr., Plaintiff's attorney made a telephone call to the law offices of T. Yates Dobson, Jr., and informed the party to whom they spoke that the Plaintiff did not wish to sign the Agreement; that upon leaving the office of her counsel, and upon discussing with the Defendant his agreement to pay to her all the costs of baby care services and babysitting services, along with the sum of $1,500 for her interests in the property previously owned by the parties, together with $1,000 in cash for furniture, the Plaintiff thereafter decided, freely, willingly, and voluntarily, to enter into the Separation Agreement which she had read in the offices of T. Yates Dobson, Jr.

19. That approximately 10 minutes after 6 p.m. on the day of January 28, 1982, the Plaintiff, and the Defendant, in the presence of Pansy E. Dobson, A Notary Public for said County and State, executed by signing and affixing their personal signatures thereto the Separation Agreement between said parties; that at the time the said Plaintiff affixed her signature to said Separation Agreement the Plaintiff was not under duress, threat, or fear of the Defendant, that the said Pansy E. Dobson taught the Plaintiff in the sixth grade; that they are friends and on a first name basis with the other; that if the Plaintiff had been under any fear or duress certainly she would have revealed such to her friend, and certainly Pansy E. Dobson would have recognized such fear and duress being practiced on Plaintiff if in fact such did exist.

20. That any alleged statements made by the Defendant to the Plaintiff that he intended to contest and to litigate in the Courts the question of the custody of the minor child of said parties, together with his alleged statements that he would seek full custody, did not constitute any threat to the Plaintiff; that such statements had been allegedly made to the Plaintiff on several occasions prior to the 28th day of January, 1982; that if such threats had in truth been made the Plaintiff was not afraid and was not intimidated by and

was not therefore or thereby placed under duress or fear at or before the time of the signing of the Separation Agreement which the Plaintiff entered into with this Defendant on the 28th day of January, 1982.

21. That at the time the Plaintiff executed said Separation Agreement, the Defendant paid to the Plaintiff the sum of $2,500 in cash; that in addition thereto, immediately prior to the signing of said Agreement by the Plaintiff, Defendant and Plaintiff agreed each with the other that the Defendant would pay the costs for baby care and babysitting services on behalf of himself and the Plaintiff; that the agreement by the Defendant to pay these additional costs, in addition to the sums of cash paid to the Plaintiff, constituted additional consideration for the entry into and the free and voluntary signing of said Separation Agreement.

22. That the Plaintiff, at the time of the execution of said Separation Agreement, was a person of intellect, having a high school education, and that her background, both socially and educationally, was equal or equivalent to that of the Defendant; that at said time the Plaintiff was capable of and did understand and know the consequences of entering into said Separation Agreement; that the said Plaintiff did in fact enter into and execute and sign the Separation Agreement, together with a Deed conveying her interest in the property formerly owned by the parties to the Defendant, freely, willingly and voluntarily, and without being under any duress, coercion, fear, or threat of the defendant.

Based upon these findings of fact the trial judge concluded that plaintiff freely and willingly entered into the separation agreement, and adjudged the separation agreement valid. Plaintiff appealed.

Daughtry, Hinton, Woodard & Lawrence, P.A., by Stephen C. Woodard, Jr., for plaintiff appellant.

T. Yates Dobson, Jr., and Narron, O'Hale, Whittington and Woodruff, P.A., by James W. Narron for defendant appellee.

HILL, Judge.

I

Plaintiff contends the trial judge erred by his refusal to set aside the deed of separation because of attorney misconduct, breach of fiduciary relationship, undue influence, duress, coercion, or denial of counsel to plaintiff. By her assignment of error we must divide the issue into two parts: (1) the alleged overreaching of the defendant, and (2) the alleged misconduct of defendant's attorney. We find no error in the trial judge's resolution of these two issues.

[1] (1) *The alleged overreaching of defendant.* North Carolina Courts have scrutinized separation agreements with utmost concern. In the case of *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E. 2d 562, 567 (1968), Justice (later Chief Justice) Sharp stated: "The relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. . . . To be valid, 'a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.' "

Courts have thrown a cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching. *See Christian v. Christian*, 42 N.Y. 2d 63, 72, 365 N.E. 2d 849, 856, 396 N.Y.S. 2d 817, 824 (1977). With these principles in mind, we examine the facts of the case under review.

Evidence supporting the factual findings of the trial judge indicates that plaintiff met her husband in the parking lot of his attorney and advised him she was not going to sign the agreement. Husband advised her of the embarrassment which would come her way if the suit were litigated. Such purported threats or duress were not new to the wife. The record reveals that such accusations directed toward her had been made on several occasions

prior to 28 January 1982, and plaintiff was not afraid or intimidated thereby, nor was she placed under duress at or prior to the time of signing the separation agreement. In fact, the parties discussed further the cost of baby-sitting expenses, and husband agreed to pay beyond his present obligations to his wife the cost of child care and baby-sitting. The offer of sharing the baby-sitting expenses by the husband was an added consideration for plaintiff to execute the instrument. The evidence further shows that the two parties went into the reception room of the husband's attorney and waited some thirty minutes for a notary so that the instrument could be executed. The wife had every opportunity to discuss any duress or coercion with her friend, the notary. Also, the wife was aware of the value of the house and lot at the time she signed the papers. She knew the lot was given to her and her husband by his parents, and the cost of the dwelling was covered by a loan. She received $1,500.00 consideration for her interest in the house. Plaintiff and defendant are equally educated.

We conclude that the evidence supports the trial court's finding that plaintiff entered into and executed the separation agreement freely, willingly, voluntarily, and without being under any duress, coercion, or fear. The findings of fact support the conclusion of law that the separation agreement executed and signed by plaintiff is valid and of full force and effect.

[2] (2) *The alleged misconduct of defendant's attorney.* Defendant's attorney did not participate in the negotiations between plaintiff and defendant. Even though he had been told by plaintiff's attorney that he had advised her not to sign the agreement, we conclude he did all that was required thereafter. He stayed in his private office while the parties sat in the reception room. He did not speak to either party until after the agreement was signed. His conversation with the wife was reassuring and innocuous after the signing. The receipt which he drew after execution was not challenged. We find nothing improper in the action by defendant's attorney.

II

[3] Finally, plaintiff argues the court erred in refusing to personally make findings of fact, state separately his conclusions of law and direct the entry of appropriate judgment as required by

G.S. 1A-1, Rule 52 of the North Carolina Rules of Civil Procedure. We do not interpret this rule as requiring the manual drafting of such judgment or oral dictation thereof. The trial judge properly directed the attorney for the defendant to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as his own when tendered and signed. The entire judgment was not made until all of this was accomplished. See *Bank v. Easton*, 12 N.C. App. 153, 182 S.E. 2d 645, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 245 (1971). We conclude the judgment was proper. Evidence presented at trial was sufficient to support the findings of fact, conclusions of law, and the judgment.

Affirmed.

Judges HEDRICK and EAGLES concur.

IN THE MATTER OF: CASSANDRA DENICE PIERCE

No. 8312DC410

(Filed 20 March 1984)

1. **Appeal and Error § 57.1— failure to except to findings of fact**

Where no exceptions are taken to the findings of fact, the only question present for appellate review is whether the findings support the conclusions of law, and it is not incumbent upon the appellate court to search the record in order to determine whether the findings are supported by competent evidence.

2. **Evidence § 48.1; Parent and Child § 1.6— proceeding to terminate parental rights—ability to provide stable home environment—testimony by social worker**

In a proceeding to terminate parental rights, the trial court did not err in permitting a social worker to give her opinion as to whether respondents were capable of providing a stable home environment for their child although the witness was not tendered as an expert witness.

3. **Parent and Child § 1.6— termination of parental rights—sufficiency of evidence**

The evidence was sufficient to support the court's order terminating respondents' parental rights in a five-year-old child on grounds that (1) the child was a neglected child within the meaning of G.S. 7A-517(21), (2) the child was left in foster care for more than two consecutive years without a showing by respondents that substantial progress has been made in correcting the conditions which led to the removal of the child, and (3) neither parent has paid a reasonable portion of the cost of the child's care in the six months preceding

the filing of action while the child was in the custody of the Department of Social Services, where the evidence tended to show: the child has been in foster care continuously since she was five months old, when she was placed in the custody of the county department of social services pursuant to an order of neglect; the child has been diagnosed as having fetal alcohol syndrome, which causes her to be moderately retarded and significantly delayed in all developmental aspects; special physical, mental and medical needs arising from the syndrome will persist throughout the child's lifetime; respondents have frequently moved between North Carolina and South Carolina and are often unemployed; respondents have had only erratic contact with their child, and the last time either parent had seen the child was more than a year prior to the hearing; respondent mother had a drinking problem at the time of the child's birth and has been convicted of possession of heroin, possession of marijuana, disturbing the peace and prostitution; respondent father was in prison at the time of the child's birth; and neither parent has contributed anything toward the child's support in the six months preceding the filing of the action.

APPEAL by respondents from *Guy, Judge.* Judgment entered 29 October 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 7 March 1984.

This is an action brought by petitioner Cumberland County Department of Social Services to terminate the parental rights of respondents Leo H. Pierce and Angel B. Pierce, parents of Cassandra Denice Pierce.

Cassandra was born November 23, 1978, and was subsequently diagnosed as having fetal alcohol syndrome ("FAS"), a permanent condition caused by the excessive consumption of alcohol by the mother during pregnancy. At the time Cassandra was born, respondent father was in prison. From her birth until she was five months old, Cassandra was in her mother's custody. This is the only period of her life she has been in the custody of either of the respondents.

In March 1979, Cassandra was placed in the custody of petitioner Department of Social Services pursuant to a judicial order of neglect. Cassandra has remained in foster care from that date until the present time. Petitioner filed its petition to terminate parental rights on 28 May 1982 and a hearing was held on 16 September and 30 September 1982, at which hearing the trial court entered its order terminating parental rights of respondents. From this order respondents appeal.

Jennie Dorsett, for petitioner appellee.

Chandler, Cooke, Jackson & Glendening, P.A., by Dale D. Glendening, Jr., for respondent appellants.

VAUGHN, Chief Judge.

[1] We note preliminarily that respondents failed to make proper objections to the trial court's findings of fact. Ordinarily, when counsel fails to except to findings of fact, they are deemed supported by competent evidence and are conclusive on appeal. *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 768, 253 S.E. 2d 494, 495 (1979). Put otherwise, where no exceptions are taken to the findings of fact, the only question present for review is whether the findings support the conclusions of law, and it is not incumbent upon this Court to search the record in order to determine whether the findings of fact are supported by competent evidence. Because of the serious consequences of a proceeding to terminate parental rights, we will nonetheless consider whether the trial court's findings of fact are supported by competent evidence.

Respondents make a number of assignments of error relating to the admissibility of evidence, namely, that two home study reports, three letters of assessment of the respondents' home situation, and a voluntary support agreement were hearsay and therefore improperly admitted into evidence.

As to the 23 May 1980 voluntary support agreement signed by respondent father, respondent admitted in his testimony that he had entered into such an agreement with petitioner. Such testimony cures any defects associated with the wrongful admission of the agreement. The assignment of error relating to this support agreement is therefore overruled.

As to the other documents, the letters of assessment and home studies, we hold that there was sufficient "clear, cogent, and convincing evidence," *see* G.S. 7A-289.30(e), to support the judgment terminating parental rights exclusive of these documents, and that any error related to the admission of such documents into evidence was therefore not prejudicial to respondents. We do not pass on the merits of the parties' arguments, whether the documents were inadmissible hearsay, as respondents contend, or whether they fell within the scope of the business rec-

ords exception or official records exception to the hearsay rule, as contended by petitioner.

[2] Respondents additionally contend that one of petitioner's witnesses, a social worker who worked on Cassandra's case, was not properly qualified as an expert witness and therefore not qualified to give her opinion as to whether respondents were capable of providing a stable home environment for their child. A similar situation was presented in *In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981). Allowing that "the better practice is for the party offering an expert witness formally to tender him or her as an expert witness," this Court, relying on *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973), concluded that

> where the witness's qualifications as an expert are shown, the intent to offer the witness as an expert is clear, and the ruling of the court on the admission of the witness's testimony is expressly stated, the appellate court will consider the validity of the trial court's ruling on the admissibility of expert testimony.

53 N.C. App. at 385, 281 S.E. 2d at 205. This governs the assignment of error concerned with the social worker's opinion testimony, and that assignment is overruled.

[3] We now turn to the central issue of this appeal: whether the judgment terminating parental rights is adequately supported by competent evidence. We hold that the judgment is so supported and therefore affirm.

Respondents appropriately group together their assignments of error relating to the trial court's refusal to grant their motion to dismiss at the close of all the evidence, motion for a judgment notwithstanding the verdict, and motion for a new trial. Each of these motions is essentially based on the proposition that the evidence was insufficient to support the judgment, i.e., that the statutory standard necessary to terminate parental rights was not satisfied. We shall therefore consider these assignments of error together.

Article 24B of Chapter 7A of the General Statutes, entitled Termination of Parental Rights, provides: "All findings of fact shall be based on clear, cogent, and convincing evidence." G.S.

7A-289.30(e). Respondents argue that if the trial judge had excluded the evidence respondents contend is inadmissible hearsay, the remaining evidence does not support findings upon which the trial judge could properly base a judgment for petitioner. We disagree.

G.S. 7A-289.32 sets out the statutory grounds for terminating parental rights. A finding of any one of the seven separately enumerated grounds is sufficient to support a termination. The trial court expressly based its judgment on three of the enumerated grounds, G.S. 7A-289.32(2), (3), and (4):

> (2) The parent has . . . neglected the child . . . within the meaning of G.S. 7A-517(21), [which defines a neglected child as a "juvenile who does not receive proper care, supervision, or discipline from his (or her) 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 (or her) welfare. . . .]
>
> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child or without showing positive response within two years to the diligent efforts of a county Department of Social Services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
>
> (4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

Even without considering the evidence respondents contend is inadmissible hearsay, there remains adequate "clear, cogent, and convincing evidence" to support a termination of parental rights on any one of the three grounds.

At the hearing, the evidence showed that the child has been in foster care continuously since she was five months old, when

she was placed in the custody of petitioner Cumberland County Department of Social Services pursuant to an order of neglect. Dr. Rita Gunther, a pediatrician for the Cumberland County Health Department, testified that she had diagnosed fetal alcohol syndrome in Cassandra. Dr. Gunther testified that due to FAS, Cassandra is moderately retarded and significantly delayed in all developmental aspects, and that special physical, mental and medical needs arising from FAS would persist throughout Cassandra's lifetime. She further testified that Cassandra is a "failure to thrive" child, testifying to the delicate nutritional status and problematic nature of infection in such children. The doctor testified that respondents did not seem to grasp the realities in regard to their child and that they failed to understand the long-term problems associated with Cassandra.

One social worker gave testimony concerning the frequent movement of the respondents between North Carolina and South Carolina, and the consequently erratic contact respondents had with their daughter. This testimony was corroborated by the respondents themselves.

Martha Smith, an adoption social worker for petitioner and Cassandra's case manager, testified that the last time either parent had seen Cassandra was in August 1981, more than a year prior to the hearing. Ms. Smith also testified that in April 1982, respondent father had stopped by her office inquiring of his wife's whereabouts. His wife was to have stopped at the department the previous day. On that occasion, respondent father did not ask to see his daughter.

Respondent mother testified that she had a drinking problem at the time of Cassandra's birth, and she also described the efforts of both respondents to regain custody of their child during their numerous moves back and forth between North and South Carolina. Respondent testified that she had been convicted of heroin possession, possession of marijuana, disturbing the peace, and that she had received a suspended sentence for prostitution.

Respondent father testified that at the time of Cassandra's birth he was in prison for welfare fraud. He also testified to his precarious employment situation and to respondents' frequent moves. He stated that he had signed a voluntary support agreement to pay $25.00 a month for his child's support but that he had

never paid any money. There was evidence that neither parent had ever paid any money to Cumberland County for the support of Cassandra.

We now apply the evidence to the three statutory grounds on which termination of parental rights was based. As to G.S. 7A-289.32(2), the above evidence supports the finding that Cassandra was a neglected child within the meaning of G.S. 7A-517(21). This Court discussed neglect in *In re Apa*, 59 N.C. App. 322, 296 S.E. 2d 811 (1982):

> Neglect may be manifested in ways less tangible than failure to provide physical necessities. Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship.

Id. at 324, 296 S.E. 2d at 813. At bar, not only is there evidence that the parents have failed to provide their daughter with physical necessities, there is evidence of sporadic contact between parents and child. For example, one of petitioner's social workers testified that a motion for review was postponed because she did not have an address at which she could locate respondents.

The evidence also supports the termination of parental rights under G.S. 7A-289.32(3), that the child was left in foster care for more than two consecutive years without a concomitant showing on respondents' part of correcting the conditions which led to Cassandra's removal or responding to petitioner's efforts to plan for Cassandra's future. *See In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982) [applying G.S. 7A-289.32(3)].

Grounds also exist to support the judgment under G.S. 7A-289.32(4). There is evidence that neither parent ever contributed the first dollar toward Cassandra's support in the six months preceding the filing of the action, while Cassandra was in petitioner's custody. Respondent father even testified that he had entered into a voluntary support agreement to pay the modest sum of $25.00 a month toward Cassandra's support yet failed to do so. *See In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981) (discussing "reasonable portion" of the cost of child care). Competent evidence supporting any one of the seven grounds stated in

G.S. 7A-289.32 would enable us to affirm the trial court's judgment; we find adequate evidence to support each of the three grounds on which the judgment was based.

Not only is the judgment amply supported by clear, cogent, and convincing evidence as to the three statutory grounds, the trial court was plainly guided by a consideration of Cassandra's best interests. One of the legislative policies governing termination of parental rights is that "[a]ction which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents . . . are in conflict." G.S. 7A-289.22(3). *See In re Smith, supra,* at 150, 287 S.E. 2d at 445 (1982) ("the [child's] best interests are paramount, not the rights of the parent"). As a victim of FAS, Cassandra will always carry the marks of her deprivation. She has medical and psychological problems that will need attention throughout her life. Her special needs require stability and continuity. Respondents' situation is characterized by instability, movement, unemployment, infrequent visitation, criminal history and inability to provide the basic resources for their child.

It is true that a court is never required to terminate parental rights, the statute only giving the court discretion to exercise its authority. *In re Godwin,* 31 N.C. App. 137, 139, 228 S.E. 2d 521, 522 (1976). At bar, there was competent evidence supporting the termination of parental rights under G.S. 7A-289.32(2), (3), and (4), and no evidence that the trial court abused its discretion. *See In re Peirce, supra,* at 389, 281 S.E. 2d at 208. The judgment appealed from is affirmed.

Affirmed.

Judges HILL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WEAVER B. MARTIN

No. 8328SC857

(Filed 20 March 1984)

1. **Bills of Discovery § 6; Constitutional Law § 30— failure to disclose supplemental handwriting analysis—no abuse of discretion in failing to sanction State**

Defendant failed to show the trial judge abused his discretion in failing to employ a remedy available under G.S. 15A-910 when the State failed to disclose a supplemental FBI handwriting analysis report damaging to defendant since defendant never indicated he was unaware of the supplemental report; he made no argument at trial that the State violated the discovery order; and his general objection was directed at three items of evidence and not at the handwriting analysis alone.

2. **Criminal Law § 173— "opening the door" to inquiry into other crimes of defendant**

There was no merit to defendant's contention that he was denied a fair trial or due process of law by the allowance into evidence of records of similar crimes committed by defendant where the record disclosed that defendant "opened the door" to further inquiry by the prosecution by cross-examining the co-defendant concerning charges against him in Florida.

3. **Criminal Law § 34.8— evidence of other crimes—common plan or scheme**

The trial judge did not err in allowing testimony by the co-defendant regarding similar crimes in which the defendant participated where the testimony clearly established a common plan or scheme to commit the crimes of obtaining property by forgery and uttering checks and forging credit card purchases.

4. **Searches and Seizures § 11— admission of items seized in inventory search of automobile admissible**

The evidence supported a trial court's findings of fact and conclusion of law that items seized in an inventory search of an automobile were admissible where an officer was investigating possible criminal behavior when he parked his patrol car behind defendant's vehicle, which matched the description of a vehicle used in several neighborhood breaking and entering crimes, and approached the two men in the vehicle, also meeting the description of men involved in the crimes; where the officer's sighting of two males in a white car parked in a driveway of the neighborhood he was patrolling warranted reasonable suspicion, based on articulate and objective facts, to detain the defendant initially; and circumstances following the initial detention gave rise to probable cause to arrest the defendant for a crime.

APPEAL by defendant from *Howell, Judge.* Judgment entered 28 March 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 February 1984.

Defendant was initially arrested and served with a warrant charging him with possession of implements of housebreaking. Subsequently, a grand jury returned true bills of indictment charging him with sixty-five forgery and uttering indictments in violation of G.S. 14-119 and G.S. 14-120 and one indictment for possession of implements of housebreaking in violation of G.S. 14-55.

A co-defendant, Ray Jennings, testified pursuant to a plea arrangement for the State. His testimony tended to show that he and the defendant worked together in Florida, but that business proved unprofitable. In order to avoid arrest on bad check charges, they came to Asheville where they lived at the Downtowner Motel. The two conceived a plan to make money by breaking into houses, stealing blank checks, and then writing checks from one account to another. Jennings described his breaking into the homes of four persons using a screwdriver, and his theft of checks and credit cards while the defendant waited in a 1965 Chrysler automobile. In addition, he described the theft of a North Carolina license plate which they used alternately with defendant's Florida license plate. He further described a break-in at the home of a witness for the State, the theft of a payroll check, and forgery of the witness's name. Jennings identified the checks offered into evidence by the State and testified that the defendant was with him when the checks were written or actually passed. Proceeds from the checks were divided equally.

A *voir dire* was conducted as to the admissibility of items seized in the car at the time of the arrest. The trial court made findings of fact and denied defendant's motion to suppress. Jennings testified thereafter in the presence of the jury, identifying tools and items of identification such as old drivers' licenses and stolen checks never negotiated. He further testified to the presence of burglary tools and a pistol along with various other stolen items in the car at the time of the arrest.

Verdicts of guilty were returned in three charges of forgery and uttering and one charge of possession of implements of housebreaking. In all other cases the trial judge withdrew a juror and declared a mistrial. The judge entered sentences imposing imprisonment for a total of eight years. Defendant appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Jane P. Gray for the State.

Assistant Public Defender David Belser for defendant appellant.

HILL, Judge.

[1] Defendant first asserts that the trial court erred in not invoking sanctions pursuant to G.S. 15A-910 for the State's failure to disclose a supplemental F.B.I. handwriting analysis report. Defendant claims that he was prejudiced by the report which identified defendant's handwriting in connection with a check drawn on the account of another party.

As part of his defense, defendant passed among the jurors an inconclusive fingerprint report prepared by Special Agent Bowers which the State stipulated was valid. Defendant tendered the report into evidence. Defendant says he was not aware of Special Agent Bowers' supplemental report, and had he known of it, he would not have attempted to introduce the inconclusive handwriting evidence which the State could easily counter with the devastating proof in the supplemental report. Defendant contends that since he made a timely motion for discovery in accordance with G.S. 15A-902(a), the State had the continuing duty to disclose the supplemental report which came into existence during the trial. See *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978).

We find no error. The decision to employ remedies available under G.S. 15A-910 is a matter within the discretion of the trial judge and, absent abuse, is not reviewable on appeal. *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Defendant at trial never indicated he was unaware of the supplemental report. He made no argument at trial that the State violated the discovery order. His general objection was directed at three items of evidence, and he made no request for sanctions against the State as provided in G.S. 15A-910. Defendant showed no evidence of bad faith by the State. For these reasons we find no abuse of discretion by the trial judge in refusing to impose sanctions. This assignment of error is overruled.

[2] Defendant next contends he was denied a fair trial or due process of law by the allowance into evidence of records of similar crimes committed by the defendant. We disagree.

It is well settled in our state that the prosecution cannot introduce evidence of another crime of the defendant which is independent of and distinct from the crime for which the defendant is on trial, even though of a similar nature. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, the record discloses that defendant opened the door to further inquiry by the prosecution by cross-examining the co-defendant Jennings concerning charges against him in Florida. Defendant also attempted to depreciate the value of Jennings' testimony by implying he would get a shorter term by testifying on behalf of the State. While the State could not have initiated such a line of inquiry on direct examination, it was entitled to explore the matter fully in its attempt to rehabilitate the witness. *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981).

[3] Nor do we find error by the trial judge in allowing testimony by the co-defendant regarding similar crimes in which the defendant participated in the city of Asheville. In reviewing the totality of the wrongdoings by the defendant and co-defendant, we believe the testimony clearly establishes a common plan or scheme to commit the crimes of obtaining property by forgery and uttering checks and forging credit card purchases. See *State v. McClain*, 240 N.C. at 176, 81 S.E. 2d at 367; see generally 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973).

Defendant next contends the trial judge erred in admitting the motel records which showed the defendant's registration and a bank deposit slip on which a bank teller had written defendant's license tag number when he cashed a check. Defendant contends the manager of the hotel was limited in her testimony to the period she was manager, i.e., from July 5 through July 16; and since the crimes for which the defendant is charged occurred in June, defendant says the registration records are incompetent and inadmissible under the hearsay rule. We find no error. The defendant admitted he was at the motel during June; and although defendant objected to the admissibility of the testimony by Mrs. Penland, the manager, defendant did not object when the records were offered into evidence. Nor do we find error in admitting the bank deposit slip. The number written on the deposit slip corresponded with the license plate later found in defendant's car. The evidence is undisputed and competent. This assignment of error is overruled.

[4] Defendant next contends the trial court erred in admitting evidence found in defendant's automobile. Defendant argues the evidence was obtained as a result of an unconstitutional search and seizure of the defendant and his automobile.

From testimony at *voir dire* and trial, the facts surrounding the search and seizure are as follows: Officer Buckner was a member of a breaking and entering squad and was engaged in patrolling the neighborhood in question for any suspicious activity. Two or three days earlier he had been made aware of an investigation being conducted by Detective Drew concerning the check scheme since it also involved breaking and entering homes. Buckner had been told the suspects were two white males, one large and one small, driving a large white car having a North Carolina license tag number "BJN 43." As part of his investigative procedure, he routinely checked as many vehicles parked in driveways as possible.

When on his patrol, Buckner observed a large white car sitting in a driveway of a residence. He testified the presence of the car looked suspicious. He therefore pulled behind the car at an angle, partially blocking it. When he approached the car, he asked the defendant and co-defendant if they had a problem, or if he could be of any help. No response was immediately forthcoming, but finally they said that they were lost and looking for a friend. Officer Buckner noticed a large green handle screwdriver lying on the front seat, which the defendant was trying to cover up with his hand. Buckner then asked for their drivers' licenses, and while defendants were getting them out, Buckner noticed a pair of pliers and another screwdriver lying on the floorboard. He then asked defendants to step out of the car. On the second or third direction to step out of the car, Officer Buckner unsnapped his gun but never took it from his holster. The defendants stepped out of the car and Buckner noticed a pry bar and a couple of brown paper bags on the floor. One of the bags contained a North Carolina license plate with the number "43" exposed. Officer Buckner also noticed a pair of white cotton gloves in Jennings' right hip pocket, which he described as "strange in August." Another officer arrived, and a computer inquiry was conducted. Jennings was arrested as a person wanted in Florida for forgery. Martin was arrested for possession of burglary tools.

After arrest the defendant's vehicle was inventoried. In addition to the items mentioned aforesaid, the following items were discovered: a lock pick, jimmy bar, green handle nose pliers, yellow handle screwdriver, .32 caliber automatic pistol, walkie talkie, Tennessee license plate, various items of electronic equipment, and various clothing and travel items. Officer Marple testified he saw a lock pick next to the passenger side of the car on the asphalt. The trial judge concluded that those items discovered in the inventory were admissible.

A police officer "may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed. 2d 889, 906-07 (1968). It was this investigative function that Officer Buckner was discharging when he parked his patrol car behind defendant's vehicle and approached the two men in the vehicle. Officer Buckner was patrolling the neighborhood having been made aware of the investigation of two males in a white car breaking and entering homes for the purpose of obtaining checks. The officer's sighting of two males in a white car parked in a driveway of the neighborhood he was patrolling warranted reasonable suspicion, based on articulate and objective facts, to detain the defendant initially. See *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979); *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981), *aff'd*, 306 N.C. 132, 291 S.E. 2d 618 (1982). Circumstances following the initial detention gave rise to probable cause to arrest the defendant for a crime. Granted, one can possess items such as screwdrivers and pliers for lawful purposes, but when the use of such implements is in issue, it is for the jury to determine the lawfulness of their possession. *State v. Shore*, 10 N.C. App. 75, 178 S.E. 2d 22 (1970), *cert. denied*, 278 N.C. 105, 179 S.E. 2d 453 (1971). The evidence supports the trial court's findings of fact which support the conclusion of law that the items seized in the inventory search were admissible.

Lastly, we find no merit in defendant's contention that the trial court committed reversible error in denying his motion to dismiss the case based on the insufficiency of the evidence and in failing to set aside the judgment.

No error.

Judges HEDRICK and EAGLES concur.

THOMAS M. WILLIAMS, INDIVIDUALLY, AND D/B/A TOMMY WILLIAMS WRECKER SERVICE v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND BECKY COX, AND JACK R. McKINNEY, INDIVIDUALLY AND AS AGENTS, OR EMPLOYEES OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 8314SC145

(Filed 20 March 1984)

1. **Rules of Civil Procedure § 15.1— denial of motion to amend complaint**

The trial court did not abuse its discretion in denying plaintiff's motion to amend the complaint to add an additional cause of action after discovery had been completed and a month before trial.

2. **Rules of Civil Procedure § 26— denial of motion to compel discovery—allowance of protective order**

The trial court did not abuse its discretion in denying plaintiff's motion to compel discovery and in sustaining defendants' motion for a protective order where plaintiff's interrogatories and requests for production of documents were very broad; plaintiff failed to show that the materials sought were relevant or necessary; and it would have been burdensome to defendants to comply with plaintiff's request.

3. **Libel and Slander § 16— insufficient evidence of slander**

Plaintiff's evidence was insufficient for the jury in an action for slander where it tended to show that plaintiff owned an automobile body shop; on three occasions an employee of defendant insurer made statements to persons insured by defendant insurer to the effect that defendants had trouble working with plaintiff in the past and preferred not to work with him in the future; there was no question that plaintiff and defendants had disputes over repair work; the only specific instance mentioned by the employee was that plaintiff put used parts in cars and charged defendant insurer for new parts; and plaintiff admitted that he did this and that if there was excess money he gave it to the customer.

4. **Contracts § 34— interference with contractual rights—insufficient evidence**

Plaintiff's evidence was insufficient for the jury in an action for interference with contract by defendant insurer in refusing to accept plaintiff's estimate on the cost of repairs of an automobile which had been taken to plaintiff's automobile body shop and which was then repaired by another shop at a cost exceeding plaintiff's estimate, since defendant insurer had a legitimate

business interest in getting automobiles which it insured repaired correctly and for the lowest price, and since plaintiff testified that there was no contract when the automobile involved in the dispute was taken to another shop.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 4 August 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 January 1984.

Plaintiff appeals from allowance of defendants' motions for directed verdict in an action for slander and interference with contract.

Robert B. Glenn, Jr., for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

WHICHARD, Judge.

Prior to commencement of this action, plaintiff owned a mechanic and body shop, and defendant State Farm operated a claims adjustment service, in Durham. Defendants Cox and McKinney were employed by defendant State Farm as claims agents.

In February 1980 a dispute arose between plaintiff and defendants over the repair of an automobile. The owner called plaintiff and told him to take the automobile to his shop. Plaintiff did so, and prepared an estimate on the cost of repairs. The automobile was insured by defendant State Farm, however, and it refused to accept the estimate. Plaintiff refused to repair the automobile for the price defendant State Farm offered to pay. The automobile was then repaired by another shop. The final cost of repair exceeded plaintiff's estimate.

Subsequently defendants Cox and McKinney, on at least four occasions, discouraged persons who needed repair work from going to plaintiff. All of these persons nevertheless had their automobiles repaired by plaintiff.

Plaintiff then instituted this action for slander and interference with contract. The trial court allowed defendants' motions for directed verdict as to both claims.

[1] Plaintiff contends the court erred in denying his motion to amend his complaint. The motion was addressed to the discretion

of the trial court and will not be reviewed absent a showing of abuse of discretion. *Vending Co. v. Turner*, 267 N.C. 576, 580-81, 148 S.E. 2d 531, 534 (1966); *Saintsing v. Taylor*, 57 N.C. App. 467, 471, 291 S.E. 2d 880, 883, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982). The "leave to amend should be freely given and the party objecting to the amendment has the burden to satisfy the trial court that he would be prejudiced thereby." *Garage v. Holston*, 40 N.C. App. 400, 403-04, 253 S.E. 2d 7, 9-10 (1979).

The complaint was filed on 4 February 1981. After discovery was completed, the case was scheduled for trial on 2 August 1982. On 2 July 1982 plaintiff filed a motion to amend the complaint in order to allege a violation of G.S. 75-1. We find no abuse of discretion in denying a motion to add an additional cause of action after discovery had been completed and a month before trial.

[2] Plaintiff contends the court erred in denying his motion to compel discovery and sustaining defendants' motion for a protective order. "It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E. 2d 479, 480, *disc. rev. denied*, 293 N.C. 589, 239 S.E. 2d 264 (1977). When a party requests production of documents under G.S. 1A-1, Rule 34, he must show good cause, which includes the elements of necessity and relevance. *Stanback v. Stanback*, 287 N.C. 448, 460, 215 S.E. 2d 30, 38-39 (1975). "[A] mere statement that an examination is material and necessary is not sufficient to support a production order." *Id.* at 461, 215 S.E. 2d at 39. The purpose of the rule is to "prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes." *Id.*

The trial judge does not have unlimited authority to issue a protective order. "The statute [G.S. 1A-1, Rule 26(c)] provides that such order may be issued only 'for good cause shown' and that it may be issued only 'to protect a party or person from unreasonable annoyance, embarrassment, oppression or undue burden or expense.'" *Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 626-27, 231 S.E. 2d 597, 602 (1977). An order under Rule 26(c) is, however, discretionary, and is reviewable only for abuse of discretion. *Booker v. Everhart*, 33 N.C. App. 1, 9, 234 S.E. 2d 46, 53

(1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E. 2d 360 (1978).

The interrogatories and requests for production of documents here were very broad. Plaintiff has not shown that the materials sought were relevant or necessary. To comply with the request would have been burdensome to defendants. Under these circumstances we find no abuse of discretion in the denial of plaintiff's motion to compel discovery and the allowance of defendants' motion for a protective order.

[3] Plaintiff contends the court erred in granting defendants' motions for directed verdict. In deciding whether to grant a motion for directed verdict, "the court must consider the evidence in the light most favorable to the non-movant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the non-movant the benefit of all inferences reasonably to be drawn in his favor." *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978).

"Slander is the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 20, 290 S.E. 2d 732, 736, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982). To be actionable, the statement must be false. *Id.; see also Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E. 2d 466, 468 (1955); *Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E. 2d 876, 878-79 (1942). If the false words impute to a person "conduct derogatory to his character and standing as a business man and [tend] to prejudice him in his business," they are actionable *per se* and damages are presumed. *Badame v. Lampke, supra; see also Scott v. Harrison*, 215 N.C. 427, 430, 2 S.E. 2d 1, 2 (1939).

If statements are slanderous *per se*, the question arises of whether they were qualifiedly privileged.

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and

> in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are . . . good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.

Stewart v. Check Corp., 279 N.C. 278, 285, 182 S.E. 2d 410, 415 (1971) (quoting 50 Am. Jur. 2d *Libel and Slander* § 195 (1970)). If a qualified privilege exists, plaintiff has the burden of proving actual malice to destroy the qualified privilege. *Stewart, supra*, 279 N.C. at 283, 182 S.E. 2d at 414; *see also Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Bouligny, Inc. v. Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344 (1967); *Towne v. Cope*, 32 N.C. App. 660, 233 S.E. 2d 624 (1977).

The record indicates that on three separate occasions defendant Cox made statements about plaintiff to persons insured by defendant State Farm. The remarks were made when the insureds came to defendant Cox to discuss repair of their automobiles. One insured testified to the following conversation with defendant Cox:

> As to whether she asked me where the car was going to be repaired we discussed body shops in the area and I subsequently said something about Mr. Williams because I've known Tommy for a long time and my wife wanted the work done there also. As to what Ms. Cox said, well, she said that she had had troubles with Tommy before and wouldn't recommend taking the car there and specifically that Mr. Williams put used parts on a car and would charge for new parts and to have the car repaired properly it should not be done there.

Another insured testified to the following conversation with defendant Cox:

> Ms. Cox said, "Well, I wouldn't recommend Mr. Williams for the simple fact that we have had some business dealings with him and they have not been very good. We have had some trouble with a few cars that we sent out there to him and because of those troubles we wouldn't recommend him to

anyone else." At that time it was also added [by] Ms. Cox, "Excuse me. I'm not supposed to say that."

. . . .

Ms. Cox told me that "We had a problem with a car out there." The names were mentioned where a quarter panel was supposed to be replaced and was not. It was repaired.

. . . .

When I asked about Mr. Williams she told me she would not recommend Tommy Williams to anyone. She said he was using used parts and charging for new parts was mentioned.

A third insured testified to the following conversation with defendant Cox:

[Ms. Cox] . . . said "Do you have anybody in particular you would like to have this done by?" and I said, "Yes, Tommy Williams." At this point she replied, saying, "Isn't there anybody else you would like to have that done by?"

I said, "No", and she said, "Well, we do not like to deal with Tommy Williams." And then she said, "Can't you think of anybody else?" and tried to dissuade me from the idea, but I wouldn't change my mind.

. . . .

She said, "We don't like to deal with Tommy Williams" and I said "That's who I want to have my car fixed by" as far as saying, "We've had trouble in the past with Tommy" I can't quite remember. There was something said about having trouble with Tommy, but I couldn't quite catch her meaning because I wasn't sure if Tommy had just [been] hard to get along with or what.

The thrust of the above conversations is that defendants had trouble working with plaintiff in the past and preferred not to work with him in the future. There is no question that plaintiff and defendants had disputes over repair work. Further, the only specific instance mentioned by defendant Cox was that plaintiff put used parts in cars and charged defendant State Farm for new parts. Plaintiff admitted that he did this and that if there was ex-

cess money he gave it to the customer. Since plaintiff admitted the truth of the statements made by defendants, the remarks were not actionable as slander. *Morrow, supra; Badame, supra; Parker, supra.* The court thus correctly granted directed verdict for defendants as to the slander claim.

[4] In regard to the interference with contract claim, our Supreme Court has stated that

> an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party. . . .
>
> To subject the outsider to liability for compensatory damages on account of this tort, the plaintiff must allege and prove these essential elements of the wrong: *First,* that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second,* that the outsider had knowledge of the plaintiff's contract with the third person. *Third,* that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth,* that in so doing the outsider acted without justification. *Fifth,* that the outsider's act caused the plaintiff actual damages.

Wilson v. McClenny, 262 N.C. 121, 132, 136 S.E. 2d 569, 577-78 (1964), (quoting *Childress v. Abeles,* 240 N.C. 667, 674, 84 S.E. 2d 176, 181-82 (1954)). "If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be." *Childress, supra,* 240 N.C. at 675, 84 S.E. 2d at 182.

Defendant State Farm had a legitimate business interest in getting automobiles which it insured repaired correctly and for the lowest price. Also, plaintiff testified that there was no contract when the automobile involved in the February 1980 dispute was taken to another shop. The court thus correctly granted directed verdict on the interference with contract claim.

Plaintiff contends the court erred in excluding certain testimony. The record indicates that the witness would have testified regarding a conversation with defendant McKinney. Similar

evidence was introduced, however, through the testimony of the three insureds quoted above. Exclusion of this testimony thus did not constitute prejudicial error.

Affirmed.

Judges WEBB and WELLS concur.

CYCLONE ROOFING COMPANY, INC. v. DAVID M. LAFAVE COMPANY, INC. AND JOSEPH C. FRYE AND EMMA GRAY FRYE v. DAVID M. LAFAVE

No. 8226DC1229

(Filed 20 March 1984)

Arbitration and Award § 2; Rules of Civil Procedure § 38— demand for jury trial— agreement to arbitrate—order requiring arbitration void

Where appellee LaFave Co. and appellants Frye had filed cross-claims against each other and both demanded a jury trial, the trial court erred in allowing appellee LaFave Co.'s motion to stay litigation pending arbitration pursuant to an arbitration agreement contained in their contract since, after originally filing a claim of lien, appellant invoked the jurisdiction of the court by filing a cross-claim against appellant, and demanding a jury trial. At that time a civil suit was filed and pending, and the court could not thereafter order arbitration, particularly over the objection of one of the parties. The court had authority to determine that the parties had waived arbitration, and its failure to so find was error. G.S. 1-567.3(a) and G.S. 1A-1, Rule 13(g).

Chief Judge VAUGHN dissenting.

APPEAL by defendants-third party plaintiffs from *Grist, Judge*. Judgment entered 25 June 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1983.

By contract dated 2 May 1978, Dr. and Mrs. Frye ("the Fryes") engaged the services of LaFave Company ("LaFave Co.") to build a home. David M. LaFave ("LaFave") is the president of LaFave Co. The contract price was $191,000; the contract called for completion of the home within twelve months.

Disagreements soon arose between the Fryes and LaFave Co./LaFave over the progress of the work, the quality of the supervision exercised by LaFave at the job site, the installation

of fixtures and flooring, and virtually every other aspect of the job. The relationship deteriorated, and in July 1979 the Fryes retained counsel. On the advice of counsel the Fryes instructed the mortgage lender to make no further payments to the contractor effective 3 August 1979. Further negotiations produced no agreement and LaFave notified the Fryes that he was ceasing activity on the job on 12 September 1979. Thereafter, the Fryes had the house completed at a total actual cost of approximately $220,000. The Fryes and LaFave continued to correspond in an attempt to resolve their outstanding differences. On 18 October 1979, counsel for LaFave Co. and LaFave wrote to counsel for the Fryes, indicating that LaFave Co. had filed a claim of lien in this matter. Neither side demanded arbitration in accordance with the contract during this entire period.

On 5 March 1980, the original plaintiff, Cyclone Roofing Company ("Cyclone"), which had subcontracted with LaFave Co., filed this suit in Mecklenburg County District Court against both the Fryes and LaFave Co. Cyclone later took a voluntary dismissal and is no longer involved in this litigation. On 7 July 1980, LaFave Co. filed an answer to the Cyclone complaint and a cross-claim against the Fryes. The cross-claim alleged performance by LaFave Co. of its duties under the contract and a balance owing of $47,449.27, consisting of $38,723.66 for services rendered and $8,725.61 as the unpaid portion of the contractor's fee. The cross-claim contained a demand for a jury trial. On 9 July 1980, the Fryes filed an answer to the Cyclone complaint and a cross-claim against LaFave Co. The cross-claim alleged various breaches by the Company and damages of $50,000. This filing also included a third-party complaint against David M. LaFave individually, alleging causes of action against him for negligence and breach of promise and resultant damages of $50,000. The Fryes also demanded a jury trial. On 14 July 1980, the Fryes replied to the LaFave Co. cross-claim, denying that the Company had performed its duties and that any balance was due. None of these pleadings included any demand for arbitration. On 11 August 1980, LaFave Co. and LaFave individually filed an answer to the cross-claim and third-party complaint, denying any breach of negligence. The answer also alleged that the underlying agreement was subject to mandatory arbitration. The same day LaFave Company and La-

Fave filed a motion to stay litigation pending arbitration. The Fryes opposed the motion.

On 30 October 1980, the District Court, Mecklenburg County, Brown, Judge, ordered a stay of litigation between LaFave Co. and the Fryes pending arbitration, and in its discretion ordered a stay of the action against LaFave individually on the ground that the arbitration would effectively resolve the matter. The court ordered that the Fryes and LaFave Co. proceed to arbitration in accordance with the contract. This order was appealed by the Fryes, and the appeal was dismissed by this Court 30 April 1981. The case was subsequently and properly transferred to the Superior Court, Mecklenburg County.

The parties proceeded to arbitration. After an initial award by the architect in favor of the Fryes, a second arbitrator made an award in favor of LaFave Co. on 6 January 1982. Thereafter, the court confirmed the second award on 25 June 1982, and entered judgment accordingly in favor of LaFave Co. in the amount of $37,094.27. From this order and judgment the Fryes appeal. In addition, they renew their appeal from the order directing arbitration.

Mraz, Michael & Boner, P.A., by Mark A. Michael, for defendant-third-party plaintiff-appellants Frye.

Horack, Talley, Pharr & Lowndes, P.A., by Susan Christman, for defendant-appellee LaFave Co.

JOHNSON, Judge.

This appeal is interlocutory since the Fryes' claim against LaFave individually remains to be adjudicated. If, however, the Fryes were eventually to prevail on appeal of the claim against LaFave Co. following trial against LaFave, there is a possibility of conflicting verdicts at a second trial, especially in view of the close relationship between LaFave Co. and LaFave. Therefore, the order of 25 June 1982 affects a substantial right and is immediately appealable. G.S. 1-277; G.S. 7A-27(d); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982).

By the time the demand for arbitration was finally made in this case, both appellee LaFave Co. and appellants Frye had answered the Cyclone complaint and filed cross-claims against

each other. Appellants had answered appellee's claim. Thus, a civil suit was filed and pending, *see McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E. 2d 860 (1952), and the court could not thereafter order arbitration, even with the consent of both parties. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982).

> [I]f the parties had not come into court and asked the court to resolve their disputes, or if they had had the court action dismissed prior to arbitration, there would have existed no prohibition to their voluntary agreement to arbitrate the issues. Once a civil action has been filed and is pending, the court has no authority to order, even with the parties' consent, binding arbitration.

Id. at 525, 293 S.E. 2d at 798. Therefore, the *Crutchley* court held that the arbitration order was void *ab initio*. *Id.*

Here, after originally filing a claim of lien, appellee invoked the jurisdiction of the court by filing a cross-claim against appellants, and demanding a jury trial. Appellee was under no compulsion to do so; under the Rules of Civil Procedure, such a claim was permissive rather than compulsory. G.S. 1A-1, Rule 13(g); *see Peterson v. Watt*, 666 F. 2d 361 (9th Cir. 1982), *and* 3 Moore's Federal Practice § 13.34[1] (construing identical federal rule as entirely permissive). Appellants also filed a claim and demanded a jury trial. Under North Carolina law, this conduct on the part of both parties evinces the election of a legal forum and constitutes waiver of the arbitration provision as a matter of law. *See Hargett v. Delisle*, 229 N.C. 384, 49 S.E. 2d 739 (1948) (once the parties have invoked the jurisdiction of the court by complaint and responsive pleadings, the court may not order them to arbitrate pursuant to prior agreement). Therefore, the court could not order arbitration in this case, particularly over the objection of one of the parties. *Crutchley v. Crutchley, supra.*

Appellee's argument that upon proof of arbitration agreement the court "has *no* alternative" but to order arbitration under G.S. 1-567.3(a)[1] has already been rejected by this Court.

1. The section states in full:

> (a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the

Development Co. v. Arbitration Assoc., 48 N.C. App. 548, 269 S.E. 2d 685 (1980), *disc. review denied*, 301 N.C. 719, 274 S.E. 2d 227 (1981) (court has authority to determine preliminary questions of *res judicata*). It follows that the court also has authority to determine the preliminary question of waiver. The decisions of other jurisdictions which have adopted the Uniform Arbitration Act support this interpretation. *See e.g. Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W. 2d 422 (Minn. 1980) (court to rule on waiver defenses based on activity before it); *Tumim v. Palefsky*, 7 Mass. App. 847, 384 N.E. 2d 1253 (1979) (arbitration clause not jurisdictional). Therefore, the court had authority to determine that the parties had waived arbitration, and its failure to so find was error.

Since the order confirming the arbitration award must be vacated, we need not consider appellants' second assignment of error. The case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judge WELLS concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

In view of the policy underlying the recently adopted Uniform Arbitration Act, G.S. 1-567.1, *et seq.*, favoring arbitration as a means of dispute resolution, I respectfully dissent.

The parties here contractually agreed to resolve disputes through arbitration. Such agreement was valid, enforceable and irrevocable. G.S. 1-567.2; *see Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983). Waiver of such an agreement is not to be lightly inferred. *In re Mercury Const. Corp.*, 656 F. 2d 933, *reh. denied*, 664 F. 2d 936 (4th Cir. 1981), *affirmed*, --- U.S. ---, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983). After reviewing the record, I do not believe that appellee, LaFave Company, waived its right to arbitration.

existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

I do not agree with the majority herein that participation in litigation constitutes an automatic waiver of a contractual right to arbitration. Rather, to find such a waiver, I would require, as have many other jurisdictions, not only participation in litigation or other action inconsistent with the right to arbitration, but also prejudice to the party opposing the motion for arbitration. *See e.g., Charter Air Center v. Florida P.S.C.*, 503 F. Supp. 243 (N.D. Fla. 1980); *Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975); *Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W. 2d 422 (Minn. 1980).

I would, thus, find a waiver of arbitration rights in these situations:

(1) When the parties have contractually agreed to arbitrate their disputes, but then pursue an action in court, with *neither* party referring to their previous arbitration agreement. *See Hargett v. Delisle*, 229 N.C. 384, 49 S.E. 2d 739 (1948).

(2) When a civil suit is already filed and pending at the time the parties enter into an agreement to arbitrate their dispute. *See Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982).

(3) When, although the parties have previously agreed to arbitration, one party takes action (i.e. substantially participates in a civil suit) which are inconsistent with his right to arbitration and the other party is prejudiced thereby.

I find no prejudice to appellees, the Fryes, resulting from appellant LaFave Company's actions in this case. On 5 March 1980, the subcontractor, who is no longer a party, instituted action against both parties herein. On 7 July 1980, appellant answered and cross-claimed against the appellees. Approximately one month later, on 11 August 1980, appellant moved to stay litigation pending arbitration. Since I do not believe the litigation had been pursued enough to cause prejudice to the appellees, I would affirm the trial court order directing the parties to proceed to arbitration.

W. J. ADAMS v. ROBERT J. NELSEN AND WIFE, ALICE E. NELSEN

No. 833DC359

(Filed 20 March 1984)

1. Arbitration and Award § 2; Laborers' and Materialmen's Liens § 1— arbitration agreement—no waiver of right to file lien claim

By contractually agreeing to arbitration, plaintiff did not thereby waive his right to file a laborers' and materialmen's lien claim and institute court action to enforce such lien but was entitled to enforce any award in his favor through a judgment enforcing his lien claim. G.S. 44A-13 and -14.

2. Arbitration and Award § 2— waiver of right to arbitration

The right to arbitration is contractual and may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Plaintiff, by pursuing an action in court, clearly indicated his intent to waive his right to arbitration.

3. Arbitration and Award § 2— failure to demand arbitration in apt time—waiver of right to arbitration

Where the contract of the parties provided that a demand for arbitration could not be made after the date when the dispute would be barred by the applicable statute of limitations, defendants waived their right to arbitration by failing to demand arbitration within three years from the time plaintiff breached the contract's arbitration provision by instituting court action. G.S. 1-52.

4. Arbitration and Award § 1— motion to dismiss not demand for arbitration

Defendants' Rule 12(b)(6) motion to dismiss was not equivalent to a demand for arbitration. Had defendants wished to assert their contractual right to arbitration, the proper procedure would have been a motion to stay litigation and order arbitration. G.S. 1-567.3(d).

5. Arbitration and Award § 2— waiver of arbitration—who should determine

The arbitrator is the proper person to determine the issue of waiver of arbitration only when such issue is intertwined with the substance of the parties' dispute. When, however, the issue of waiver is predicated upon participation in a lawsuit by a party seeking arbitration, the trial judge should determine the waiver issue.

6. Arbitration and Award § 2— waiver of contractual right to arbitration

A defendant may be deemed to have waived a contractual right to arbitration (1) when parties pursue an action in court with neither party seeking to invoke a previously agreed upon arbitration clause; (2) when defendant did not demand arbitration within the applicable statutory time limit; and (3) when defendant participates in litigation or takes other action inconsistent with the right to arbitration so that plaintiff will be prejudiced if the court action is stayed and arbitration ordered.

7. Arbitration § 1— arbitration of disputes concerning alimony, custody and child support

When a civil action concerning alimony, child support, and custody is already filed and pending and there has been no prior agreement to arbitrate, the trial judge is without authority, even if the parties consent, to order arbitration.

APPEAL by plaintiff from *Rountree, Judge*. Judgment entered 28 January 1983 in District Court, CARTERET County. Heard in the Court of Appeals 5 March 1984.

In this case we must decide whether the trial court erred in dismissing, under Rule 12(b)(6) of the Rules of Civil Procedure, an action by plaintiff concerning money owed by defendants for services performed under a contract containing a provision that all claims or disputes under said contract would be resolved through arbitration.

Plaintiff, a registered professional engineer, alleges, in essence, that on 22 August 1978, he entered into a contract with defendants, owners of a parcel of land in Carteret County, in which plaintiff agreed to perform professional design services in connection with the design and construction of a residence for defendants on defendants' parcel of land. Under the terms of said contract, defendants still owe plaintiff $2,662.00.

On 11 September 1979, plaintiff, in accordance with Article 44A of the General Statutes, filed a claim of lien for $2,410.00 on defendants' parcel of land. On 9 November 1979, plaintiff filed the present action praying for judgment against defendants and for enforcement of his lien claim through a court ordered execution sale.

On 4 December 1979, defendants filed an answer, denying plaintiff's claims and alleging as an affirmative defense, that plaintiff performed the contract in an unprofessional manner and failed to fully perform his obligations under the contract. Defendants also moved, under Rule 12(b)(6) to dismiss, alleging that plaintiff failed to state any facts upon which relief could be granted. Also on 4 December, defendants demanded a trial by jury.

The trial court granted defendants' motion to dismiss and, furthermore, ordered that plaintiff's claim of lien be cancelled.

Darden and Pierce, by R. D. Darden, Jr., for plaintiff appellant.

Bennett, McConkey and Thompson, by Thomas S. Bennett, for defendants appellees.

VAUGHN, Chief Judge.

Plaintiff contends that the trial court erred in granting defendants' 12(b)(6) motion to dismiss. We agree. The only situations warranting a 12(b)(6) dismissal are:

(1) when the complaint on its face reveals that no law supports plaintiff's claim;

(2) when the complaint on its face reveals that some fact essential to plaintiff's claim is missing; and

(3) when some fact disclosed in the complaint defeats plaintiff's claim.

Advertising Co. v. City of Charlotte, 50 N.C. App. 150, 152, 272 S.E. 2d 920, 922 (1980).

Plaintiff's complaint, which, in essence, alleged that plaintiff performed services for which defendants still owe him money pursuant to a valid contract entered into between the parties, was sufficient to withstand defendants' motion to dismiss. We find no defect on the face of plaintiff's complaint.

[1] The trial court, was, furthermore, without authority to cancel plaintiff's claim of lien. Defendant does not dispute that plaintiff was entitled to file a claim of lien pursuant to G.S. 44A-8. The right to file and enforce a lien claim and the right to resolve a dispute through arbitration are mutually exclusive rights. Plaintiff, by contractually agreeing to arbitration, did not thereby waive his right to file a lien claim and institute court action to enforce such lien. *See Mills v. Robert Gottfried, Inc.*, 272 So. 2d 837 (Fla. App. 1973); *Frederick Contr. v. Bel Pre Med.*, 274 Md. 307, 334 A. 2d 526 (1975). Plaintiff is entitled to enforce any award in his favor through a judgment enforcing his lien claim. G.S. 44A-13 and 14. *See Mills v. Robert Gottfried, Inc., supra; Frederick Contr. v. Bel Pre Med., supra.*

Plaintiff's complaint, valid on its face, was not, as defendants suggest, rendered invalid by the fact that the parties had, prior

to the time plaintiff instituted this suit, contractually agreed to arbitrate all disputes. Attached to plaintiff's complaint and incorporated therein by reference was the parties' contract, containing the following arbitration provision:

> All claims, disputes and other matters in question between the parties to this Agreement, arising out of, or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration, arising out of, or relating to this Agreement shall include, by consolidation, joinder or in any other manner, any additional party not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by all the parties hereto. Any consent to arbitration involving an additional party or parties shall not constitute consent to arbitration of any dispute not described therein or with any party not named or described therein. This Agreement to arbitrate and any agreement to arbitrate with an additional party or parties duly consented to by the parties hereto shall be specifically enforceable under the prevailing arbitration law. In no event shall the demand for arbitration be made after the date when such dispute would be barred by the applicable statute of limitations. The award rendered by the arbitrators shall be final.

[2] We are aware of the legislative intent underlying the recently adopted Uniform Arbitration Act, G.S. 1-567.1, *et seq.*, favoring arbitration as a means of dispute resolution. We recognize, moreover, that the parties' contractual agreement to resolve disputes through arbitration was valid, enforceable and irrevocable. G.S. 1-567.2; *see Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983). Nevertheless, the right to arbitration is contractual, and, thus, in accordance with traditional contract principles, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. *See Campbell v. Blount*, 24 N.C. App. 368, 210 S.E. 2d 513 (1975). There is no question but that plaintiff, by pursuing an action in court, clearly indicated his intent to waive his right to arbitration.

[3] There is furthermore no question but that defendants, by failing to demand arbitration as provided by the parties' contract,

waived their right as well. According to the contract's arbitration provision, to avoid waiver, it was necessary for a party to demand arbitration within the applicable statutory time limit. The statute of limitations governing contract disputes is three years. G.S. 1-52. Defendants, therefore, to have invoked their right to arbitration should have demanded such within three years from the time plaintiff breached the contract's arbitration provision by instituting court action. *See Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E. 2d 620 (1982). Because of their own inaction, defendants are now barred from invoking their arbitration rights.

[4] We find no merit in defendants' suggestion that their 12(b)(6) motion was equivalent to a demand for arbitration. Defendants' motion, which alleged that plaintiff stated no facts warranting relief, made no reference to and did not invoke the arbitration process. Had defendants wished to assert their contractual right to arbitration, the proper procedure would have been a motion to stay litigation and order arbitration. G.S. 1-567.3(d); *Cf. Mills v. Robert W. Gottfried, Inc., supra; Eisel v. Howell*, 220 Md. 584, 155 A. 2d 509 (1959) (motions to dismiss for lack of jurisdiction in actions concerning contracts with arbitration clauses were improper); *but cf. Walter L. Keller & Associates v. Health Management Foundation*, 438 So. 2d 1076 (Fla. App. 1983).

[5] Although defendants in this case waived their arbitration rights as a matter of law, we note that had the statute of limitations not run its course, it would have been within the trial judge's discretion to determine whether, under the doctrine of laches, defendants, by participating in the lawsuit, had, nevertheless, waived their rights to arbitration. While some jurisdictions vest sole authority in the arbitrator to determine the issue of waiver, we believe the arbitrator is the proper person only when the issue of waiver is intertwined with the substance of the parties' dispute. *See Charter Air Center v. Florida P.S.C.*, 503 F. Supp. 243 (N.D. Fla. 1980). When, in contrast, the issue of waiver is predicated upon participation in a lawsuit by a party seeking arbitration, we believe it to be more practical and efficient for the trial judge to determine the waiver issue. *See Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W. 2d 422 (Minn. 1980).

[6, 7] With a view toward helping trial judges faced with similar controversies, we today set forth four situations in which a de-

fendant may be deemed to have waived a contractual right to arbitration: First, when parties pursue an action in court with neither party seeking to invoke a previously agreed upon arbitration clause, the trial judge may render a judgment on the merits, since the parties, by their conducts have impliedly waived their rights to arbitration. *See Hargett v. Delisle,* 229 N.C. 384, 49 S.E. 2d 739 (1948). Second, when a civil action concerning alimony, child support, and custody is already filed and pending and there has been no prior agreement to arbitrate, the trial judge is without authority, even if the parties consent, to order arbitration. *See Crutchley v. Crutchley,* 306 N.C. 518, 293 S.E. 2d 793 (1982). Third, when, as here, defendant did not demand arbitration within the applicable statutory time limit, defendant is barred from asserting his right to arbitration. Fourth, when the defendant participates in litigation or takes other action inconsistent with the right to arbitration, so that plaintiff will be prejudiced if the court action is stayed and arbitration ordered, then the trial judge may find a waiver of arbitration rights. *See In re Mercury Const. Corp.,* 656 F. 2d 933, *reh. denied,* 664 F. 2d 936 (4th Cir. 1981), *affirmed,* --- U.S. ---, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983); *Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.,* 398 F. Supp. 1057 (E.D.N.Y. 1975); *Brothers Jurewicz, Inc., supra.* When determining, in this fourth situation, whether defendants' actions have prejudiced plaintiff, the question is one of reasonableness. We leave it to the trial judge to consider the situations of the parties, the nature of the transaction, and the facts of the particular case. *See Charter Air Center, supra.* The facts in the case *sub judice,* falling within the third category, remove the question of waiver from the discretion of the trial judge and require such a finding as a matter of law. Plaintiff, having a valid cause of action, is entitled to his day in court.

Reversed and remanded for proceedings not inconsistent with this opinion.

Judges WHICHARD and PHILLIPS concur.

GEORGE J. HODGES v. FIRTH FRANKLIN HODGES AND WIFE, MAUDE E. HODGES

No. 8311SC467

(Filed 20 March 1984)

Appeal and Error § 68.2; Mortgages and Deeds of Trust § 1— former appeal of same case—sufficiency of evidence as to finding of mortgage—law of the case

In an action in which plaintiff sought a judgment requiring defendants to reconvey to plaintiff a tract of land that plaintiff had deeded to his brother, the defendant, the Court adopted an earlier holding by the Court as the law of the case where the same facts and the same questions were involved in both appeals. In the first appeal, the Court comprehensively reviewed the law by which a court determines whether a particular transaction constitutes a deed and option or a mortgage and concluded that the evidence was insufficient to find that the parties intended to create a debt, and due to the material similarity of the evidence adduced at both trials, the trial court's granting of a directed verdict in favor of defendants at the second trial was proper.

APPEAL by plaintiff from *Smith, Judge.* Judgment entered 12 October 1982 in Superior Court, HARNETT County. Heard in the Court of Appeals 12 March 1984.

Plaintiff instituted this civil action seeking a judgment requiring defendants to reconvey to plaintiff a tract of land that plaintiff had deeded absolutely to his brother, the defendant Firth Hodges. This action has been filed three times and tried twice. The first action was apparently abandoned for insufficient process. The second action resulted in the first trial and former appeal of this case, reported as *Hodges v. Hodges*, 37 N.C. App. 459, 246 S.E. 2d 812 (1978).

That appeal was brought by defendants when the trial court denied their motion for a directed verdict. This Court held that the trial court erred in denying defendants' motion. However, since defendants had failed to move for a judgment notwithstanding the verdict, this Court could not order judgment entered consistent with its holding, but could only remand for a new trial. Upon remand, plaintiff took a voluntary dismissal, and subsequently refiled the case for the third time as this action. At the resulting second trial, defendants again moved for a directed verdict at the close of plaintiff's evidence. The motion was granted, and from the order granting the directed verdict, plaintiff appeals.

Neill McK. Ross, for plaintiff appellant.

Mast, Tew, Armstrong & Morris, P.A., by George B. Mast and John W. Morris, for defendant appellees.

VAUGHN, Chief Judge.

A full factual summary of this case is contained in our previous opinion. *See Hodges v. Hodges, supra.* We only briefly review here the major facts as they pertain to this appeal.

On the death of their mother intestate, plaintiff and his brother, the defendant Firth Hodges, inherited a parcel of land as tenants in common which they divided by cross-deeds into two separately owned tracts. The tract received by plaintiff is the subject of this action.

At some point subsequent to the division of the farm land, plaintiff needed funds for his trucking business. He contacted his brother and the result of their discussions was an arrangement by which plaintiff would convey his tract to Firth, who would use the entire tract as security for a $25,000 loan, the proceeds of which would be received by plaintiff. In addition, Firth would give plaintiff the option to buy back plaintiff's tract for $25,000, with provisions for adjusting the $25,000 figure if certain expenses were incurred. There was an express stipulation that the option could only be exercised within a certain amount of time. The resultant deed, deed of trust, and option agreement were recorded, and the loan was closed.

The evidence tends to show that on the date by which the option was to be exercised, plaintiff sent Firth a telegram requesting the execution of a deed so that the parties could "close the matter as above specified." However, no deed was ever sent to plaintiff, nor was any money tendered to defendant Firth. Plaintiff, believing he was entitled to the tract of land he had deeded to his brother, decided to take legal action to regain it. This decision resulted in the filing of three lawsuits, of which this is the third.

In his complaint, plaintiff alleges several theories to support reconveyance, but the only one pertinent to this appeal is that the deed was actually given to secure an indebtedness and should be reformed to reflect a mortgage between the parties. At the close

of plaintiff's evidence, the trial court granted defendants' motion for a directed verdict. Plaintiff appeals from the order granting the directed verdict.

To prevail upon this appeal, that is, to show that the trial court erred in directing a verdict for defendants, plaintiff must show that he presented evidence at the second trial materially different from that produced at the first trial, and plaintiff must further show that the directed verdict was improperly granted. We hold that plaintiff has not so shown and therefore affirm.

It has been stated that upon remand, substantially different facts must be shown before an appellate court can consider the same question on a subsequent appeal.

> As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. . . .

Transportation, Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E. 2d 181, 183 (1974) (citations omitted), *quoting Collins v. Simms*, 257 N.C. 1, 11, 125 S.E. 2d 298, 305 (1962).

In deciding whether the evidence on retrial is substantially the same, or materially different, from that adduced at the previous trial, it is necessary to examine and compare the evidence offered at each trial. As our Supreme Court concluded in one case, where such a comparison discloses "variances, discrepancies, omissions and some additions, in minor details, [b]ut in basic trend and content there is no material difference in the evidence adduced, [i]t is substantially the same." *Maddox v. Brown*, 233 N.C. 519, 522, 64 S.E. 2d 864, 866 (1951).

We have examined and compared the evidence adduced at the two trials in the instant case, paying particular attention to the testimony that plaintiff claims demonstrates material factual differences in the evidence. Our comparison reveals no material differences, and we are thus compelled to accept this Court's ear-

lier decision reversing the denial of defendants' motion for a directed verdict as "the law of the case."

In particular, we do not think that the affidavit and oral testimony offered at the second trial by Y. T. Jernigan, a former tenant of the land that is the subject of this action, materially contradicts the testimony that he offered at the first trial. In his affidavit, Mr. Jernigan stated that "Firth also told me that he had George's land for security for the $25,000 he had given to George." At the second trial he testified that plaintiff "made the arrangements with his brother to give him, secure his money with the deed." This is substantially similar to Mr. Jernigan's testimony at the first trial, where he stated that he had "heard Firth say that he loaned George Twenty-Five Thousand Dollars." We agree with this Court's assertion on the first appeal of this matter that while these bits of evidence are "inconsistent with the idea of a sale," they are of "such scant probative value as to be insufficient . . . to carry plaintiff's case to the jury." *Hodges v. Hodges, supra*, at 469, 246 S.E. 2d at 818.

Having concluded that the evidence adduced at the two trials is substantially similar, there is no need to consider whether the trial court at the second trial erred in granting defendants' motion for a directed verdict. As the same facts and the same questions were involved in both appeals, we must adopt the earlier holding of this Court as the law of the case. *See Transportation, Inc. v. Strick Corp., supra*, at 239, 210 S.E. 2d at 183. We nevertheless express our approval of this Court's reasoning and application of the law as contained in our prior opinion. In this opinion, the Court treated plaintiff's principal theory as "based on his allegations that at the time the deed and contract providing plaintiff an option to repurchase were executed and delivered the relationship of debtor and creditor existed between him and his brother, Firth, and that the deed and contract together were intended to constitute and did constitute a mortgage." *Hodges v. Hodges, supra*, at 466, 246 S.E. 2d at 816.

In the first appeal, this Court comprehensively reviewed the law by which a court determines whether a particular transaction constitutes a deed and option or a mortgage. There is no need for us to do more than briefly synopsize that law here. "[T]he inquiry in every case must be, whether the contract in the specific case is

a security for the repayment of money or an actual sale." *Conway v. Alexander*, 11 U.S. (7 Cranch) 218, 236-37, 3 L.Ed. 321, 328 (1812).

> Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction seems to be whether the debt existing prior to the conveyance is still left subsisting or has been entirely discharged or satisfied by the conveyance.

Ferguson v. Blanchard, 220 N.C. 1, 7-8, 16 S.E. 2d 414, 418 (1941). In ascertaining the true intent of the parties at the time of a transaction, evidence of "[t]he intention [to create a mortgage] must be established, not by simple declaration of the parties, but by proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase . . . ." *O'Briant v. Lee*, 214 N.C. 723, 731, 200 S.E. 865, 870 (1939).

We have already held that the evidence adduced at the second trial of this action differed in no significant manner from that of the first trial. We agree with the previous conclusion of this Court that other than plaintiff's testimony that the transaction was intended as a loan, there was no evidence that the parties intended to create a debt, and that such evidence is not sufficient to take the case to the jury.

The plaintiff himself testified at both trials that he was under no obligation to repay his brother. At the first trial plaintiff testified that he knew he had "the right to do it or not to do it [exercise the option] at my own choice . . . ." *Hodges v. Hodges, supra*, at 470, 246 S.E. 2d at 818. At the second trial plaintiff stated, "The option contract said what you had to do to exercise the option." Where there is no obligation to repay, as here, there is no debt and thus no mortgage.

In order for a moving party to be awarded a directed verdict, all of non-movant's evidence must be taken as true, the non-movant is to be given the benefit of reasonable inferences, and any inconsistencies are to be resolved in non-movant's favor. *See Jones v. Development Co.*, 16 N.C. App. 80, 84, 191 S.E. 2d 435, 438, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972). Applying

these rules to the case, we find that the evidence does not support plaintiff's contention that a mortgage was created by the dealings between the parties, and hold that the trial court did not commit error in granting a directed verdict.

Although we hold that the transaction in question was a deed and option, i.e., an absolute sale with an option granted back to the plaintiff to repurchase within a specified time, we do so without passing on the question of whether plaintiff properly exercised his rights under the option. Plaintiff did not proceed at trial on the theory that he complied with all the necessary conditions in order to exercise his option; rather, he argued that the parties intended to create a mortgage debt.

In summary, due to the material similarity of the evidence adduced at both trials, and the correct application by this Court of the law concerning the creation of a mortgage debt to the facts adduced at the first trial, the trial court's granting of a directed verdict in favor of defendants at the second trial was proper, and the judgment appealed from is hereby affirmed.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ISAAC JUNIOR WILLIAMS

No. 8316SC961

(Filed 20 March 1984)

1. Property § 4.2— malicious damage to property by use of explosive—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for malicious damage to real property, an occupied dwelling, by the use of an explosive where it tended to show that a plastic jug containing flammable material was hurled into an occupied dwelling and ignited, causing a fire; defendant possessed a plastic container of gasoline on that date; defendant had on the same evening threatened one of the occupants of the house; defendant was apprehended near the scene shortly after the crime occurred and smelled of a "flammable-like material" at the time of apprehension; and a glass sliver found on defendant's arm could have had a common origin with glass taken from a broken window of the dwelling in question.

2. Criminal Law § 48.1— custodial silence inadmissible

The use for impeachment purposes of defendant's silence, at the time of his arrest and after receiving the *Miranda* warnings, violated defendant's right to due process under the Fourteenth Amendment.

3. Criminal Law § 138— use of evidence proving element of offense to find aggravating factor

In imposing a sentence for malicious damage to real property by use of an explosive, the trial court improperly used evidence necessary to prove an element of the offense in finding as an aggravating factor 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. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Herring, Judge.* Judgment entered 27 May 1983 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 13 March 1984.

Defendant was charged in a proper bill of indictment with malicious damage to real property, an occupied dwelling house, by the use of an explosive, in violation of N.C. Gen. Stat. Sec. 14-49.1. Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

The defendant met Evelyn Bostic in 1980, and the couple began to live together approximately one year later. In August 1982, Ms. Bostic broke off her relationship with defendant and moved in with her sister, Dolly Rogers, who resided with her boyfriend and her two-year-old daughter at 326 Tuskeegee Drive, Laurinburg, North Carolina. Following Ms. Bostic's departure, defendant attempted to see and talk with her at Ms. Rogers' house and at Ms. Bostic's work place. On Saturday, 14 August 1982, defendant returned to Ms. Rogers' house at approximately 11 p.m., and was told Ms. Bostic was not there. He returned fifteen minutes later, appeared angry, and was permitted to enter the house to confirm her absence. Ms. Bostic returned to the house at approximately 3:30 a.m., and received a telephone call from defendant almost immediately thereafter. She testified that they argued and that defendant threatened her. At approximately 4:30 a.m., defendant purchased "a dollar's worth" of gasoline, which he put in a plastic milk container. At some time between 4:24 and 5:30 a.m. a brick was hurled through Ms. Bostic's window, followed by a fire bomb. The resultant fire was extinguished by the adults in the house. Defendant was apprehended by police

at approximately 6:30 a.m. about one mile from Ms. Rogers' house. He did not have the plastic milk jug with him, and the officer detected "a faint odor of a flammable-like substance" when defendant got into the police car. A fragment of glass removed from defendant's arm at the police station was later compared to glass from Ms. Rogers' broken window by an SBI forensic chemist, who testified that the pieces of glass "could have had a common origin." The chemist also testified that burned residue taken from the bedroom contained gasoline and the remains of a plastic jug.

Defendant offered evidence tending to show the following: At no time on 14 August 1982 did defendant call or attempt to see Evelyn Bostic. At approximately 3:30 p.m. defendant left Laurinburg for Wagram, where he attended a family reunion. At approximately 11:00 p.m. defendant left Wagram and went with two other individuals to a nightclub in Red Springs, North Carolina. Sometime after 3:30 a.m. defendant left Red Springs and returned to his home in Wagram. He was attacked by an unknown number of people upon arriving home, and he fled to his aunt's house, approximately a quarter mile away. Because his aunt was not home, defendant broke into her house and remained there for approximately thirty minutes. Defendant then hitchhiked into Laurinburg to report the attack to the police, but changed his mind upon arrival and decided to return to Wagram. He was soon thereafter stopped by the police.

Defendant was found guilty as charged of malicious damage by explosives and sentenced to serve twenty-five years in prison, a term exceeding the presumptive fifteen-year term for Class C felony. Defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Charles H. Hobgood, for the State.

Mason, Williamson, Etheridge and Moser, P.A., by Terry R. Garner, for defendant, appellant.

HEDRICK, Judge.

Defendant contends that the trial court erred in denying his motions to dismiss the charges against him, arguing that the evidence presented at trial "was insufficient to submit the case to the jury."

N.C. Gen. Stat. Sec. 14-49.1 provides: "Any person who willfully and maliciously damages or attempts to damage any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable as a Class C felony."

[1] It is elementary that "proof of every crime consists of: (1) Proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime." *State v. Bass*, 253 N.C. 318, 321, 116 S.E. 2d 772, 774 (1960) (citation omitted). *See also State v. Bryant*, 50 N.C. App. 139, 272 S.E. 2d 916 (1980). There is in this record substantial evidence that on 15 August 1982 a plastic jug containing flammable material was hurled into an occupied dwelling and that the device ignited, causing a fire. There is also substantial evidence that defendant, on that date, possessed a plastic container of gasoline, that he had on the same evening threatened one of the occupants of the house, that he was apprehended near the scene shortly after the crime occurred, that he smelled of "a flammable-like material" at the time of apprehension, and that a glass sliver found on his arm "could have had a common origin" with glass taken from a broken window of the dwelling in question. We think it clear that the State's evidence was sufficient to permit submission of the case to the jury. These assignments of error are without merit.

[2] By Assignment of Error No. 8 defendant argues that the court erred when it allowed the State "to cross examine the defendant concerning the defendant's failure to talk to the officers at the time of his arrest concerning his account of his activities during the early morning hours of August 15, 1982." Defendant contends that introduction of evidence concerning his "custodial silence" constitutes a violation of his constitutional rights. We agree. The record shows that Deputy Small informed defendant of his constitutional rights immediately after asking defendant to accompany him to the police department. At trial, defendant was subjected to a detailed cross-examination about his failure to relate his account of his activities on 15 August to Deputy Small and other officers. We think the issue here presented is controlled by the decision of the United States Supreme Court in *Doyle v. Ohio*, 426 U.S. 610, 618-19, 49 L.Ed. 2d 91, 98, 96 S.Ct. 2240, 2245 (1976), in which the Court said:

> [W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. . . . We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.

See also 2 H. Brandis, Brandis on North Carolina Evidence Sec. 179 (2d rev. ed. 1982). Because we believe the court committed prejudicial error in allowing into evidence defendant's failure to recount to police officers his story of the events of 15 August, we hold that defendant is entitled to a new trial.

While defendant argues other alleged errors going to the court's conduct of his trial, we believe such alleged errors are unlikely to occur at defendant's next trial, and so we decline to discuss them. We do wish, however, to discuss defendant's sole assignment of error going to the sentencing phase of the proceedings, and to that aspect we now turn our attention.

[3] The record discloses that defendant was sentenced to a term exceeding the presumptive based on the court's finding of the following factors in aggravation:

> 7. The 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.
>
> 15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement, and the defendant either Waived Counsel or was represented by Counsel in Court during trial of the same.

The court found no mitigating factors.

Defendant assigns error to the court's finding of Factor No. 7, arguing that the same evidence was used to prove an element of the offense and to establish the factor in aggravation, in violation of N.C. Gen. Stat. Sec. 15A-1340.4(a)(1). We agree.

N.C. Gen. Stat. Sec. 15A-1340.4(a)(1) in pertinent part provides: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." N.C. Gen. Stat. Sec. 14-49.1, the statute pursuant to which defendant was convicted, sets out as an element of the offense of malicious damage by explosives "the use of any explosive or incendiary device or material." The statutory aggravating factor found by the trial judge requires a showing that the defendant employed "a weapon or device which would normally be hazardous to the lives of more than one person." Our examination of the record reveals that the State impermissibly relied on the same evidence to show an element of the offense and to prove a factor in aggravation.

Because of the error already discussed, we hold that defendant is entitled to a new trial.

New trial.

Judges HILL and JOHNSON concur.

NORLIN INDUSTRIES, INC. v. MUSIC ARTS, INC., AND KENNITH PAUL WHICHARD, JR.

No. 833SC237

(Filed 20 March 1984)

1. **Rules of Civil Procedure §§ 7, 15— failure to allow amendment to plead estoppel proper**

The trial court correctly concluded that an amendment to defendant's answer to plead estoppel was unnecessary since the issues to which estoppel was to be a defense did not arise until the plaintiff's reply, and under G.S. 1A-1, Rule 7 the defendants were precluded from alleging it in any further responsive pleadings and could have raised this defense at trial without having previously alleged it.

2. **Rules of Civil Procedure § 15; Unfair Competition § 1— Chapter 75 violation as alternative counterclaim—statute of limitations barring claim**

The trial court correctly denied defendants' motion to amend their answer to assert as an additional alternative counterclaim a G.S. 75-5(b)(2) violation in limiting their dealership to Lowrey organs since the four year period of statute of limitations for Chapter 75 violations barred the claim.

3. Contracts § 7; Frauds, Statute of § 6; Monopolies § 2.1; Rules of Civil Procedure § 15; Unfair Competition § 1— oral "franchise agreement" limiting exclusive area to sell—barred by statute of frauds and statute of limitations

The trial court properly denied defendants' motion to assert an additional alternative counterclaim alleging that defendants were damaged by a 1976 G.S. 75-5(b)(2) violation and by the opening of another store by plaintiff in 1979 in violation of its alleged oral "franchise agreement" since the G.S. 75-5(b)(2) claim was barred by the statute of limitations, and since the assertion of the oral "franchise agreement" in which the plaintiff allegedly gave defendant corporation an exclusive area in which to sell was barred by the statute of frauds pursuant to G.S. 75-4.

4. Accounts § 2— debt owed to plaintiff not contested—summary judgment for plaintiff proper

The trial court properly entered summary judgment for plaintiff where there was no genuine issue as to the amount owed since the defendants, in their answers to the plaintiff's interrogatories, admitted the debt owed to plaintiff to be $57,093.47, and the trial court granted summary judgment in favor of plaintiff for the total amount of $65,657.49, the amount admitted plus attorneys' fees which were not contested. G.S. 6-21.2.

APPEAL by defendants from *Tillery, Judge*. Judgment entered 29 September 1982, in Superior Court, PITT County. Heard in the Court of Appeals 8 February 1984.

Thigpen & Hines by James C. Smith for plaintiff appellee.

Willis A. Talton for defendant appellants.

BRASWELL, Judge.

The plaintiff filed this action to recover a sum of money owed by the defendants to the plaintiff for goods sold. The defendants answered asserting a counterclaim to which the plaintiff replied. The plaintiff then filed a motion for summary judgment. The defendants, along with their response to the motion for summary judgment, also filed a motion to amend their answer. The trial court denied the defendants' motion to amend and granted the plaintiff's motion for summary judgment. The defendants, on the basis that both of these rulings were in error, have appealed.

More specifically the facts are as follows. The plaintiff is the national distributor of Lowrey organs and in 1973 entered into a dealer security agreement with the defendant Music Arts, Inc., whereby the plaintiff agreed to sell and deliver certain musical instruments and accessories to the defendant Music Arts. The

defendant Whichard personally guaranteed payment in writing any indebtedness incurred by Music Arts to the plaintiff under this agreement. In the summer of 1979, Music Arts defaulted under the terms of the agreement by failing to pay for goods sold and delivered to it by the plaintiff. The plaintiff pursuant to their agreement repossessed and sold the remaining collateral property securing the unpaid indebtedness of Music Arts. After applying all credits from the sale of the collateral property, the plaintiff alleged that the outstanding balance due from Music Arts was $73,080.59. When Music Arts refused to pay this sum, the plaintiff filed this action against Music Arts as debtor and Whichard as guarantor on 29 January 1981.

In the defendants' answer, they admitted that in the summer of 1979 they owed the plaintiff for goods delivered, but denied the amount owed was $73,080.59. They further asserted a counterclaim against the plaintiff that in 1973 the parties also entered into an oral "franchise agreement" in which Music Arts was given an exclusive territory in which to sell. The defendants alleged that this oral agreement was violated (1) when the plaintiff opened a new store in Music Arts' allotted territory in 1979 and (2) when the plaintiff conspired with another party to remove the dealership from the defendants in 1976.

In its reply to this counterclaim, the plaintiff denied that it entered into any "franchise agreement" with Music Arts, denied any conspiracy against Music Arts, and further asserted that the counterclaim was barred by the applicable statute of limitations and by the statute of frauds.

Thereafter, the defendants, responding to plaintiff's first set of interrogatories, admitted that the unpaid balance due to plaintiff under the dealer security agreement was $57,093.47. The plaintiff then filed a motion for summary judgment against the defendants for $57,093.47, plus interest and attorneys' fees and judgment dismissing defendants' counterclaim on the grounds that (1) the 1976 conspiracy claim was barred by the statute of limitations, G.S. 1-52(5), and (2) the alleged oral "franchise agreement" was void and unenforceable pursuant to G.S. 75-4, a statute of frauds provision.

In the defendants' response to plaintiff's motion the defendants contended that the plaintiff's motion should not be granted

and that their counterclaim should not be dismissed because the plaintiff was estopped to plead the statute of limitations and the statute of frauds. They also filed a motion to amend their answer, seeking leave of court to plead their estoppel theory as an affirmative defense and seeking to add two alternative counterclaims. The first of these alternative counterclaims alleged that the plaintiff violated G.S. 75-5(b)(2), which forbids the restraint of trade, when it placed certain restrictions on Music Arts in 1976 as it attempted to sell its business. The second alternative counterclaim stated that by violating G.S. 75-5 in 1976 and by opening another store in 1979 in violation of their "franchise agreement," Music Arts was damaged by a severe loss of business.

In the hearing on these motions, the trial court granted the plaintiff's motion for summary judgment and entered judgment in favor of the plaintiff in the amount of $65,657.49. The trial court also denied the defendants' motion to amend their answer on the grounds that such an amendment would be futile and dismissed their counterclaim with prejudice.

The first question presented for our review by the defendants asks whether or not the trial court erred by denying the defendants' motion to amend their answer. "A motion to amend a pleading, made more than 30 days after the original pleading is served, shall be freely granted when justice so requires. G.S. 1A-1, Rule 15(a); [citation omitted]. However, the motion is addressed to the discretion of the trial court." *Olive v. Williams*, 42 N.C. App. 380, 388, 257 S.E. 2d 90, 96 (1979). We have found no abuse of discretion.

[1] The defendants first sought leave of court to amend their answer in order to plead estoppel as an affirmative defense. "Although G.S. 1A-1, Rule 8(c) requires that a party affirmatively plead estoppel, that rule applies only to responsive pleadings." *Meachan v. Board of Education*, 47 N.C. App. 271, 277, 267 S.E. 2d 349, 353 (1980). Since the issues to which estoppel was to be a defense did not arise until the plaintiff's reply, and under G.S. 1A-1, Rule 7 the defendants were precluded from alleging it in any further responsive pleading, the defendants could have raised this defense at trial without having previously alleged it. *Id.* Therefore, we hold the trial court correctly concluded that an amendment to the defendants' answer was unnecessary.

[2] The defendants also sought leave of court to amend their answer in order to assert two additional alternative counterclaims. The first of these new counterclaims, according to the defendants, arose in 1976 when Music Arts was attempting to sell its business to Charles Entzminger and Richard Rados. During the sale negotiations, defendant Whichard and the potential buyers met with the Lowrey area representative who told Entzminger and Rados that when they bought Music Arts if they offered any other organ brand than Lowrey for sale, then the Lowrey dealership would be taken from them. After hearing such a statement limiting their dealership to Lowrey organs, Entzminger and Rados terminated the negotiations. The defendants contend that this action by the plaintiff blocked the sale of the business and indirectly violated G.S. 75-5(b)(2) which forbids any person "[t]o sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival."

Nevertheless, a counterclaim, like any other claim, must be asserted within the applicable period of limitations or it will be time barred. *Perry v. Trust Co.*, 223 N.C. 642, 27 S.E. 2d 636 (1943). The period of limitations for all Chapter 75 violations is four years after the claim accrues. G.S. 75-16.2. The defendants have alleged that the G.S. 75-5(b)(2) violation occurred in November of 1976, more than four years prior to the filing of this complaint. We therefore hold that the trial court correctly denied the defendants' motion to amend due to the fact that the assertion of this claim would indeed be futile because it is barred by the statute of limitations.

[3] The second of the additional alternative counterclaims alleges that the defendants have been damaged by the 1976 G.S. 75-5(b)(2) violation and by the opening of another Lowrey store by the plaintiff in 1979 in violation of its alleged oral "franchise agreement." As stated above, the G.S. 75-5(b)(2) claim is barred by the statute of limitations. Its reassertion in this second counterclaim is likewise futile. Besides the statute of limitations bar, the assertion of the oral "franchise agreement" in which the plaintiff allegedly gave Music Arts an exclusive area in which to sell is barred by the statute of frauds pursuant to G.S. 75-4. This statute states in part that:

> No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of

> North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: . . .

The oral franchise agreement allegedly prohibited the plaintiff from distributing Lowrey organs within a certain territory, including all of Pitt County, to any of Music Arts' competitors or from opening any new stores of its own. This oral contract substantially limited the plaintiff's right to do business in this area, except through the defendant as its exclusive distributor. Through G.S. 75-4, "[t]he General Assembly has declared that no contract whereby a person limits and restricts his legal right to do business in the State shall be valid and enforceable unless in writing and signed by the party so contracting." *Electronics Co. v. Radio Corp.*, 244 N.C. 114, 117, 92 S.E. 2d 664, 666 (1956). Because under G.S. 75-4, the alleged oral contract is void and unenforceable, we hold that the trial court correctly denied the defendants' motion to amend their answer in order to assert this counterclaim.

[4] The second question raised for our review asks whether the trial court erred in granting the plaintiff's motion for summary judgment. Upon a motion for summary judgment, "the moving party has the burden of establishing that there is no genuine issue as to any material fact," thus entitling him to judgment as a matter of law. *Normile v. Miller*, 63 N.C. App. 689, 692, 306 S.E. 2d 147, 149 (1983). Its purpose is to avoid the necessity of trial by exposing a fatal weakness in the claim or defense of his opponent. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

In the defendants' answer, "it is admitted that in the summer of 1979 the Defendants had not paid the Plaintiff for some of the goods which had been previously delivered," but the defendants deny that the amount which they owe is $73,080.59. Thus, there is no genuine issue with regard to the defendants' liability (since they also admitted that defendant Whichard personally guaranteed payment of such indebtedness to plaintiff). There is also no genuine issue as to the amount owed because the defendants' in their answers to the plaintiff's interrogatories admitted the debt to be $57,093.47. The plaintiff, in turn, then abandoned its claim of $73,080.59 and asked only for relief in the amount of $57,093.47, the admitted amount, in their motion for summary judgment

along with $8,564.02 for attorneys' fees pursuant to G.S. 6-21.2. The trial judge granted summary judgment in favor of the plaintiff for the total amount of $65,657.49. The defendants do not contest the award of attorneys' fees on appeal.

The trial court also dismissed the defendants' counterclaim present within their answer when it was first filed. This counterclaim alleges another 1976 conspiracy to remove the Lowrey franchise from the defendants between the plaintiff and a third party and a violation by the plaintiff of the oral franchise agreement by opening another store in their exclusive selling area in 1979. As discussed above, any alleged conspiracy occurring in 1976 is barred by the applicable statute of limitations, G.S. 1-52(5). Also, the oral franchise agreement on which the second part of the counterclaim is based is void and unenforceable pursuant to G.S. 75-4. There being no issue as to any material fact with regard to the plaintiff's claim or the defendants' counterclaim, we hold that the trial court correctly granted the plaintiff's motion for summary judgment and properly dismissed the defendants' counterclaim.

Affirmed.

Judges WELLS and PHILLIPS concur.

JOYCE ELAINE DUNN v. DAVID SCOTT HERRING AND GEORGE DILLON SMITH

No. 834SC416

(Filed 20 March 1984)

Automobiles and Other Vehicles § 76.1 — striking unlighted trailer across roadway — no contributory negligence as matter of law

Plaintiff's evidence did not show that she was contributorily negligent as a matter of law in colliding with defendants' tractor-trailer where it tended to show that plaintiff was traveling in the eastbound lane while it was dark and the weather was clear; the tractor was in the eastbound lane facing westbound traffic with its headlights on; the trailer extended across the westbound lane and was unlighted; plaintiff saw the lights from the tractor and slowed down from 55 miles per hour to about 35 miles per hour; and plaintiff did not see the trailer at any time and did not apply her brakes before her vehicle hit the

trailer. Whether plaintiff should have seen the trailer and, if so, whether she had adequate time to avoid the collision were factual questions appropriate for jury resolution.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 18 November 1982 in Superior Court, DUPLIN County. Heard in the Court of Appeals 7 March 1984.

This is an action for damages which resulted when plaintiff's automobile collided with defendants' tractor-trailer.

The plaintiff's evidence tended to show the following: At about 6:55 p.m. on 11 November 1980, plaintiff was traveling to her parents' home in Warsaw from Greenville, where she attended school. She had just turned off Route 11 onto Rural Paved Road No. 1300, and was traveling in a westerly direction. It was dark but the weather conditions were clear.

Defendant-driver Herring was backing a tractor-trailer into a private drive off Rural Paved Road No. 1300. The tractor was positioned in the eastbound lane, generally facing westbound traffic. The trailer was extended across the westbound lane, plaintiff's lane of travel. The headlights of the cab of the tractor were on; however, the trailer was unlit. There were no flares or warning devices.

Plaintiff testified that she had just come around a curve and entered a straight stretch of road when she saw the lights from the tractor in the eastbound lane, and slowed down from her former speed of fifty-five miles per hour to about thirty-five miles per hour. Plaintiff testified:

> The first thing I remember seeing was the headlights, when I came around the curve. I could tell it wasn't moving, or if it was moving at all, it was moving very slowly. Being raised in that part of the country, I was used to farm trucks being on the roads, so I slowed down to see what course it would take, whether it was a tractor or what it was. All I remember seeing, really, was the headlights of the truck.

Plaintiff testified that she did not see the trailer at any time before the collision. Because the lights were coming from the eastbound lane, plaintiff stated she saw no need to slow down further or to stop her vehicle, and she proceeded at a speed of about

thirty-five miles per hour. Plaintiff did not recall applying her brakes at any time before the collision, when her vehicle hit the trailer portion of the tractor-trailer.

Plaintiff's vehicle was damaged extensively and plaintiff sustained numerous bodily injuries. The trial court granted defendants' motion for a directed verdict at the close of plaintiff's evidence. From the order granting this motion, plaintiff appeals.

Thompson and Ludlum, by E. C. Thompson, III, for plaintiff appellant.

White, Allen, Hooten, Hodges & Hines, by John R. Hooten, for defendant appellees.

VAUGHN, Chief Judge.

The test for directing a verdict for a defendant on the ground of contributory negligence is easily stated. Such a motion should only be granted when "the evidence, when considered in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Meeks v. Atkeson*, 7 N.C. App. 631, 636, 173 S.E. 2d 509, 512 (1970), *quoting Brown v. Hale*, 263 N.C. 176, 139 S.E. 2d 210 (1964). Although readily stated, the application of this rule to fact situations like the instant one often creates "a serious and troublesome question" for the trial court. *Carrigan v. Dover*, 251 N.C. 97, 101, 110 S.E. 2d 825, 828 (1959).

Because the trial court runs the risk of invading the province of the jury, directed verdicts are to be sparingly granted. An examination of cases involving facts resembling ours demonstrates that only the strongest evidence does not present a jury question and mandates a directed verdict. We find that plaintiff's evidence does not establish plaintiff's contributory negligence as a matter of law, and the directed verdict must be reversed and the case remanded for a new trial.

Carrigan v. Dover, supra, presents a fact situation analogous to ours. In that case, the plaintiff was traveling between twenty and twenty-five miles per hour in the left lane of a three-lane road where the speed limit was thirty-five miles per hour. It was night and the road conditions were dry. When the car in front of plaintiff signaled to make a left turn, plaintiff moved over to the

middle lane where a tractor-trailer was stopped about forty feet in front of the plaintiff. Although there were streetlights in the area, there were no lights on the tractor-trailer, and it blended into the darkness. Plaintiff testified that he did not see defendant's vehicle until he was twenty-five or thirty-five feet from it. There was no evidence that plaintiff applied his brakes before the collision. Upon these facts our Supreme Court stated:

> [O]pposing inferences are permissible from plaintiff's proof as to whether or not he ought to have seen in the exercise of ordinary care for his own safety the tractor-trailer in time to have avoided running into it, and as to whether or not he used ordinary care in the interest of his own safety, and therefore, the case was properly submitted to the jury.

Id. at 103, 110 S.E. 2d at 829.

Williams v. Express Lines, 198 N.C. 193, 151 S.E. 197 (1930) framed the issue on appeal as "whether it is contributory negligence as a matter of law to run into an unlighted truck in the nighttime, upon a straight road . . . where there is nothing to obscure the vision of the driver. . . ." *Id.* at 195-6, 151 S.E. at 198.

In that case, plaintiff's evidence tended to show that although he kept a proper lookout he did not see the unlighted truck parked on the highway until he was within five or ten feet of it. The evidence further indicated plaintiff was traveling upgrade, that plaintiff's headlights were adjusted downward, and the bottom of the truck was fifty inches off the ground. The Supreme Court found a permissible inference existed that plaintiff's lights did not illuminate the truck and that plaintiff's failure to see the truck prior to the collision was not contributory negligence as a matter of law.

In *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11 (1945), the plaintiff testified that as he approached defendants' truck which was parked on the road, the lights from an approaching car "blinded" him. In holding there was no error in denying defendant's motion for a nonsuit, the Supreme Court noted that while the standard of conduct to be observed by the plaintiff was that of an ordinarily prudent driver, "certainly the ordinarily prudent [person] must be permitted to put some reliance on compliance

with the most common and ordinary laws or rules established for his [or her] protection . . . ." *Id.* at 631, 36 S.E. 2d at 15.

The Court made two applications of this principle, both of which pertain to this case. First, the plaintiff was not required to anticipate that the defendants' truck would be parked on the pavement in the right-hand lane of travel without lights, and second, the plaintiff was not obligated to stop because he was momentarily blinded by the headlights of a passing car. Neither was plaintiff at bar required to anticipate defendant driver's negligence, nor was she required to stop simply because the headlights of the truck shone in her direction. Furthermore, unlike the plaintiff in *Cummins*, plaintiff at bar never testified that the headlights blinded her, only that they "probably helped prevent me from seeing [the trailer] to some degree," giving her even less reason to stop her car.

In *Furr v. Pinoca Volunteer Fire Dept.*, 53 N.C. App. 458, 281 S.E. 2d 174, *review denied*, 304 N.C. 587, 289 S.E. 2d 377 (1981), this Court reversed a directed verdict against plaintiff, reasoning:

> "Plaintiff's inability to stop [her] vehicle within the radius of [her] lights cannot be considered contributory negligence *per se* . . . ." "The duty [of exercising ordinary care] . . . does not extend so far as to require that [the motorist] must be able to bring his [or her] automobile to an immediate stop on the sudden arising of a dangerous situation which [the motorist] could not reasonably have anticipated" . . . . The jury could have found that a person exercising ordinary care under the circumstances here could not reasonably have expected the presence of defendants' truck on the highway and could not reasonably have perceived that presence in time to avoid the collision.

Id. at 464, 281 S.E. 2d at 178-9.

These cases show that whether plaintiff ought to have seen the trailer and, if so, she had adequate time to avoid the collision, are factual questions appropriate for jury resolution. Plaintiff's position receives further support from cases which have affirmed judgments of nonsuits or directed verdicts, or reversed their denial. These cases are factually distinguishable from ours. In these cases, the single permissible inference was plaintiff's con-

tributory negligence. *See, e.g., Whaley v. Adams*, 25 N.C. App. 611, 214 S.E. 2d 301 (1975) (defendant's overturned vehicle had lights on it, and was also framed by light from another vehicle); *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968) (collision occurred in broad daylight where plaintiff had unobstructed view); *Morgan v. Cook*, 236 N.C. 477, 73 S.E. 2d 296 (1952) (plaintiff testified that the lights of defendant's oil truck blinded him).

Although this is a close case, such cases are not appropriately resolved by directed verdicts. *See Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982) (distinguishing situations where evidence permits, but does not compel, finding of contributory negligence); *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978) ("evidence of plaintiff's contributory negligence, while strong, is not so overpowering as to preclude all reasonable inferences to the contrary").

The better procedure to follow in these cases is well-expressed in *Partin v. Power and Light Co.*, 40 N.C. App. 630, 253 S.E. 2d 605, *review denied*, 297 N.C. 611, 257 S.E. 2d 219 (1979), an action to recover for personal injuries sustained when plaintiff came into contact with defendant's high voltage line. This court in *Partin* was responding to a trend from the Supreme Court to place a heavier burden on the defendant in establishing contributory negligence in that type of case than it had formerly. However, their analysis is equally applicable to fact situations such as ours:

> Between those cases holding contributory negligence as a matter of law and those cases holding the evidence was for the jury, the line is thin and at some places obscure or nebulous . . . . [I]t may be advisable for the trial court, in such cases where the line is not clear, to reserve its ruling on a motion for directed verdict until the jury has returned a verdict and then allow or deny a motion for a judgment notwithstanding the verdict under Rule 50(b), which on appeal may obviate the need for a new trial if the appellate court reverses the judgment notwithstanding the verdict.

Id. at 639-40, 253 S.E. 2d at 612-3. In cases such as this one, where a moving vehicle collides with a vehicle stopped in its lane of travel, and the question of plaintiff's contributory negligence is a close one, the trial court should similarly reserve its ruling. The

trial court did not do so, and this case must be remanded for a new trial.

Reversed and remanded for a new trial.

Judges HILL and PHILLIPS concur.

J. DOUGLAS MORETZ v. THE NORTHWESTERN BANK

No. 8310SC323

(Filed 20 March 1984)

Rules of Civil Procedure § 13; Unfair Competition § 1— failure to plead compulsory counterclaim—principles of equity not frustrating unfair trade practices claim

Although plaintiff's claim should have been filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a), for equity reasons, the trial court erred in dismissing plaintiff's cause of action for unfair trade practices in violation of G.S. 75-1.1 which plaintiff alleged defendant committed in the course of legal and financial transactions between 1977 and 1979. The remedies provided pursuant to G.S. 75-1.1 are equitable in nature and should not be frustrated by narrow and strict applications of procedural rules.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff from *Hobgood, Robert, Judge.* Judgment entered 14 December 1982 in WAKE County Superior Court. Heard in the Court of Appeals 15 February 1984.

Plaintiff's complaint alleged that defendant committed unfair trade practices in violation of N.C. Gen. Stat. § 75-1.1 (1981) in the course of legal and financial transactions between 1977 and 1979, in summary, as follows. On 11 November 1976 Clyde C. Baker executed a $3,000.00 note to defendant, payable in one year. Plaintiff signed the note as an endorser. When the note fell due, Baker wrote a worthless check to defendant and never paid the obligation. On 9 December 1977, at defendant's request, plaintiff executed a new promissory note for $3,000.00 plus interest, subject to the condition precedent that defendant pursue all possible efforts to collect the note from Baker, including criminal prosecution for giving defendant a worthless check. When defendant filed criminal charges against Baker, Baker hired defendant's retained

counsel to represent him on the worthless check charge. At the request of defendant's retained counsel, bank officer Jerry Almond wrote to the district court, indicating that Baker's 1976 note had been paid by an endorser and that defendant no longer had any interest in prosecuting Baker. In August, 1978, Baker entered a plea of no contest to the worthless check charge and was given a sixty day suspended jail sentence and fined $25.00. No order of restitution was made. After trial, the letter written by Almond was removed from the court files. In May, 1979, defendant sued plaintiff on the 1977 note. Plaintiff answered defendant's complaint, alleging that defendant had willfully failed to fulfill the condition precedent that defendant would pursue every possible effort to collect the obligation from Baker and that plaintiff was therefore relieved of any obligation to defendant on the 1977 note. Plaintiff prevailed in that action. On appeal, judgment in favor of plaintiff was affirmed by this court in *Northwestern Bank v. Moretz*, 56 N.C. App. 710, 289 S.E. 2d 614 (1982).

Plaintiff filed the present action in July, 1982. Defendant moved to dismiss for plaintiff's failure to state a claim on which relief might be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. The trial court held that under N.C. Gen. Stat. § 1A-1, Rule 13(a) of the Rules of Civil Procedure, plaintiff's claim should have been brought as a compulsory counterclaim in the prior action between the parties, and ordered that plaintiff's action be dismissed. From entry of the order dismissing his action, plaintiff appealed.

Margot Roten and Kimzey, Smith, McMillan & Roten, by Duncan A. McMillan, for plaintiff.

Tharrington, Smith & Hargrove, by John R. Edwards and Elizabeth F. Kuniholm, for defendant.

WELLS, Judge.

Plaintiff contends that the trial court erred in dismissing his suit under Rule 13(a) of the Rules of Civil Procedure[1] because

1. G.S. § 1A-1, Rule 13(a). (a) *Compulsory counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its ad-

plaintiff's G.S. § 75-1.1[2] action for unfair trade practices had not matured at the time plaintiff answered defendant's complaint in the prior action between plaintiff and defendant and was therefore not a compulsory counterclaim. While we must disagree with this argument, we nevertheless hold for other reasons that plaintiff's suit should not have been dismissed under Rule 13(a).

It is clear from plaintiff's complaint that all of the transactions and occurrences constituting defendant's unfair practices had taken place when plaintiff filed his answer in the previous action and plaintiff concedes that when he answered defendant's complaint, he was aware of those events and circumstances. The injury was therefore then extant, the only unknown aspect of the matter being the extent of plaintiff's damages. It would appear that at the trial of the prior action, plaintiff's ultimate and entire damages would have been somewhat speculative since plaintiff incurred post trial damages in defending defendant's action against him at the appellate level.

Our decision, however, is based on principles of equity. The remedies provided pursuant to G.S. § 75-1.1 are equitable in nature and should not be frustrated by narrow or strict applications of procedural rules. At the time plaintiff filed his answer in the prior action, there was a degree of uncertainty as to the maturity of his G.S. § 75-1.1 claim against defendant sufficient to require a careful balancing of the procedural requirements of Rule 13(a) of the Rules of Civil Procedure and the equitable

judication the presence of third parties of whom the court cannot acquire jurisdiction. . .

2. § 75-1.1. *Methods of competition, acts and practices regulated; legislative policy.* (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession. (c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service. (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

remedies of G.S. § 75-1.1. It would offend our sense of justice to allow defendant to avoid answering in this action for its flagrant conduct through a narrow or strict application of the provisions of Rule 13(a) of the Rules of Civil Procedure, thereby defeating the balancing process we deem necessary in this case.

For the reasons stated, the order of the trial court must be reversed and this cause must be remanded for further proceedings on the merits of plaintiff's action.

Reversed and remanded.

Judge BRASWELL concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring.

Though I agree that the judgment appealed from was erroneous and must be reversed and that it would be inequitable and unconscionable to bar plaintiff's claim under the circumstances recorded, I do not agree that except for the equities involved the claim that plaintiff asserts in this suit meets the requirements for compulsory counterclaims laid down in Rule 13(a) of the North Carolina Rules of Civil Procedure. In my opinion Rule 13(a) has no application to plaintiff's claim for two reasons: First, it did not arise out of the transaction or occurrence that the bank's prior suit was based on, as that rule requires. Second, the claim had not ripened into maturity when plaintiff filed answer to the bank's suit, and it is inherent that the only claims that have to, or can, be asserted are those that are in existence.

The transaction or occurrence that the bank's prior suit against plaintiff arose out of was plaintiff's endorsement of the 1977 note executed by Baker; on the other hand the transaction or occurrence that this suit by the plaintiff arose out of was the bank's foundationless lawsuit against him to collect under the endorsement. Until the spuriousness of that suit was established, and it took a trial and appeal adverse to defendant to do it, the present suit had no basis whatever. The defendant's deceitful and duplicitous practices, though plaintiff learned about them before the other suit was brought, were but some of the foundation

stones of the present case. By themselves, however, they had no legal significance and blossomed into a valid claim only when they were joined by plaintiff being damaged by the prior lawsuit and, equally important, by the lawsuit being determined to be unjust and invalid. The minor damage that plaintiff sustained before answer was filed in that case, by having to employ counsel, did not complete the claim asserted in this case. Valid claims and counterclaims alike are based not on hopes, expectations, or future events; but on events that have already come to pass. If defendant had won that case, as it tried to do for three years and could have done up to the very end when its appeal was lost, plaintiff would have had no claim. Thus when answer was filed in that case, plaintiff had no claim to assert—he only had the prospect of a claim, about which Rule 13(a) is silent.

STATE OF NORTH CAROLINA v. PASQUALE DiNUNNO

No. 835SC368

(Filed 20 March 1984)

1. **Criminal Law § 104— joint trial—consideration of evidence on motion for nonsuit**

When defendants are tried jointly and one of them offers no evidence, the evidence of the codefendant may not be considered on a motion to dismiss by the defendant offering no evidence although counsel for defendant cross-examined witnesses for the codefendant.

2. **Narcotics § 4.1— possession of cocaine—insufficient evidence**

The State's evidence was insufficient to show that defendant had possession of cocaine found in a briefcase where it tended to show that defendant was en route to Canada from Florida on a non-commercial plane piloted by the codefendant; the plane landed in Wilmington, and while it was being refueled, the codefendant returned to the plane to get money to pay for the fuel; while at the plane, the codefendant noticed the arrival of law enforcement officers; the codefendant removed a briefcase from the plane and walked quickly into the terminal building, refusing the order of one of the officers to stop; the codefendant left the briefcase next to the wall in the back of the terminal building, out of sight of the officers following him, and returned to the front of the terminal; during this time, defendant remained at the counter near the front of the terminal; and the briefcase was later found to contain in excess of 400 grams of cocaine.

State v. DiNunno

APPEAL by defendant from *Rouse, Judge.* Judgment entered 3 March 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 November 1983.

Defendant Pasquale DiNunno and one David Greenberg were separately indicted on 14 September 1981 for trafficking in cocaine. Over the objection of defendant, his case was joined with Greenberg's for trial before a jury. The trial commenced on 22 February 1982 and occupied several days. The evidence basically tended to show the following:

Defendant DiNunno and Greenberg flew into New Hanover County Airport at approximately 1:20 on the morning of 28 July 1981. The plane was a non-commercial, twin engine plane piloted by Greenberg. The air traffic controller at the airport called the New Hanover County Sheriff's Department and the U.S. Customs office. The plane taxied to the Air Wilmington terminal. The owner of Air Wilmington, Bill Cherry, was called at home by the airport tower and drove to the airport. Cherry arrived at approximately 1:35 a.m. and began to fuel the aircraft in which defendant and Greenberg had arrived. Cherry completed fueling the plane and went into the terminal building. Defendant and Greenberg went into the terminal building to use the restroom. Greenberg indicated to Cherry that he had to go to the aircraft to get some money to pay Cherry for the fuel, which cost over $300.00. Cherry went behind a counter in the terminal and began writing up the bill. DiNunno remained in the building next to the counter.

Meanwhile, Deputy Winston Hemingway and Sergeant William Barefoot of the New Hanover County Sheriff's Department arrived at the Air Wilmington terminal and observed Greenberg getting out of the plane with a briefcase. Greenberg saw the officers and walked hurriedly back into the terminal building with the briefcase despite several requests by Hemingway to stop. Greenberg entered the terminal and without stopping threw some money on the counter and continued walking swiftly toward the rear of the terminal. He put the briefcase down next to a wall near the restrooms and returned to the counter, where defendant DiNunno was still standing. Upon questioning, Greenberg produced identification and denied that the briefcase belonged to him.

The briefcase was placed in the trunk of Sgt. Barefoot's patrol car until a customs official arrived. When the customs official arrived, the briefcase was forced open by Sgt. Barefoot. It contained five packets of white powder. A field test, later confirmed by a laboratory test, showed the powder to be cocaine. Both DiNunno and Greenberg were arrested.

After the State rested against both defendants, defendant DiNunno presented no evidence but his co-defendant, Greenberg, testified in his own behalf. Greenberg testified that DiNunno had told him on the plane before landing that he, DiNunno, was "hot" and, after landing, that a briefcase or valise on the plane was also "hot." Greenberg testified that he was carrying the briefcase into the airport to give to DiNunno in order to get both the briefcase and DiNunno off the plane.

During the course of the trial, counsel for DiNunno made several motions to sever the trial and for mistrial. The motions were denied. At the end of the State's evidence, defendant DiNunno moved that the charges against him be dismissed. The motion was denied. The motion to dismiss was renewed at the close of codefendant Greenberg's evidence and again at the close of all the evidence and denied each time.

On 3 March 1982, DiNunno was found guilty as charged in the indictment of trafficking in cocaine. Greenberg was acquitted. After the verdict was returned, defendant moved again to dismiss and also to set aside the jury verdict. The motions were denied and judgment was entered sentencing defendant to thirty-five years in prison and imposing a $250,000.00 fine. From this judgment, defendant appealed.

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

Burney, Burney, Barefoot, Bain and Crouch, by Roy C. Bain, for defendant appellant.

EAGLES, Judge.

In his first argument, defendant contends that it was error for the trial court to deny his motion to dismiss made at the close of the State's evidence and renewed at the close of defendant

Greenberg's evidence. This presents the question of whether Greenberg's testimony as to defendant DiNunno should have been considered. G.S. 15-173 provides in part:

> When on the trial of any criminal action in the superior or district court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. . . .
>
> If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. . . .

[1] This statute has been interpreted to mean that when defendants are tried jointly and one of them offers no evidence, the evidence of the co-defendant may not be considered on a motion to dismiss by the defendant offering no evidence. *See State v. Frazier*, 268 N.C. 249, 150 S.E. 2d 431 (1966) and *State v. Berryman*, 10 N.C. App. 649, 179 S.E. 2d 875 (1971). The State argues that this rule does not apply because the defendant offered evidence through cross-examination of the witness for co-defendant Greenberg. We do not agree. While the opinions in *Frazier* and *Berryman* do not reveal whether the defendants who did not offer evidence cross-examined witnesses for the defendants who offered evidence, we do not believe we can disregard them in our determination of the instant case. The defendant DiNunno through his attorney cross-examined Greenberg as to the events leading up to and surrounding the arrest. As we read the cross-examination, he did not attempt to elicit substantive evidence beneficial to the defendant DiNunno. This does not constitute introducing evidence within the meaning of G.S. 15-173. We believe that in passing on the motion to dismiss we can consider only the evidence offered by the State before it rested.

[2] The State's evidence tends to show that defendant was en route to Montreal, Canada, from Fort Lauderdale, Florida, on a non-commercial plane piloted by co-defendant Greenberg. The plane landed in Wilmington. While it was being refueled, Greenberg returned to the plane to get money to pay for the fuel. While at the plane, he noticed the arrival of law enforcement officers. Greenberg removed a briefcase from the plane and walked

quickly into the terminal building, refusing the order of one of the officers to stop. He left the briefcase next to the wall in the back of the terminal building, out of sight of the officers following him, and returned to the front of the terminal. The briefcase was later found to contain in excess of 400 grams of cocaine. During this time, the defendant remained at the counter near the front of the terminal.

The only competent evidence tending to show any connection between defendant and the briefcase is the presence of both on the same plane. There was no evidence that the defendant had control of the plane. The State's evidence showed that defendant was in close proximity to the drugs but does not show that he ever had control of the briefcase or knew of its contents. We hold that this does not support a reasonable inference that the defendant had possession of the drugs. *See State v. Weems*, 31 N.C. App. 569, 230 S.E. 2d 193 (1976). Defendant's motion to dismiss should have been allowed.

Reversed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EUGENE SUDELL WILLIS

No. 8310SC223

(Filed 20 March 1984)

1. **Criminal Law § 173— defendant "opening the door" to admission of evidence**

Testimony by one of the arresting officers that he had personally seen defendant selling heroin and testimony by a witness that he did not like defendant because of defendant's involvement in heroin traffic was properly admitted after defendant had "opened the door" by eliciting the officer's admission that he had never seen defendant *buy* heroin, and after defendant "opened the door" by eliciting testimony from the officer that he did not like the defendant and suggesting some sort of "personal vendetta."

2. **Narcotics § 2— indictment charging possession of heroin—no fatal variance**

There was no fatal variance in an indictment which charged possession of "four grams or more, but less than 14 grams of heroin, a controlled substance included in Schedule 1 of the North Carolina Controlled Substance Act," but did not recite the statute number G.S. 90-95(h)(4), or name the offense as traf-

ficking since G.S. 15A-924(a)(6) clearly mandates that such an omission does not constitute grounds for reversal of a conviction.

3. Constitutional Law § 67— exclusion of questions leading to identity of informant—no error

In a prosecution for trafficking in heroin, the trial court properly excluded, at a suppression hearing, questions about the specific time the informant had seen defendant with heroin since defendant was not entitled to know the identity of the informant and there was independent corroboration of the testimony of the chief witness, G.S. 15A-978(b)(2), and since revealing the exact time when the informant had seen the defendant with heroin would tend to reveal his identity and expose him to reprisal. Further, defendant failed to carry his burden of showing prejudice. G.S. 15A-1443(a).

APPEAL by defendant from *Brewer, Judge.* Judgment entered 1 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 26 October 1983.

Defendant was convicted of trafficking in heroin. The State's evidence tended to show: A proven reliable informant came to police headquarters and told officers that defendant was "fixing to leave" a restaurant to make a delivery of heroin. They immediately proceeded to the restaurant, arriving there about five minutes later. The officers found the defendant, who was known to them, standing in the open driver's side door of his wife's car and ordered him to freeze. The officers saw him throw a foil-wrapped packet into the back seat and they immediately arrested defendant and seized the packet. A search of defendant's person revealed another similar packet. The two packets contained about seven grams of a mixture of heroin and quinine.

Defendant testified, and denied possession of any heroin. He also denied any involvement in drug dealing. His evidence on cross-examination tended to show that he was the victim of malicious police behavior, including the theft of certain valuables from his wife's car at the time of his arrest.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Ralph McDonald, for defendant appellant.

JOHNSON, Judge.

[1] Defendant contends that the court erred in admitting evidence that he had been involved in other independent narcotics-

related offenses. The court overruled defendant's objection to testimony by one of the arresting officers that he had personally seen defendant selling heroin. This testimony came, however, after defendant had "opened the door" by eliciting the officer's admission that he had never seen defendant *buy* heroin. A similar situation arose with respect to polygraph evidence in *State v. Small*, 301 N.C. 407, 436, 272 S.E. 2d 128, 145-46 (1980):

> Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself. *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949); *see also State v. Patterson, supra*, 284 N.C. 190, 200 S.E. 2d 16. Here on direct examination defendant testified in such a way as to leave the false impression that the state had refused to accept his offer to submit a polygraph examination. It was proper for the state, therefore on cross-examination to show that, in fact, defendant had been given a polygraph. The state was not, however, required to stop there. Had it done so the jury might have been left with the impression that the state, bearing the burden of proof, did not offer the results of the polygraph because they were unfavorable to it. Both the state and defendant are entitled to a fair trial. Defendant by first injecting the subject of the polygraph into the trial in a manner designed to mislead the jury invited the very cross-examination of which he now complains. His assignments of error directed to this cross-examination are for this additional reason overruled.

Here, defendant attempted to show that he was an innocent victim of conspiratorial police officers who had no reason, other than personal ill-will, to suspect him of drug dealing. The testimony complained of was in direct response to this evidence; therefore, its admission was not error.

The court also allowed the same witness to testify on redirect that he did not like defendant because of defendant's involvement in heroin traffic. Defendant contends that this was prejudicial error. Again, the record shows that defendant "opened the door" by eliciting testimony calculated to show bias and discredit the officer's substantive testimony. He got the officer to admit he did not like the defendant and suggested some sort of

"personal vendetta." Therefore, the State could properly inquire into the reason for this dislike on redirect.

> "A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so."

State v. Patterson, 284 N.C. 190, 196, 200 S.E. 2d 16, 20 (1973), *quoting State v. Glenn*, 95 N.C. 677, 679 (1886), *see also State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977) (fear explained by assault). We hold that defendant, by thus attempting to discredit the officer's testimony, made the witness' explanation admissible.

Defendant also objects to the court's failure to give cautionary instructions after a second witness gave a similar explanation of his dislike. The court stated, "I will allow a motion to strike," but defendant made none. Even assuming that a motion to strike was not required, defendant failed to request the appropriate instruction and thus his assignment must be overruled. *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980).

[2] The indictment charged possession of "four grams or more, but less than fourteen grams of heroin, a controlled substance included in Schedule I of the North Carolina Controlled Substance Act." It did not recite the statute number, G.S. 90-95(h)(4), or name the offense, trafficking. Defendant alleges that this constitutes a fatal variance. However, G.S. 15A-924(a)(6) clearly mandates that such an omission does not constitute grounds for reversal of a conviction. The pleading sufficiently alleged the essential elements of the crime and the other matters required by the statute. G.S. 15A-924(a); *State v. Barneycastle*, 61 N.C. App. 694, 301 S.E. 2d 711 (1983). Nothing in the record suggests defendant was misled in any way. In fact, in one of his pre-trial motions defendant acknowledged that he was charged with trafficking. Although the better practice is to allege both the specific offense and the statute number, the error in this case did not prejudice the defendant.

[3] Defendant contends that the court erred in excluding, at a suppression hearing, questions about the specific time the informant had seen him with the heroin. However, defendant was not entitled to know the identity of the informant, since there was independent corroboration of the testimony of the chief witness. G.S. 15A-978(b)(2); *State v. Bunn*, 36 N.C. App. 114, 243 S.E. 2d 189, *cert. denied*, 295 N.C. 261, 245 S.E. 2d 778 (1978). In addition, as the court pointed out in ruling on the questions, revealing the exact time when the informant had seen the defendant with heroin would tend to reveal his identity and expose him to reprisal. It is apparent that the informant had left the scene shortly before; he came running into the police office and announced that defendant "was fixing to leave," and that officers had better hurry up if they "wanted" defendant. Fixing the *exact* time of his presence would add nothing to this testimony. Thus, the trial judge properly excluded the evidence in the exercise of his duty to control the conduct and course of the trial. *See State v. Covington*, 290 N.C. 313, 334, 226 S.E. 2d 629, 644 (1976); 1 Brandis, N.C. Evidence, § 25 (1982). Under the circumstances of the case, then, we hold that the court did not abuse its discretion in sustaining objections to the questions. Assuming, *arguendo*, that the ruling was in error, we also hold that defendant has failed to carry his burden of showing prejudice. G.S. 15A-1443(a). He has not shown, nor does the record suggest, that the informant participated in any transaction or how revealing the exact time of the informant's presence would be relevant or help his defense. *See State v. Cherry*, 55 N.C. App. 603, 286 S.E. 2d 368, *disc. rev. denied*, 305 N.C. 589, 292 S.E. 2d 572 (1982).

Finally, defendant assigns as error the accumulation of the foregoing alleged errors. Because of our disposition of them, this assignment is meritless. We conclude that defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge VAUGHN and Judge WELLS concur.

State v. Yarn

STATE OF NORTH CAROLINA v. JEROME YARN

No. 835SC609

(Filed 20 March 1984)

1. **Criminal Law § 66.16— in-court identification—independent origin from photographic identification—sufficiency of evidence**

The evidence was sufficient to support the trial court's determination that a burglary victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification where the victim testified: the intruder was in her presence for 10-15 minutes; for part of that time, the intruder attempted to cover his face, but she nevertheless observed the intruder's face while he squatted at the foot of her couch for more than seven minutes; her attention was focused directly on the intruder's face during these seven minutes; the intruder could be seen in the light of a hall light and an outside street light; she recognized the intruder as someone she had seen before in the vicinity of her trailer park; and she had described the intruder previously to the police as a big black man that she had seen before in the trailer park.

2. **Criminal Law § 89.2— evidence competent for corroboration**

Evidence concerning the sheriff's response to a vandalism call at the victim's trailer park a month after the burglary in question was properly admitted where its purpose was to illustrate testimony as to the location of windows in an office of the trailer park from which a witness saw defendant on the date in question and not to link defendant with that vandalism.

3. **Criminal Law § 138— sentencing hearing—court's inadvertent reference to wrong crime**

Defendant was not prejudiced by the trial court's inadvertent reference at the sentencing hearing to the defendant having been convicted of first degree rape when in fact defendant was convicted of first degree burglary.

APPEAL by defendant from *Lane, Judge.* Judgment entered 7 October 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 January 1984.

Defendant was tried on charges of first degree burglary during the 5 October 1982 criminal session of New Hanover County Superior Court. The State's evidence tended to show that during the early morning hours of 10 March 1982, defendant broke and entered the trailer of Mrs. Mickie Hasty, with the intent to commit a felony therein, to wit: rape. Defendant denied the commission of the crime and presented an alibi defense. The jury returned a guilty verdict, and defendant received a twenty year sentence. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Newton G. Pritchett, Jr., for the State.

Sperry, Scott, Cobb & Cobb, by W. Allen Cobb, Jr., for defendant-appellant.

EAGLES, Judge.

[1] Defendant first assigns as error that the trial judge improperly admitted an in-court identification of defendant by Mrs. Hasty. Defendant contends that, in light of a pretrial photographic lineup that Mrs. Hasty viewed, the State did not present sufficient evidence to show that Mrs. Hasty's in-court identification of defendant as the perpetrator of the crime was of independent origin. We do not agree.

Identification evidence must be excluded as violating the due process clause where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Even if pretrial photographic or lineup identification procedures are found to be impermissibly suggestive, an in-court identification by a witness who participated in the pretrial identification procedure is nevertheless admissible "if the trial judge determines from the evidence presented that the in-court identification is of independent origin, based on the witness' observations at the time and scene of the crime, and thus not tainted by the pretrial identification procedure." *State v. Thompson*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981). Factors to consider in determining whether the in-court identification was of independent origin include:

(1) The opportunity of the witness to view the accused at the time of the crime;

(2) The witness' degree of attention at the time;

(3) The accuracy of the witness' prior description of the accused;

(4) The witness' level of certainty in identifying the accused at the time of the confrontation; and

(5) The time between the crime and the confrontation.

State v. Thompson, supra.

Here, during a *voir dire* hearing on the admissibility of an in-court identification of the defendant by Mrs. Hasty, the court heard testimony concerning a previous photographic lineup viewed by Mrs. Hasty. The court declined to admit testimony concerning the photographic lineup and refused to allow a file folder containing seven of the photographs shown at the previous photographic lineup to be admitted into evidence because it did not contain all of the photographs shown to Mrs. Hasty. There was no finding that the pretrial photographic lineup was impermissibly suggestive; but even if there had been, there was competent evidence to support the trial judge's finding that Mrs. Hasty's in-court identification of defendant was of independent origin, untainted by the pretrial identification procedure. The State presented competent evidence through Mrs. Hasty's testimony to show: that the intruder was in her presence for ten to fifteen minutes on 10 March 1982; that, for part of that time, the intruder attempted to cover his face; that she nevertheless observed the intruder's face while he squatted at the foot of her couch for more than seven minutes; that her attention was focused directly on the intruder's face during these seven minutes; that the intruder could be seen in the light of a hall light and an outside street light; that she recognized the intruder as someone that she had seen before in the vicinity of her trailer park; and that she had described the intruder previously to the police as a big black man that she had seen before in the trailer park. This evidence is sufficient to support the trial judge's conclusion of law that Mrs. Hasty's in-court identification of defendant was of independent origin and was admissible. *State v. Thompson, supra.* Because we hold that the in-court identification was admissible, we also find no merit in defendant's contention that the trial judge improperly denied defendant's motion for a directed verdict based on improper admission of this identification.

[2] Defendant assigns as error the trial court's admission of evidence concerning the sheriff's response to a vandalism call at Mrs. Hasty's trailer park one month after the crime for which defendant was being tried. This evidence was admitted, not to show that vandalism took place in April of 1982 nor to link defendant with that vandalism, but to illustrate prior testimony as

to the location of windows in an office at the trailer park that would allow a view of the trailer in which defendant lived. The owner of the trailer park had testified that, while looking out his office window, he had seen defendant leave his trailer between 8:00 a.m. and 8:30 a.m. on 10 March 1982, which contradicted defendant's alibi testimony. Since defendant had challenged the owner's testimony that he could see the trailer from the office building, evidence to show the location of windows in the office was relevant. We note that the trial judge instructed the jury not to consider any matter with reference to the alleged vandalism. Absent any evidence of a change in the condition of the premises between March 1982 and April 1982, we find that testimony to show where windows were located in the office in April of 1982 was not too remote to be material to the question of where the windows were in March of 1982. There was no error in admitting this testimony.

[3] Defendant assigns as error the fact that the trial judge, at the sentencing hearing, inadvertently referred to the defendant having been convicted of first degree rape when in fact the defendant was found guilty of first degree burglary. The judgment of record in this case clearly stated that the defendant was convicted of first degree burglary. The trial judge in his instructions and in every other reference to the charge properly identified the charge as first degree burglary. This was clearly a nonprejudicial misstatement, a *lapsus linguae,* made after guilt had been determined and the sentencing hearing had been completed. Since no prejudice resulted, we find no error in the sentencing phase of defendant's trial.

We have carefully examined defendant's remaining assignments of error and find them to be without merit.

No error.

Judges HEDRICK and BRASWELL concur.

BETTY J. PHILLIPS v. KINCAID FURNITURE COMPANY, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8325SC365

(Filed 20 March 1984)

Master and Servant § 108.1— unemployment compensation—misconduct precluding recovery

The trial court erred in reversing an Industrial Commission decision finding that plaintiff should be disqualified from receiving unemployment compensation benefits by reason of misconduct since there was ample evidence to support the Commission's finding that claimant "refus[ed] to do her assigned work as instructed by the supervisor in charge" and since the claimant's action in refusing to proceed with her work as instructed constituted misconduct. G.S. 96-15(i).

APPEAL by the Employment Security Commission and the employer, Kincaid Furniture Company, from *Beaty, Judge.* Judgment entered 2 November 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 6 March 1984.

This is an appeal from an order of the Superior Court reversing the Employment Security Commission's denial of claimant's application for unemployment benefits. The record discloses the following:

Betty J. Phillips, claimant, was employed by Kincaid Furniture Company at its place of business in Hudson, North Carolina, as a glaze wiper. On 4 May 1982, she was discharged from her job. Claimant then filed an initial claim for unemployment benefits. Because a question was raised as to whether Ms. Phillips should be disqualified from receiving benefits by reason of misconduct, her claim was referred to an adjudicator pursuant to N.C. Gen. Stat. Sec. 96-15, who determined that she was not disqualified from receiving benefits. The employer appealed the decision, and an appeals referee, after an evidentiary hearing, made findings of fact and conclusions of law and held that claimant was disqualified for unemployment benefits by reason of misconduct. Ms. Phillips appealed this decision to the Commission, which made findings of fact that, except where quoted, are summarized as follows:

On 4 May 1982, Ms. Phillips was instructed by her supervisor "to do her share of the work." Claimant demanded to speak with

her regular supervisor, who was not present at the time. She then told the supervisor in charge that "she did not work for him and did refuse to work," whereupon she was discharged "for wilfully and without good cause refusing to do her assigned work as instructed by the supervisor in charge."

The Employment Security Commission then entered an order denying claimant's application for benefits. Ms. Phillips appealed to the Superior Court, which reversed the decision of the Commission and held that claimant is entitled to unemployment benefits "for the period beginning 6 June 1982." Employer Kincaid Furniture Company and the Employment Security Commission appealed.

No counsel for claimant, appellee.

Kathryn S. Aldridge for the Employment Security Commission, appellant, and Kennedy, Covington, Lobdell and Hickman, by Stephen M. S. Courtland, for Kincaid Furniture Company, Inc., appellant.

HEDRICK, Judge.

The standard of review for an appellate court in reviewing the action of the Employment Security Commission is established by N.C. Gen. Stat. Sec. 96-15(i): "In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." This part of the statute has been discussed by our courts many times. *See e.g., In re Baptist Children's Homes v. Employment Security Comm.*, 56 N.C. App. 781, 783, 290 S.E. 2d 402, 403 (1982):

> The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.

Bearing in mind the standard by which we are to be guided, we turn to the record to determine whether there was evidence to support the findings of fact made by the Commission. We note the testimony of Bernard Edwards, assistant foreman:

Q. Tell me what you remember about, any, excuse me, any interaction you may have had with Ms. Phillips on May the 4th of this year?

A. I gave her instructions to do a job and she refused to do it, said she didn't work for me.

Q. What, what did you tell her to do?

A. Well she buffs glaze, that's what she does for, that's what her job was, and she said she didn't work for me, and I told her Blaine was gone, he wouldn't be back til after dinner. She said she wasn't going to do nothing until she talked to Blaine. I said, well, either one you want to do, either work or I'll clock you out. She said, that's up to you, but I'm not going to do nothing until I talk to Blaine.

Q. So you clocked her out?

A. I clocked her out and headed toward the office with her and when I got up to the office she wasn't there, she was gone. I don't know where she went, must have went on home I guess.

Ernie McAteer, personnel manager, testified as follows:

Q. Now how did she come to be unemployed, did you discharge her, did she quit or what happened?

A. Well, she was, told by, the assistant foreman in the finishing room, Mr. Edwards, that is here with me, to, she was given instructions by him of which she, refused to, comply with. She told that she didn't work for him. The foreman over the entire department was not present at the time, he was, he was not in the plant, and, of course Mr. Edwards was in charge and had all the authority of . . .

Q. Okay.

A. . . . the foreman when, when he is not there.

Claimant, in her testimony, denied telling Mr. Edwards that she did not work for him and alleged that she refused to work only because other employees were attempting to provoke a fight.

We think there was ample evidence to support the Commission's finding that claimant "refus[ed] to do her assigned work as

instructed by the supervisor in charge" on 4 May 1982. Although the evidence regarding the circumstances surrounding Ms. Phillips' discharge was controverted, the Commission made specific findings of fact resolving the controversy. These findings are supported by the evidence and thus are conclusive on appeal.

We turn now to the question whether the Commission's findings of fact support its conclusions of law and decision. In denying claimant's claim for benefits, the Commission concluded that "the claimant's wilful conduct was insubordinate and . . . without good cause," and constituted "misconduct connected with the work."

"Misconduct," while not defined by statute, has been the subject of much discussion by our courts. In *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 359 (1982), our Supreme Court adopted the following definition:

> [M]isconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent.

The Court went on to say:

> However, a violation of a work rule is not wilful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. . . . This Court has defined a "good cause" to be a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.

Id. at 375-76, 289 S.E. 2d at 359.

We think it clear that claimant's action in refusing to proceed with her work as instructed constitutes misconduct under the definition adopted in *Intercraft*. Further, we think her alleged fear of other employees, uncommunicated to her supervisor, did not constitute "good cause" under *Intercraft*. We thus hold the Commission's decision supported by its conclusions of law which are in turn supported by findings of fact. The Superior Court erred in its holding to the contrary.

The result is: the judgment of the Superior Court is reversed and the cause is remanded to the Superior Court for entry of an

order reinstating the order of the Employment Security Commission disqualifying claimant from receiving unemployment insurance benefits.

Reversed and remanded.

Judges HILL and JOHNSON concur.

DAVID H. RITTER v. BEVERLY J. KIMBALL

No. 8320DC189

(Filed 20 March 1984)

Divorce and Alimony § 25; Rules of Civil Procedure § 26— child custody—discovery from Department of Social Services—validity of limitation

In a child custody case in which plaintiff sought leave to depose the county Department of Social Services, the trial court's limitation of plaintiff's discovery by denying plaintiff access to the names of, or identifying information regarding, persons making reports of child abuse and neglect was permissible under G.S. 1A-1, Rule 26(c) to protect such persons "from unreasonable annoyance, embarrassment, oppression, or undue burden," and the trial court did not abuse its discretion in directing the Department of Social Services to appear for a deposition and produce documents in its possession subject to such limitation.

APPEALS by plaintiff and by Moore County Department of Social Services, movant, from *Burris, Judge.* Order entered 4 November 1982 in District Court, MOORE County. Heard in the Court of Appeals 5 March 1984.

J. Douglas Moretz, P.A., by Michael L. Stephenson and J. Douglas Moretz, for plaintiff.

Seawell, Robbins, May & Rich, by P. Wayne Robbins, for movant Moore County Department of Social Services.

WHICHARD, Judge.

I.

Plaintiff sued his former wife for custody of their minor child. He sought leave to depose the Moore County Department of

Social Services (DSS) "regarding matters concerning the care, custody, maintenance and tuition and alleged allegations of neglect of the . . . child." A subpoena was issued directing DSS to appear for a deposition and to produce any documents in its possession containing information regarding the child and his parents.

Pursuant to G.S. 1A-1, Rule 26(c), DSS moved for a protective order "on the ground that said deposition would require [it] to d[i]vulge certain writings from its juvenile files which it believe[d] to be privileged communications." The court heard arguments of counsel, made findings of fact regarding the motion and subpoena, and entered the following pertinent conclusions of law:

> 1. That there exists no compelling reasons [sic] to disclose the names of parties making reports of abuse and neglect to [DSS] and that there is an overriding interest on the part of [DSS] to protect against such revelation.
>
> 2. That under G.S. 7A-544, all information concerning reports of neglect and abuse received by [DSS] shall be held in "strictest confidence" by [DSS].
>
> 3. That requiring [DSS] to disclose parties making initial abuse and neglect reports would have a chilling [e]ffect upon the duty of any person or institution to report suspected child abuse or neglect cases.
>
> . . .
>
> 5. That the mere inconvenience of [plaintiff] in having to seek an alternative method of obtaining the requested information should not override the overall philosophy of the Juvenile Code to keep juvenile records confidential.
>
> 6. That the file has been reviewed by this Court in chambers and this Court has exorcised [sic] the references to the party making the reports and the name of the reporter from the record. That said information withheld from the plaintiff to this action is not of overriding relevancy to the suit in question and same is not otherwise readily available to the plaintiff through the use of other means.
>
> 7. That the Court has deleted said names of the reporting parties from the summary given to the Court and that

> the balance of said reports supplied to the Court by [DSS] will not be subject to the protective order.

It thereupon ordered that DSS "make available to the plaintiff's attorney . . . a copy of said revised Court summary deleting the names of the reporter of abuse or neglect and such information surrounding the report which may lead to the identity of said reporter."

Plaintiff appeals from the limitations on discovery. DSS appeals from the allowance of discovery.

II.

G.S. 1A-1, Rule 26(c) provides, in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge . . . may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had; . . . (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . .

An "order under Rule 26(c) is discretionary and is reviewable only for abuse of that discretion." *Booker v. Everhart*, 33 N.C. App. 1, 9, 234 S.E. 2d 46, 53 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E. 2d 360 (1978).

The court grounded limitation of plaintiff's discovery on the requirement that information received by DSS concerning reports of child abuse and neglect "shall be held in strictest confidence." G.S. 7A-544. It perceived that "requiring [DSS] to disclose parties making initial abuse and neglect reports would have a chilling [e]ffect upon the duty of any person or institution to report suspected child abuse or neglect cases." The statutory provision, and the court's proper perception of its purpose, *viz*, to encourage reporting of abuse and neglect, provided ample basis for an exercise of judicial discretion to deny plaintiff access to names of, or identifying information regarding, persons making such reports. The limitation of discovery was designed to protect such persons "from unreasonable annoyance, embarrassment, oppression, or undue burden." G.S. 1A-1, Rule 26(c). Such limitation was

permissible under the rule, and we find no abuse of discretion therein.

III.

G.S. 1A-1, Rule 26(c) further provides: "If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." "It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E. 2d 479, 480, *disc. rev. denied*, 293 N.C. 589, 239 S.E. 2d 264 (1977).

The materials subjected to discovery are not in the record, and thus are not before us for review. The limitations on discovery appear adequate to address the policy concerns which DSS urges as the basis for a finding of abuse of discretion. G.S. 1A-1, Rule 26(c) clearly grants discretion to permit discovery when the court fully or partially denies a motion for a protective order, and neither the record nor the briefs contain any basis for finding an abuse in the exercise of that discretion to permit the limited discovery provided for here. We thus find no abuse of discretion in the allowance of discovery.

IV.

Because the record reveals no abuse of discretion in either the limitation or the allowance of discovery, the order is

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

State v. Warren

STATE OF NORTH CAROLINA v. ALTON EARL WARREN

No. 834SC859

(Filed 20 March 1984)

1. **Criminal Law §§ 26.5, 92.3— failure to join offenses—indictments in subsequent charges not brought when trial on first charge had**

G.S. 15A-926(c)(2), dealing with failure to join related offenses, does not apply when indictments in the subsequent charges had not been brought when trial was had on the first charge. Therefore, where indictments for burglary and larceny were non-existent when defendant was tried for murder, the trial court properly denied his motion to dismiss the charges in this case for the State's failure to join him with the charge of murder at defendant's earlier trial.

2. **Criminal Law § 26— rights against double jeopardy not violated with separate trials for murder and for burglary and larceny**

Defendant's rights against double jeopardy, under the Fifth Amendment to the Constitution of the United States, were not violated where he was tried for burglary and larceny after being tried for murder where the evidence tended to show that defendant went to the victim's residence on the day of her death, whereupon she admitted defendant, who was her friend and lover; after a brief interlude, the victim was shot and killed with a gun defendant brought with him to her residence; after realizing the victim was dead, defendant attempted to leave the scene in his own car; when his car became stuck in a ditch, defendant returned to the victim's residence, broke in, took her purse and car keys and left the scene. Such evidence showed separate crimes for which defendant was not tried at his first trial, and thus the State was not estopped or barred from proceeding to trial on the charges in this case.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 30 March 1983 in Duplin County Superior Court. Heard in the Court of Appeals 10 February 1984.

At the 12 July 1982 term of Superior Court for Duplin County, defendant was tried for the murder of Dorothy Peterson which occurred on 28 January 1982. Defendant was convicted of manslaughter and received a sentence of six years. On 17 January 1983, defendant was indicted for first degree burglary of Ms. Peterson's home on 28 January 1982 and for the larceny of Ms. Peterson's purse following the breaking and entering of her residence. Upon defendant's convictions on these charges, defendant was sentenced to prison terms of fourteen years for the burglary

and three years for the larceny. From these sentences, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Bailey & Raynor, by Edward G. Bailey and Glenn O'Keith Fisher, for defendant.

WELLS, Judge.

[1] In his first assignment defendant contends that the trial court erred in denying his motion to dismiss the charges in this case for the state's failure to join them with the charge of murder at defendant's 1982 trial. Defendant contends that at the time of his murder trial the prosecutor had sufficient evidence to warrant trying defendant on the burglary and larceny charges, and that he was therefore entitled to dismissal pursuant to N.C. Gen. Stat. § 15A-926(c) (1983), which provides:

. . .

(c) Failure to Join Related Offenses.

(1) When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial must be granted unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to make this motion constitutes a waiver of any right of joinder of offenses joinable under subsection (a) with which the defendant knew he was charged.

(2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial, and must be granted unless

a. A motion for joinder of these offenses was previously denied, or

b. The court finds that the right of joinder has been waived, or

> c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.
>
> . . .

Accepting for the sake of defendant's argument that this record tends to show that the prosecutor had sufficient evidence to try defendant on the burglary and larceny charges when defendant was tried for murder, our supreme court held in *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 504 L.Ed. 2d 281 (1977), that G.S. § 15A-926(c)(2) does not apply when indictments in the subsequent charges had not been brought when trial was had on the first charge. In the case before us, the indictments for burglary and larceny were nonexistent when the defendant was tried for murder. Although we do not find the court's logic in *Furr* persuasive, we are, nevertheless, bound by the decision. The court's decision in *Furr* is clearly controlling in this case, and this assignment of error must therefore be overruled. *See also State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980), following and relying on *Furr*.

[2] In his second assignment of error, defendant contends that his rights against double jeopardy, under the Fifth Amendment to the Constitution of the United States, were violated in this trial. We disagree. Although it is clear from the record in this case that the state, in effect, put on its murder case in the trial of defendant for burglary and larceny, the ultimate issues tried were not the same. The evidence in the case tends to show that defendant went to Ms. Peterson's residence on the day of her death, whereupon she admitted defendant, who was her friend and lover. After a brief interlude, Ms. Peterson was shot and killed with a gun defendant brought with him to her residence. After realizing Ms. Peterson was dead, defendant attempted to leave the scene in his own car. When his car became stuck in a ditch, defendant returned to the Peterson residence, broke in, took her purse and car keys and fled the scene. Such evidence shows separate crimes for which defendant was not tried at his first trial, and thus the state was not estopped or barred from proceeding to trial on the charges in this case. *See State v. Furr, supra.* This assignment is overruled.

We have examined defendant's other assignments of error and the arguments in their support, find them to be entirely without merit and therefore overrule them without discussion.

No error.

Judge BRASWELL concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the defendant's conviction should be set aside because of the State's failure to indict and try him for burglary at the same time he was indicted and tried for murder. Except for an empty pocketbook of little intrinsic or probative value, virtually all the evidence in this case was introduced in the murder case and was available to the State before they elected to try him just for murder. The State had evidence that the decedent's house was broken into, she was killed therein, her car keys, pocketbook, and car were taken, and defendant had the car and keys. Finding the empty pocketbook, which the State already had evidence of, added nothing material to the case, in my opinion. I deduce from the record that the State elected not to prosecute defendant for burglary at first because it was expected that he would be convicted of murder and punished to their satisfaction. Having so decided and subjected the defendant to the jeopardy of trial, the State should be bound thereby, even though the defendant was convicted only of manslaughter and received a lighter sentence than the State expected. Nor do I think that *State v. Furr, supra,* is controlling, as the majority holds. In that case, according to the Court, there was no indication in the record that the subsequent indictments were held back pending the outcome of the first trial; in this case, however, the indication is otherwise, at least to me.

AVCO FINANCIAL SERVICES v. CHARLES W. ISBELL

No. 8311DC431

(Filed 20 March 1984)

Execution § 1— exemptions from collection of judgment—motor vehicles

Under the statute setting forth the exemptions of a judgment debtor from the collection of the debt, G.S. 1C-1601, section (a)(3) does not limit the exemption for a motor vehicle under any section to a $1,000 interest in one motor vehicle but applies only to exemptions claimed under that section, and section (a)(2) permits the debtor to exempt "any property" up to $2,500 in value except that described in the "residence exemption" of section (a)(1), whether it be motor vehicles, other personal property, tools of the trade, or property not qualifying for any other exemption. Therefore, a judgment debtor could exempt from the collection of the judgment his interest in a Chevrolet van in the amount of $1,000 under section (a)(3) and the remaining interest in the van, worth $211.64, and his interest in a motorcycle, worth $1,200, under the "wild card" provision of section (a)(2).

APPEAL by defendant from *Pridgen, Judge.* Order entered 31 January 1983 in District Court, LEE County. Heard in the Court of Appeals 8 March 1984.

This is an appeal by defendant, judgment debtor, from a court order denying his motion to claim his interest in certain property as exempt from the claims of a judgment creditor pursuant to N.C. Gen. Stat. Secs. 1C-1601-1604.

F. Jefferson Ward, Jr., for plaintiff, appellee.

Cameron & Hager, P.A., by Richard B. Hager, for defendant, appellant.

HEDRICK, Judge.

The following facts are not controverted:

On 30 August 1982 judgment was entered against the defendant and for the plaintiff in the amount of $800.00. On 5 December 1982 defendant was served by plaintiff with formal notice of defendant's right to exempt certain property from collection of the judgment. On 3 January 1983 defendant filed a motion to claim exempt property pursuant to N.C. Gen. Stat. Sec. 1C-1603. In this motion defendant claimed as exempt his interest in a 1981 Chevrolet van, valued at $1,211.64, and his interest in a

1978 Harley motorcycle, valued at $1,200.00. Plaintiff filed an objection to defendant's motion, and the matter came on for hearing before Judge Pridgen on 31 January 1983. From an order denying defendant's motion and directing levy and execution on the van and motorcycle, defendant appealed.

N.C. Gen. Stat. Sec. 1C-1601 in pertinent part provides:

> (a) Exempt property.—Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of his creditors:
>
> (1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor . . . uses as a residence. . . .
>
> (2) The debtor's aggregate interest in any property, not to exceed two thousand five hundred dollars ($2,500) in value less any amount of the exemption used under subdivision (1).
>
> (3) The debtor's interest, not to exceed one hundred [sic] dollars ($1,000) in value, in one motor vehicle.

The statute provides additional exemptions for the debtor's interests in personal property, "tools of the trade," life insurance, health aids, and personal injury awards. The sections concerning personal and business property contain a dollar limit on the amount of exemption available to the debtor under these sections.

In the instant case, defendant seeks to exempt his interest in the Chevrolet van in the amount of $1,000.00, the statutory maximum available under N.C. Gen. Stat. Sec. 1C-1601(a)(3). He seeks to shelter his remaining interest in the van, worth $211.64, and his interest in the motorcycle, worth $1,200.00, under N.C. Gen. Stat. Sec. 1C-1601(a)(2), the so-called "wild card" provision. Plaintiff, on the other hand, contends that the statute clearly limits defendant's available exemption to a maximum $1,000.00 interest in *one* motor vehicle. Resolution of the controversy thus requires this Court to consider and, if necessary, to interpret these statutory provisions. Both parties agree that the case is one of first impression in this State.

The law governing statutory construction is well-settled. When the language of a statute is clear and without ambiguity, "there is no room for judicial construction," and the statute must be given effect in accordance with its plain and definite meaning. *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E. 2d 849, 854 (1980). When a literal interpretation of statutory language yields absurd results, however, or contravenes clearly expressed legislative intent, "the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921). *See also Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979).

Turning now to the statutory provisions at issue in the instant case, we think the language of N.C. Gen. Stat. Sec. 1C-1601 (a)(2) is clear and free from ambiguity. The provision states that the debtor may exempt "any property" under its terms, and contains only one qualification: that the exemption is available only to debtors not claiming an equivalent or larger exemption under N.C. Gen. Stat. Sec. 1C-1601(a)(1)—the "residence exemption." Under the clear language of Sec. 1C-1601(a)(2), then, a debtor may use the exemption to shelter "any property" except that described in the "residence exemption," whether it be motor vehicles, other personal property, "tools of the trade," or property not qualifying for any other exemption. Nor do we believe this literal interpretation leads to absurd results, or contravenes the legislative purpose. It seems clear that the purpose of the exemption, consistent with the overall statutory scheme, is to permit the debtor some flexibility in determining which of his assets should be sheltered from creditors' claims. We see no reason to treat motor vehicles differently from other forms of property in according protection to this legislative goal.

Plaintiff contends that the language of N.C. Gen. Stat. Sec. 1C-1601(a)(3) is equally clear and limits defendant's available exemption under *any* section to a $1,000.00 interest in *one* motor vehicle. While we agree that the language of Sec. 1C-1601(a)(3) is clear and unambiguous, we do not agree with plaintiff's contention regarding its meaning. We believe the limits contained in subsection (a)(3) apply only to exemptions claimed *under that subsection* and have no application to exemptions claimed under subsection (a)(2).

The order is reversed and the cause remanded to the District Court for entry of an order consistent with this opinion.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

PATRICIA H. DOUGLAS v. J. C. PENNEY COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 837SC364

(Filed 20 March 1984)

Master and Servant § 108.1— denial of unemployment compensation—discharge pursuant to misconduct

The evidence supported the Commission's findings of fact and the facts found supported the Commission's conclusions of law and resulting decision that claimant was discharged from her work for misconduct connected with work pursuant to G.S. 96-14(2) by, as a security officer, discussing security matters with store sales personnel. Because claimant was discharged for misconduct connected with work, she was properly denied benefits under the unemployment compensation statute.

APPEAL by claimant from *Phillips, Herbert O., III, Judge.* Judgment entered 19 October 1982 in Superior Court, WILSON County. Heard in the Court of Appeals 5 March 1984.

Claimant was employed as a security officer with J. C. Penney Company, from 16 September 1981 until 12 April 1982, at which time she was discharged for violating a company rule prohibiting discussion of security matters with non-security employees. The trial court affirmed the decision of the Employment Security Commission denying claimant benefits after finding that she was discharged pursuant to G.S. 96-14(2) for misconduct connected with work.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for claimant-appellant.

C. Coleman Billingsley, Jr., for defendant-appellee Employment Security Commission of North Carolina.

VAUGHN, Chief Judge.

Claimant, in her sole assignment of error, excepts to the factual findings and legal conclusion of the Employment Security Commission. On appeal, our scope of review is to determine:

> (1) whether there was evidence before the Commission to support its findings of fact; and
>
> (2) whether the facts found support the Commission's conclusions of law and resulting decision.

Intercraft Industries Corp. v. Morrison, 305 N.C. 373, 289 S.E. 2d 357 (1982).

The Employment Security Commission made the following findings of fact:

> 1. Claimant last worked for J. C. Penney Company on April 12, 1982. From April 11, 1982 until April 17, 1982, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a).
>
> 2. Claimant was discharged from this job for violating a company rule which states that security officers are prohibited from discussing security matters with store sales personnel. These matters were to be discussed solely with management and other security officers.
>
> 3. Claimant violated this rule on the following occasions: On April 7, 1982, claimant, a security officer, discussed with two sales clerks the termination of another salesperson who had been caught taking money from the cash register and voiding sales slips.
>
> 4. Claimant was or should have been aware of this rule because she was advised of said rule when hired.

The record reveals plenary evidence to support the Commission's findings. Counsel for claimant, in his brief, argues that Finding of Fact Number Four is unsupported by the evidence. Although this contention is not made the basis of an exception or assignment of error and, thus, does not require our review, we, nevertheless, note that store manager Mr. Hacker's testimony that he informed claimant of the rule when she was hired directly

supports Finding of Fact Number Four and renders groundless this contention. *See Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976); Rule 10(a), Rules of Appellate Procedure.

Claimant was denied benefits after it was determined that she was discharged for misconduct connected with work pursuant to G.S. 96-14(2). Misconduct, as that term has been construed by our courts, is conduct evincing a willful or wanton disregard for an employer's interest, as demonstrated by the following types of conduct:

> (1) deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee;
>
> (2) carelessness or negligence of such degree or recurrence that it manifests equal culpability, wrongful intent, or evil design, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

In re Collingsworth, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973); *see also Intercraft Industries Corp. v. Morrison, supra; In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980).

Mere inefficiency or unsatisfactory job performance does not amount to misconduct. *In re Kidde & Co. v. Bradshaw*, 56 N.C. App. 718, 289 S.E. 2d 571 (1982). Nor does violation of a work rule constitute misconduct if the evidence shows that the employee's actions were reasonable and taken with good cause, good cause being that deemed by reasonable men and women valid and not indicative of an unwillingness to work. *Intercraft Industries Corp. v. Morrison, supra.*

Claimant, who was informed of the company's confidentiality rule on at least one occasion, contends that because she did not intentionally violate the rule, she cannot be guilty of misconduct. We disagree. Confidentiality is an integral part of a store's security. By breaking confidentiality, claimant violated a standard of behavior the company rightfully expected of its security employees. Claimant's actions, even if not intentional, manifested such a degree of carelessness as to show a substantial disregard of her employer's interests and of her duty to protect those interests. The evidence, furthermore, did not show claimant's viola-

tion of the company work rule to be reasonable and with good cause. Claimant's actions, in short, constituted misconduct.

Claimant's attorney, in his brief, raises a question of due process, contending that claimant was denied such when her motion to remand in order to hear testimony from two of the company's employees was denied by the Employment Security Commission. Claimant had a hearing with the opportunity to present and refute any evidence. That claimant chose not to call these witnesses at the initial hearing does not entitle her to a rehearing. It was within the discretionary power of the Commission to deny claimant's motion to remand. *See* G.S. 96-15(e). Claimant, who received both administrative and judicial review, has been accorded procedural due process.

The Employment Security Commission correctly applied the law to the facts and we repeat its apposite conclusion that

> [C]laimant violated a known company rule. Furthermore, the rule is reasonable and claimant's employer has the right to expect that its employees will not violate the rule. Claimant's violation of the rule evinced a wilful disregard of the employer's interest.
>
> Claimant must, therefore, be disqualified for benefits for having been discharged from the job for misconduct connected with the work.

The trial court order affirming this decision must be and is affirmed.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DONALD EUGENE WHITE

No. 8326SC944

(Filed 20 March 1984)

Burglary and Unlawful Breakings § 5.1; Criminal Law § 60.5— breaking or entering—fingerprints—time of impression—insufficiency of evidence

The State's evidence was insufficient to support conviction of defendant for felonious breaking or entering of a house where the only evidence connecting defendant with the crime was testimony that latent prints lifted from the broken window at the scene of the crime matched those of defendant where defendant offered a reasonable explanation for the presence of his prints on the broken window by testifying that he had formerly lived in the house, the house had been vacant some eight months prior to the crime, and defendant and his girlfriend had gone to the then vacant house and peered into the window, and where the State's witness testified that fingerprints could last a year or longer.

APPEAL by defendant from *Owens, Judge.* Judgment entered 31 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 March 1984.

Defendant, charged with felonious breaking and entering and felonious larceny, appeals from a jury verdict finding him guilty of felonious breaking and entering and not guilty of felonious larceny.

The State's evidence tended to show: On 15 September 1982, sometime between 7:30 a.m. and 3:00 p.m., someone broke into and entered the home leased by Vanessa Bennett Abraham and her son, Martin Bennett.

Martin Bennett testified that when he arrived home from school at around 3:00 p.m. on 15 September, he noticed that the kitchen window had been broken and that a television and tape recorder were missing. He testified that when he left for school at 7:30 a.m., the doors were locked, but when he came home, the back door was open.

Vanessa Bennett Abraham testified that she left for work at around 7:00 a.m. and when she returned home at around 3:15 p.m., she, too, noticed the broken kitchen window and the missing television and tape recorder. She also testified that her jewelry lay scattered on her bed and that the screens from both the kitchen and bedroom windows had been removed.

Officer Larry F. Matkins, a member of the Crime Scene Search Unit in the Police Department Crime Laboratory, testified that on 15 September, he lifted latent prints from the screen, frame, and window that had been broken.

Officer Johnny B. Boyd, qualified as an expert witness in fingerprint identification, testified that two of the latent prints lifted from the broken window matched the known fingerprints of defendant.

Defendant's evidence tended to show: Defendant testified that on 15 September 1982, he and his friend, Connell Goodson, left defendant's house at 7:45 a.m. and walked to school. He arrived at school in time to attend his 11:00 a.m. class. After class, he and Goodson went to the University Biology Laboratory where both men worked. They left the Laboratory at 3:45 p.m.

Defendant testified that in January 1982, the house rented by Vanessa Bennett Abraham had been vacant. He testified that he had lived in the house in 1976 and that in January, he had returned with his girlfriend and had peered in the kitchen window.

Connell Goodson's testimony, as to defendant's whereabouts on 15 September 1982, substantially matched that of defendant.

Attorney General Edmisten, by Richard L. Griffin, Assistant Attorney General, for the State.

Kenneth W. Parsons, for defendant appellant.

VAUGHN, Chief Judge.

Defendant contends that the trial court erred in denying his motions to dismiss and his motion to set aside the verdict. In recognition of the rule that fingerprint evidence is insufficient, by itself, to carry a case to the jury, we find merit in defendant's contention.

The State relied on the testimony of Officer Johnny Boyd, a qualified expert in fingerprint identification, to prove that the latent prints lifted from the broken window at the scene of the crime matched those of defendant. While fingerprint evidence shows that a defendant has, at some time, been at the crime scene, such evidence has no probative force unless it can also be shown that defendant's fingerprints were impressed at the time

the crime was committed. *State v. Bass*, 303 N.C. 267, 278 S.E. 2d 209 (1981); *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979).

Defendant offered a reasonable explanation for the presence of his prints on the broken window: In January 1982, approximately eight months before the crime was committed, defendant and his girlfriend had gone to the then vacant house and peered into the window. Defendant testified that the only way to see the kitchen was from the back kitchen window and that "[i]n order to look in the kitchen window, [he] had to climb up there." State's witness, Larry Matkins, testified that fingerprints could last a year or longer.

The State concedes that defendant's testimony shows that his fingerprints could have been impressed while defendant was lawfully on the premises, but argues that during cross-examination, defendant contradicted himself, and, thus, the question of his guilt was properly left to the jury. Defendant, during cross-examination, testified that he did not have to climb on anything to see into the window: "When I said before that we climbed up there, I meant that I had lifted [my girlfriend] up. . . . I know I didn't climb up there. I could stand on the ground on my tiptoes and see in the edge of the window."

Regardless of whether defendant had his feet on the ground when he peered into the window, his testimony provided a lawful explanation for the presence of his prints on the window. The State produced no evidence to negate defendant's explanation, but seeks to rely solely on defendant's contradictory testimony during cross-examination to show that defendant could have left his prints only at the time of the crime.

The burden is not on defendant to sufficiently explain the presence of his prints, but on the State, to prove by substantial evidence, defendant's guilt. *State v. Bass, supra; see State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948). While the jury decides what the evidence proves or does not prove, the judge decides whether the evidence is sufficient to withstand a motion to dismiss. *State v. Scott, supra.* The trial judge here erred in denying defendant's motions to dismiss.

Reversed.

Judges WHICHARD and PHILLIPS concur.

JUAN NAPUTI v. LINDA G. NAPUTI

No. 8312DC43

(Filed 20 March 1984)

Divorce and Alimony § 23— child custody—North Carolina court without jurisdiction

A North Carolina court did not have subject matter jurisdiction to modify a Texas divorce decree and award plaintiff custody of his daughter where there was no evidence or implication that a Texas court ever declined to exercise its jurisdiction to modify the original decree, and since it is an absolute prerequisite to North Carolina's power to modify the Texas decree that Texas no longer have jurisdiction. G.S. 50A-14(a) and G.S. 50A-3(a)(3)(ii).

APPEAL by defendant from *Hair, Judge*. Judgment entered 1 September 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 5 March 1984.

This is an action brought by plaintiff to obtain custody of his daughter, a minor child. The parties were divorced and custody of their two children, a son and a daughter, was awarded to defendant by Texas decree of September 1979. Shortly thereafter, plaintiff, a military officer, was transferred to North Carolina while defendant continued to reside in Texas with the two children. Defendant currently resides in Texas.

In November 1981, the parties' daughter telephoned plaintiff and requested that he allow her to come live with him in North Carolina. Plaintiff sent her an airline ticket, and since that time the child has resided with plaintiff and his new wife in North Carolina. Shortly after his daughter came to North Carolina plaintiff instituted this action for her custody. Defendant raised the defense of lack of subject matter jurisdiction at several points during the proceedings, but these motions were denied. On 1 September 1982 the trial court issued its order awarding custody of the parties' daughter to plaintiff. From this order defendant appeals.

Lumbee River Legal Services, Inc., by David P. Ford, for defendant appellant.

No brief for plaintiff appellee.

VAUGHN, Chief Judge.

The critical issue on appeal is this: Did North Carolina have subject matter jurisdiction to modify the Texas divorce decree and award plaintiff custody of his daughter? We hold that North Carolina did not have jurisdiction, and the order issued by the trial court is therefore void.

North Carolina has adopted the Uniform Child Custody Jurisdiction Act [hereinafter "UCCJA"] as Chapter 50A of the General Statutes. G.S. 50A-14(a), entitled "Modification of custody decree of another state," governs the jurisdictional issue at bar. It sets out the following jurisdictional requirements for modification:

> 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.

By requiring the court of the state seeking modification to have jurisdiction, the jurisdictional requirements of G.S. 50A-14(a) necessarily include those of G.S. 50A-3, the UCCJA section that articulates the means by which North Carolina can acquire jurisdiction to render or modify a custody decree. The trial court found that G.S. 50A-3(a)(3)(ii) applied to confer jurisdiction on North Carolina. This statute provides:

> A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: . . . [t]he child is physically present in this State and . . . it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent . . . .

To meet the requirements of G.S. 50A-14(a) and G.S. 50A-3(a)(3)(ii), three questions must be answered affirmatively. As applied to this case, we frame the questions as follows:

A. Lack of Texas jurisdiction:

1. Did the Texas court lack jurisdiction under jurisdictional prerequisites similar to those of the UCCJA, or, has the Texas court declined to exercise jurisdiction to modify the decree?

B. North Carolina jurisdiction:

2. Was the child physically present in North Carolina?

3. Did an emergency situation exist?

As to whether Texas has jurisdiction, there is no evidence or implication that a Texas court ever declined to exercise its jurisdiction to modify the original decree. In fact, the record indicates the contrary, that plaintiff had originally sought to gain custody of his daughter through the Texas courts, but this was never accomplished. There is some conflict in the record as to why plaintiff abandoned his efforts in Texas; it nevertheless appears that the Texas courts were willing to hear plaintiff's petition for a modification of the decree.

The jurisdictional question on which this appeal turns, then, is whether "it appears to the court of this State [North Carolina] that the court which rendered the decree [Texas] does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with . . . Chapter [50A]." G.S. 50A-14(a)(1). We hold that Texas has maintained jurisdiction of the subject matter and therefore North Carolina was without jurisdiction to modify the Texas decree.

The Texas statute conferring jurisdiction in custody matters is substantially similar to that of the UCCJA, as adopted by North Carolina, *see* TEX. FAM. CODE ANN. 11.045 (Vernon Supp. 1982-3), and a related statute explicitly provides for continuing jurisdiction in all matters relating to suits affecting the parent-child relationship, subject to certain exceptions. *See* TEX. FAM. CODE ANN. 11.05 (Vernon Supp. 1982-3). We have examined those exceptions, and conclude that none apply to the instant case. Thus, Texas continues to have jurisdiction of the issue of child custody and the requirement of G.S. 50A-14(a)(1), that the rendering court "not now have jurisdiction," is not satisfied. *Cf. Williams v. Richardson*, 53 N.C. App. 663, 281 S.E. 2d 777 (1981), *review denied*, 304 N.C. 733, 288 S.E. 2d 382 (1982) (where rendering state no longer had jurisdiction at the time modification sought).

Since Texas has continuing jurisdiction, and since it is an absolute prerequisite to North Carolina's power to modify the Texas decree that Texas no longer have jurisdiction, *see* G.S. 50A-14(a), North Carolina does not have subject matter jurisdiction. Any judgment rendered without subject matter jurisdiction is void, *Pifer v. Pifer*, 31 N.C. App. 486, 488, 229 S.E. 2d 700, 702 (1976); *see In re Peoples*, 296 N.C. 109, 144, 250 S.E. 2d 890, 910 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979) (subject matter jurisdiction cannot be conferred upon a court by consent, waiver, or estoppel); therefore, the order modifying the original Texas decree is void. If plaintiff still seeks a modification of the decree awarding custody to defendant, he must bring his action in Texas.

Our holding that North Carolina is without subject matter jurisdiction obviates the need to consider appellant's other assignments of error. In particular, we do not decide whether North Carolina had jurisdiction pursuant to an emergency situation, nor do we pass judgment on the conclusion of law that the change in circumstances was sufficient to justify the modification of the custody decree. The judgment below is hereby vacated.

Vacated.

Judges WHICHARD and PHILLIPS concur.

JUDITH H. HENDRIX v. GORDON C. HENDRIX, JR.

No. 8321DC325

(Filed 20 March 1984)

Divorce and Alimony § 21.9— complaint requesting enforcement of separation agreement and equitable distribution—construed as seeking alternative relief—dismissal of equitable distribution claim improper

Where plaintiff sought three claims of relief: (1) absolute divorce, (2) enforcement of a validly executed separation agreement, and (3) equitable distribution, the trial court erred in granting defendant's motion to dismiss the equitable distribution claim since under G.S. 1A-1, Rule 8(e)(2), a party may plead alternative claims. However, pursuant to G.S. 50-20(d), defendant might be entitled to judgment on the pleadings after answer is filed, if he admits the validity of the separation agreement. G.S. 50-21(a).

Judge PHILLIPS concurring in the result.

Hendrix v. Hendrix

APPEAL by plaintiff from *Alexander, Judge.* Order entered 5 November 1982 in District Court of FORSYTH County. Heard in the Court of Appeals 15 February 1984.

Morrow and Reavis by John F. Morrow and Clifton R. Long, Jr., for plaintiff appellant.

White and Crumpler by Fred G. Crumpler, Jr., G. Edgar Parker, Craig B. Wheaton and Randolph M. James for defendant appellee.

BRASWELL, Judge.

The complaint purports to set forth three claims for relief:

(1) absolute divorce,

(2) enforcement of validly executed separation agreement, and

(3) equitable distribution.

The parties are husband and wife. They separated 21 November 1980. In the second claim the plaintiff-wife pleads the valid existence of two deeds of separation (the first, on 21 November 1980; the second, superseding the first, on 2 June 1981), attaches copies as exhibits, incorporates them into the pleadings by reference, and asks that they be incorporated into the divorce decree and enforced under the contempt powers of the court.

By the third claim for equitable distribution the wife seeks to bring herself within the provision of G.S. 50-20, *et seq.*, and in argument contends that this is a claim seeking alternative relief. This claim does not contend that the property settlement included within the deeds of separation in the second claim is subject to any infirmity. She does not contend that the separation agreement is unfair or invalid for any reason. She does not allege any breach. Rather, as evidenced by her second claim for relief, she has pled the creation of a valid separation agreement, participated in by herself, and asks that it be enforced.

The action is before us solely upon the defendant's motion under G.S. 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure to dismiss for failure to state a claim. On 5 November 1982 the trial judge granted the motion to dismiss as to the third claim (for equitable distribution), and plaintiff appeals.

The motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint to state a claim for relief. The scope of our review is to determine whether the third claim gives sufficient notice of the events upon which the claim is based so as to provide the basis for a response from the party sued, and whether the matter alleged contains enough subject matter so as to constitute the elements of some claim recognizable in law. If so, it is our duty to overturn the dismissal.

Under the general rules of pleadings, G.S. 1A-1, Rule 8(e)(2) of the Rules of Civil Procedure allows a party to "set forth two or more statements of a claim . . . alternatively . . . [and] in separate counts." further, if an alternative statement of a claim, "made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." The Rule also sanctions the making of inconsistent claims.

It is North Carolina's public policy that "an equitable distribution of property shall follow a decree of absolute divorce." G.S. 50-21(a). That section also sets out the procedure for making application for the distribution. However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in G.S. 50-20(d):

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

Here at the pleadings stage [and before answer has been filed], we hold that the plaintiff has stated a claim for equitable distribution as an alternative claim for relief. However, we would envision that, considering the provisions of G.S. 50-20(d), the defendant might be entitled to a judgment on the pleadings after answer is filed, if he admits the validity of the separation agreements. The trial judge would have to find the facts required by section (d). Thereupon the claim for equitable distribution would be dismissed. In an alternative manner the issue of effect

of the separation agreements could be resolved by summary judgment. We perceive that the status of the separation agreements in this particular case on these particular facts should be resolved before any court ordered discovery under the third claim in the complaint.

Reversed and remanded.

Judge WELLS concurs.

Judge PHILLIPS concurs in result.

Judge PHILLIPS concurring in result.

Though I agree that plaintiff's claim for equitable distribution was improperly stricken, I do not agree that it should be stricken upon defendant admitting the validity of the separation agreements, or that no discovery relating to defendant's assets should be done during the interim, or that an early hearing by the trial judge is either necessary or advisable. The main reason for permitting inconsistent claims to be alleged is so that litigants can investigate and assess them before having to decide—or before the court decides for them—which inconsistent claim is supportable and which is not. These two inconsistent claims, I think, ought to be left to follow the usual course of such claims until such time as the progress of the litigation, by one means or another, brings one claim to the fore and shunts the other aside; which is as inevitable as the falling of night, since the claims are utterly and completely contradictory. And it can and should happen, quickly and easily, without the necessity of any hearing before, or findings by, the judge. Indeed, if, instead of seeking the aid of the judge, defendant had but answered the interrogatories about his assets that plaintiff submitted to him and had required plaintiff to answer a few thoughtful inquiries of his own about both claims, one claim or the other would probably have been eliminated or abandoned long ago.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 MARCH 1984

BRYAN v. BRYAN No. 8312DC496	Cumberland (82CVD3619)	Vacated
LEONARD AUTOMATICS, INC. v. TAHARI, LTD. No. 8327SC317	Gaston (82CVS1635)	Affirmed
SMITH v. CITY OF ASHEVILLE No. 8328SC349	Buncombe (82CVS3171)	Affirmed
STATE v. BANKS No. 832SC850	Beaufort (82CRS7674) (82CRS8100) (82CRS8102) (82CRS8108) (82CRS8113)	No Error
STATE v. BROWN No. 832SC135	Beaufort (82CRS502)	No Error as to Trial; Reversed and Remanded as to Sentence
STATE v. COOPER No. 832SC656	Martin (81CRS4174)	No Error
STATE v. LEWIS No. 8326SC879	Mecklenburg (83CRS63651) (83CRS63653)	No Error
STATE v. MOSES No. 8320SC955	Stanly (83CRS533) (83CRS534) (83CRS535) (83CRS2240) (83CRS2241) (83CRS2242)	No Error
STATE v. SMITH No. 8312SC803	Cumberland (82CRS39578)	No Error
VARNELL v. MILGROM, INC. No. 827SC1097	Edgecombe (81CVS1003)	Appeal Dismissed
WEST v. WEST No. 8212DC1343	Cumberland (82CVD1472)	Affirmed

NORTH CAROLINA REINSURANCE FACILITY v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, AND THOMAS J. CALDARONE, AS DOMICILIARY RECEIVER OF AMERICAN RESERVE INSURANCE COMPANY

STATE OF NORTH CAROLINA, ON RELATION OF JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PLAINTIFF v. AMERICAN RESERVE INSURANCE COMPANY, DEFENDANT, AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, THIRD-PARTY PLAINTIFF v. THOMAS J. CALDARONE, AS COMMISSIONER OF INSURANCE OF THE STATE OF RHODE ISLAND AND AS DOMICILIARY RECEIVER OF AMERICAN RESERVE INSURANCE COMPANY, THIRD-PARTY DEFENDANT

Nos. 8310SC41 and 8310SC591

(Filed 3 April 1984)

1. Appeal and Error § 9— consent to cross-claim—moot question

When the Commissioner of Insurance, as ancillary receiver of an insolvent insurance company, joined the other parties in an interpleader action brought by the N.C. Reinsurance Facility in consenting to the Facility's payment of the funds at issue into court and to discharge of the Facility from further liability on account of said funds, he in effect consented to the assertion of a cross-claim against him by the N.C. Guaranty Association in the interpleader action and rendered moot the issue as to whether the court should have dismissed the cross-claim because of a provision in the order appointing him as ancillary receiver.

2. Appeal and Error § 16.1— jurisdiction after appeal

The trial court in an insolvent insurance company receivership action properly refused to exercise jurisdiction over funds involved in an interpleader action because of the pendency of an appeal in the interpleader action.

3. Insurance § 1— insolvent insurer—credit by N.C. Reinsurance Facility—recovery by receivers or N.C. Guaranty Association

Funds resulting from a credit by the N.C. Reinsurance Facility to an insolvent insurance company for claims paid by the N.C. Guaranty Association on automobile liability policies ceded by the insolvent company to the Reinsurance Facility do not constitute a "right of action," "property" or "other assets" which are recoverable by its receivers under G.S. 58-155.12(b), and the Guaranty Association is entitled to reimbursement from such funds pursuant to G.S. 58-155.48(a)(2).

4. Insurance § 1— insolvent insurer—surplus from special deposit—expenses of Guaranty Association as second priority claim against

The trial court did not err in allowing expenses of the N.C. Guaranty Association as a second priority claim against surplus proceeds from the special deposit of an insolvent insurer. Furthermore, G.S. 58-155.25 did not bar

Guaranty Association expenses incurred after the order of liquidation of the insolvent insurer, even if the Guaranty Association came within the provisions of G.S. 58-155.25, since that statute must be read in conjunction with the provisions of G.S. 58-155.60 authorizing payment of "*all* expenses of the Association relating to the insurer."

5. Insurance § 1— insolvent insurer—remaining general assets—transfer to domiciliary receiver

The trial court did not err in ordering the Commissioner of Insurance, as ancillary administrator of an insolvent insurance company, to transfer immediately to the domiciliary receiver all funds remaining after the payment of special deposit and secured claims and expenses. G.S. 58-155.12(b).

APPEAL by North Carolina Commissioner of Insurance Ingram and Rhode Island Commissioner of Insurance Caldarone from *McKinnon, Judge.* Judgment entered 8 October 1982 in Superior Court, WAKE County.

APPEAL by North Carolina Commissioner of Insurance Ingram from *Hobgood, Robert, Judge.* Judgment entered 24 January 1983 in Superior Court, WAKE County.

Cases consolidated on appeal 12 August 1983. Heard in the Court of Appeals 9 December 1983.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for Commissioner of Insurance Ingram, appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Gary S. Parsons, for Commissioner of Insurance Caldarone, appellant/appellee.

Moore, Van Allen and Allen, by Arch T. Allen, III, and Joseph W. Eason, for North Carolina Insurance Guaranty Association, appellee.

WHICHARD, Judge.

PROCEDURAL BACKGROUND

This litigation arises from the insolvency of American Reserve Insurance Company (American Reserve), a Rhode Island corporation licensed to do business in North Carolina, which was

declared insolvent by a Rhode Island court on 7 May 1979.[1] The insolvency order named Rhode Island Commissioner of Insurance Thomas J. Caldarone (Commissioner Caldarone) as domiciliary receiver. On 31 May 1979 North Carolina Commissioner of Insurance John R. Ingram (Commissioner Ingram) requested appointment as ancillary receiver. The Wake County Superior Court granted the appointment, making it permanent on 8 June 1979. The same day it allowed the North Carolina Insurance Guaranty Association (the Association) to intervene and to join Commissioner Caldarone as a third-party defendant. On 10 November 1981 the court entered its order of liquidation, which directed that all claimants file their claims within 120 days and that Commissioner Ingram prepare his report of the North Carolina assets and debts of American Reserve.

On 5 August 1981 the North Carolina Reinsurance Facility (the Facility) filed an independent but related action. Its accounts reflected a balance in favor of American Reserve, and it anticipated a conflict between Commissioner Ingram and the Association over those funds. The Facility, after paying the funds (the interpleader funds) into court, interpleaded Commissioner Ingram and the Association. The court subsequently discharged the Facility and allowed Commissioner Caldarone to intervene. On 8 October 1982 the court entered judgment in favor of the Association. Commissioners Ingram and Caldarone appealed.

Meanwhile, Commissioner Ingram filed his receiver's report on 11 August 1982. The Association and Commissioner Caldarone filed timely exceptions. On 24 January 1983 the court entered summary judgment in favor of the Association. Commissioner Ingram appealed.

Since the primary issue in both cases is disposition of the interpleader funds, this Court granted the unopposed motion of Commissioner Caldarone to consolidate the cases for hearing on appeal.

1. A separate insolvency proceeding involved American Reserve's subsidiary, Reserve Insurance Company. *See Ingram, Comr. of Insurance v. Insurance Co.*, 303 N.C. 623, 281 S.E. 2d 16 (1981). For a brief description of the events leading up to these insolvencies, *see Schacht v. Brown*, 711 F. 2d 1343, 1345-46 (7th Cir.), *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 698, 104 S.Ct. 508 (1983).

STANDARD OF REVIEW

The interpleader case was tried on stipulated facts. The court granted summary judgment in the receivership action after the parties agreed there was no dispute as to any material fact. The issues involve statutory interpretation. Full appellate review is therefore appropriate, and the conclusions of law "are reviewable *de novo.*" *Humphries v. City of Jacksonville,* 300 N.C. 186, 187, 265 S.E. 2d 189, 190 (1980).

JURISDICTIONAL AND PROCEDURAL ISSUES

I.

[1] Commissioner Ingram contends the trial court erred in failing to dismiss the cross-claim filed against him by the Association in the Facility's interpleader action. The basis of his contention is the following provision in the order appointing him ancillary receiver in the other action:

> [A]ll persons, firms, corporations, municipalities and counties are restrained from interfering in any manner with the property or assets of the respondent American Reserve Insurance Company or with the Ancillary Receiver in the exercise of his duties and are hereby restrained from instituting any suit against said Ancillary Receiver or making any attachment, levy, or lien against the assets of the respondent except by the permission of this court first had and obtained . . . .

Assuming, without deciding, that the court in the Facility's action should have dismissed the cross-claim because of this provision, we find no basis for intervening at this juncture. Commissioner Ingram joined the other parties to the litigation in consenting to the Facility's payment of the funds at issue into court and to the discharge of the Facility from further liability on account of said funds. He thereby in effect consented to assertion of the cross-claim against him in the Facility's action and rendered moot the issue now presented. This Court will not entertain the issue merely to determine a now abstract proposition of law as to whether the trial court should have dismissed the cross-claim. *Parent-Teacher Assoc. v. Bd. of Education,* 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969). This assignment of error is therefore overruled.

II.

[2] Commissioner Ingram also contends the trial court in the receivership action erred in refusing to exercise jurisdiction over the interpleader funds involved in the Facility's action. When the order containing this refusal was entered, the Facility's action had been appealed to this Court; and pendency of the appeal was the express basis on which the trial court refused to exercise jurisdiction. "[A]n appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio.*" *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E. 2d 748, 749 (1977). The refusal to exercise jurisdiction thus was proper.

THE STATUTORY SCHEME

Resolution of this appeal primarily requires statutory interpretation. It involves the interrelation of various parts of Chapter 58 of the General Statutes and two organizations created under it, the Association and the Facility.

The Uniform Insurers Liquidation Act (the Uniform Act), G.S. 58-155.10 to 58-155.17, provides the basic mechanism for the liquidation of American Reserve. Rhode Island, the domicile of American Reserve, is a "reciprocal state" under the Uniform Act. G.S. 58-155.10(9); R.I. Gen. Laws § 27-14-2(7) (1979). Therefore, Commissioner Caldarone, as domiciliary receiver, has primary responsibility for collecting and distributing American Reserve's assets. G.S. 58-155.12; R.I. Gen. Laws §§ 27-14-4, 27-14-5 (1979 & Cum. Supp. 1983). Commissioner Ingram, as ancillary receiver, is to recover assets and to liquidate special deposit claims and secured claims which are proved and allowed in the ancillary proceedings. *Id.*

Foreign casualty companies such as American Reserve must make special deposits of securities as a prerequisite to doing business in North Carolina. G.S. 58-182.1, 58-188. The State Treasurer holds these in safekeeping "for the protection of contract holders." G.S. 58-182.6. The policyholders have a statutory lien on the deposits, G.S. 58-185, which they can enforce by suit for sale by the Commissioner when the company "fails to pay any of its liabilities," G.S. 58-184. These deposits "constitute a *trust* for the benefit of North Carolina policyholders and are not *assets* of the insolvent insurance company." *Ingram, Comr. of Insurance*

v. Insurance Co., 303 N.C. 623, 629, 281 S.E. 2d 16, 20 (1981) (hereinafter *Ingram*); *see also Guaranty Assoc. v. Assurance Co.*, 48 N.C. App. 508, 269 S.E. 2d 688, *disc. rev. denied and appeal dismissed*, 301 N.C. 527, 273 S.E. 2d 453 (1980), *rev'd on other grounds*, 455 U.S. 691, 71 L.Ed. 2d 558, 102 S.Ct. 1357 (1982). The Uniform Act distinguishes between these "special deposits" and the "general assets" of the insolvent, *see* G.S. 58-155.10(5), 58-155.10(11), and allows certain claims priority against the special deposits. G.S. 58-155.15. *Compare* R.I. Gen. Laws §§ 27-14-14, 27-14-15 (1979).

The Association functions to complement these protective deposits. Our Supreme Court has stated:

> In 1971, the legislature effected additional protection for North Carolina policyholders by enacting Article 17B, creating an organization, the Insurance Guaranty Association, which would promptly ascertain claims against an insolvent insurer and pay each covered claim of $100 to $300,000 which arises within thirty days of a determination of insolvency. G.S. 58-155.48(a)(1). The purpose of the association "is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. . . ." G.S. 58-155.42. At least forty-five states have enacted versions of a Model Post-Assessment Guaranty Association Act. *See* Hank, Post-Assessment Guaranty Funds: Are They the Ultimate Solution to the Insolvency Problem? 1976 Insurance Law Journal 482. It serves as an adjunct to normal liquidation proceedings. *See Cooper Claims Service v. Arizona Insurance Guaranty Ass'n.*, 22 Ariz. App. 156, 158, 524 P. 2d 1329, 1331 (1974). The Guaranty Association is a non-profit unincorporated legal entity which covers all property and casualty insurance business transacted in North Carolina. G.S. 58-155.46. All insurance companies licensed to transact business in North Carolina and not exempted by G.S. 58-155.43 must become members of the Association. G.S. 58-155.46. The Association acts as insurer. G.S. 58-155.48(a)(2).
>
> To pay covered claims, the Guaranty Association assesses its members based upon the percentage of business

transacted in North Carolina. G.S. 58-155.48(a)(3). The Association has the power to borrow funds to pay covered claims. G.S. 58-155.48(b)(2). Once the Association pays a claim, any person receiving payment "shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association." G.S. 58-155.51 (a). The Act also provides that "[t]he expenses of the Association . . . shall be accorded the same priority as the liquidator's expenses." G.S. 58-155.51(b).

Ingram, supra, 303 N.C. at 630-31, 281 S.E. 2d at 21.

In *Ingram* the Supreme Court considered the effect of the "Quick Access" statute, G.S. 58-155.60,[2] on this scheme. It held that the statute requires the Commissioner to deliver the special deposit proceeds to the Association. The Association may use the proceeds "at the outset" to cover its expenses. "However, the Association has no permanent right in these funds for operating expenses unless all claims are paid and deposit funds remain." *Id.* at 635, 281 S.E. 2d at 23. The Association must (1) pay all claims it is authorized to pay, (2) credit all expenses related to the insolvent if there is any surplus, (3) repay any remaining surplus to the Commissioner, and (4) account to the Commissioner for all funds received. *See id.*

The parties here have followed this procedure. Commissioner Ingram challenges the allowance of certain expenses against the deposit proceeds, but no party questions the basic structure outlined above.

The primary issue here involves funds generated by American Reserve's participation in the Facility, which assures the

2. § 58-155.60. Use of deposits made by insolvent insurer.

Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not required by statute, by an insolvent insurer to the extent those deposits are needed by the Association first to pay the covered claims in excess of one hundred dollars ($100.00) as required by this Article and then to the extent those deposits are needed to pay all expenses of the Association relating to the insurer.

. . . .

ready availability of liability insurance to certain automobile insurance risks.

> In 1973, the General Assembly created the Facility to replace the outmoded and largely unworkable Assigned Risk Plan. Essentially, the Facility is a pool of insurers which insures drivers who the insurers determine they do not want to individually insure. The Facility is a creation of North Carolina's Compulsory Automobile Liability Insurance Law. The pertinent provisions are codified in Article 25A, Chapter 58, of the General Statutes. G.S. § 58-248.26 to .40 (1975 Cum. Supp. 1979) [hereinafter referred to as "Facility Act"]. Under the Facility Act, all insurance companies which write motor vehicle insurance in North Carolina are required to be members of the Facility. They are required to issue motor vehicle insurance to any "eligible risk" as defined in G.S. 58-248.26(4) who applies for that coverage, if the coverage can be ceded to the Facility. G.S. 58-248.32(a) provides in part that no licensed agent of an insurer may refuse to accept any application from an eligible risk for such insurance and that the agent must immediately bind the coverage applied for if cession of the particular coverage and limits are permitted in the Facility. After writing such coverage, the company has the option of either retaining it as a part of its voluntary business or ceding it to the Facility. If the policy is ceded, the writing company pays to the Facility the net premium, less certain ceding and claims expense allowances, and the Facility is then liable on the particular policy. Should there be a loss under the policy, the ceding company settles the claim and is reimbursed by the Facility.

The Association shall account to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder, and shall repay to the Commissioner a portion of the deposits received which shall be equal to an amount computed by adding the lesser of the amount of the covered claim or one hundred dollars ($100.00) for each covered claim. Said repayment shall in no way prejudice the rights of the Association with regard to the portion of the deposit repaid to the Commissioner. After all of the deposits of the insolvent insurer have been expended by the Association for the purposes set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article (1979, c. 628). (Provisions relating to insolvent domestic insurers omitted.)

Hunt v. Reinsurance Facility, 302 N.C. 274, 283, 275 S.E. 2d 399, 402-03 (1981). The reimbursement by the Facility ordinarily takes the form of a credit to the member's account against which premiums due and Facility expenses are debited to arrive at a net quarterly figure. Here, however, the Association paid certain losses, which arose after American Reserve became insolvent, on policies ceded by American Reserve to the Facility. Had American Reserve remained solvent, it would have paid the claims itself. The Facility credited American Reserve's account in the amount of the losses paid. (The Association is not a member of the Facility, *see* G.S. 58-248.27, 58-155.48, 58-155.46, and therefore cannot be credited directly under the governing statutes, *see* G.S. 58-248.33.) This credit constitutes the interpleader funds, the primary subject matter of this litigation.

THE FUNDS AT ISSUE

The special deposits and interest turned over to the Association totaled $97,451.67. The total of allowed special deposit and secured claims is $102,236.57. Of this $70,897.37 represents policyholder claims, which have first priority. G.S. 58-155.60. The remainder represents expenses, $29,839.20 for the Association and $1,500.00 for Commissioner Ingram. Under the order these are to be paid pro rata. The unpaid difference, $4,784.90, is to be paid out of any other assets or property of American Reserve in North Carolina.

Since the court awarded the interpleader funds totaling $22,550.00 to the Association, this remaining unpaid balance will be satisfied out of them. The order directs Commissioner Ingram then to transfer the remainder immediately to Commissioner Caldarone. There also is $13,593.99 in general assets available for possible recovery in the Rhode Island proceedings.

THE INTERPLEADER FUNDS: "ASSETS" OF THE INSOLVENT?

[3] As indicated above, the interpleader funds result from a credit by the Facility to the insolvent, American Reserve, for claims paid by the Association. The statutes do not expressly provide for the disposition of these funds. The legislature provided for sharing of net losses upon the insolvency of a Facility member, but made no provision for net credits. *See* G.S. 58-248.29. The

respective organizing Acts of both the Facility and the Association do not mention the other entity.

Resolution of the issue involves determining the legislative intent in establishing these two organizations. In so doing, we must consider the language of the statutes, the circumstances surrounding their adoption which may throw light on the evils sought to be remedied, and the legislative history. *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E. 2d 548, 555 (1967).

The interpleader funds arose as a credit to the named Facility account of American Reserve, pursuant to its regular accounting procedures, when claims on Facility-reinsured policies were paid. The Association, however, actually paid the claims.

The issue involves determination of whether this credit is recoverable by the receivers under G.S. 58-155.12(b), which provides:

> The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all the *property, contracts,* and *rights of action,* and all of the *books and records* of the insurer located in this State, and he shall have the immediate right to recover *balances due from local agents* and to obtain possession of any *books and records* of the insurer found in this State. He shall also be entitled to recover the *other assets* of the insurer located in this State except that upon the appointment of an ancillary receiver in this State, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such *other assets.* The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this State, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this State. (Emphasis supplied.)

The credit clearly is not "balances due from local agents" or "books and records." It clearly is not "contracts." Facility membership is imposed by statute, G.S. 58-248.27, and no contract with members is required by its plan of operation.

American Reserve had no "right of action" against the Facility. The statute provides only that the Facility "shall reinsure" the covered risks. G.S. 58-248.33(b). Under standard reinsurance agreements, the reinsurer has no liability, and the reinsured no cause of action, until the reinsured has paid the loss. *Fidelity & Deposit Co. of Maryland v. Pink*, 302 U.S. 224, 227-29, 82 L.Ed. 213, 215-16, 58 S.Ct. 162, 163-64 (1937), *reh'g denied*, 302 U.S. 780, 82 L.Ed. 603, 58 S.Ct. 407 (1938); 13A J. Appleman, Insurance Law and Practice § 7695, at 537-38 (1976). Nothing in the statutory reinsurance scheme here suggests a different rule; instead, the legislature took care to ensure that the Facility would not be considered the primary insurer, but only a reinsurer. *See* G.S. 58-248.33(g)(6); 58-248.26(l); and 58-248.31(a). American Reserve never paid the claims in question, and has not suffered injury by the Facility's failure to pay in its behalf. It thus has no "right of action" against the Facility. *See R.R. v. Highway Commission*, 268 N.C. 92, 96, 150 S.E. 2d 70, 73 (1966); 1 C.J.S. *Actions* § 15.a (1936).

The receivers, to recover the interpleader funds, must therefore show that the funds are either "property" or "other assets." Under the rules of statutory construction, "[t]he word 'property' . . . include[s] all property, both real and personal." G.S. 12-3(6). No party contends the funds are real property. "The words 'personal property' . . . include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendable to heirs at law." *Id.* The account entry at issue does not appear to fit any of these definitions. *See* Black's Law Dictionary 219 (5th ed. 1979) ("chose in action"); *id.* at 499 ("evidence of debt"); 73 C.J.S. *Property* §§ 14, 21-22 (1983). The absence of a "right of action" in American Reserve to recover the funds reinforces this conclusion. *See* Black's Law Dictionary 1095 (5th ed. 1979) ("property"); 63 Am. Jur. 2d *Property* §§ 1, 22 (1972); 73 C.J.S. *Property* §§ 5, 6 (1983). A holding that these funds are not "property" of American Reserve does not appear to be "inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the . . . statute." G.S. 12-3; *see Trust Co. v. Wolfe*, 243 N.C. 469, 475, 91 S.E. 2d 246, 251

(1956). We thus hold that the funds are not "property" of American Reserve.

The receivers may recover these funds, then, only if they are "other assets" of American Reserve. The parties accordingly have focused on the definition of "assets." The term is not defined generally in Chapter 12 of the General Statutes, but G.S. 58-155.10(5) provides the following definition for purposes of the Uniform Act:

> "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets.

As pointed out above, the account entry is not real or personal property of American Reserve. For the receivers to prevail, then, it must fall under "or otherwise" within the intended meaning of that term as used in G.S. 58-155.10(5).

North Carolina law sheds no light on this term. The section quoted above was taken verbatim from a 1939 report of the National Conference of Commissioners on Uniform State Laws. *See* Unif. Insurers Liquidation Act § 1(8), 13 U.L.A. 435 (Master ed. 1980). It superseded an earlier draft which did not contain the phrase "or otherwise" or the language regarding the classes benefitted by special deposits. The earlier draft read:

> "*General assets*" means all property, real or personal, not specifically mortgaged, pledged, deposited as security or otherwise encumbered, and as to such specifically encumbered property the term includes all in excess of the amount necessary to discharge the sum or sums secured.

Report of the Committee on a Uniform Reciprocal Liquidation Act for Insurance Companies, in Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the

Forty-Eighth Annual Conference 369, 374 (1938). The only language explaining the change appears in the commissioners' prefatory note: "Insurance company assets take the form, for the most part, of special deposits required by state law, balances in the hands of insurance agents, policy premiums due but unpaid, and investments of reserve funds." Unif. Insurers Liquidation Act commissioners' prefatory note, 13 U.L.A. 429-30 (Master ed. 1980). Addition of "or otherwise" and the other new language apparently came in response to concern that these special deposits would be dissipated by local creditors because of their unique trust characteristics. *See United States v. Knott*, 298 U.S. 544, 80 L.Ed. 1321, 56 S.Ct. 902 (1936); *Continental Bank & Trust Co. v. Gold*, 140 F. Supp. 252 (E.D.N.C. 1956); Unif. Insurers Liquidation Act commissioners' prefatory note, 13 U.L.A., *supra*, at 430-31. The unique nature and recent vintage of statutory reinsurance proceeds tend to confirm an interpretation that the statutory definition of "assets" of insolvent companies does not include them.

The definition of "assets" in other contexts tends to support this reading of the statute. Assets are generally defined as property of any kind, whether real or personal, tangible or intangible, legal or equitable, which can be made available for the payment of debts. *Spagnola v. Iowa Employment Security Comm.*, 237 Iowa 645, 646-47, 23 N.W. 2d 433, 434 (1946); Black's Law Dictionary 108 (5th ed. 1979); *see also* 19 J. Appleman, Insurance Law and Practice § 10352, at 157 (1982) ("admitted assets" are those available for discharging liabilities). Since American Reserve had no right of action to recover the interpleader funds, it could not have made them available to pay its creditors. Similarly, under federal bankruptcy law American Reserve held at most bare legal title to the Facility account. By analogy, the most it could pass to the receivers would be its bare legal title, excluding any equitable interest in the interpleader funds. *See* 11 U.S.C. §§ 541(a)(1), (d) (1982); 4 L. King, Collier on Bankruptcy ¶ 541.24 (15th ed. 1983). Traditional accounting principles also do not provide for these funds to be assets of American Reserve. *See* E. Faris, Jr., Accounting for Lawyers 319 (3d ed. 1975); B. Ferst & S. Ferst, Basic Accounting for Lawyers 31-35 (2d ed. 1965).

The Commissioners cite numerous reinsurance cases for the proposition that reinsurance proceeds are assets of the insolvent, and that therefore the Association cannot assert a claim against

them. *See, e.g., General Reinsurance Corp. v. Missouri General Insurance Co.*, 458 F. Supp. 1 (W.D. Mo. 1977), *aff'd*, 596 F. 2d 330 (8th Cir. 1979); *Skandia America Reinsurance Corp. v. Schenck*, 441 F. Supp. 715 (S.D.N.Y. 1977). These cases are distinguishable, however, in that they deal exclusively with private, as opposed to statutory, reinsurance. Whether private reinsurance proceeds constitute an asset of an insolvent insurer "lies in the nature of a reinsurance contract." *State of Florida, ex rel. O'Malley v. Department of Insurance*, 155 Ind. App. 168, 177, 291 N.E. 2d 907, 912 (1973) (holding that proceeds were asset of insurer). The reinsurance here, by contrast, resulted from statutory mandate. G.S. 58-248.27, 58-248.33. The relationship between the Facility and American Reserve therefore is not controlled by the contractual principles applied in the private reinsurance cases.

We conclude that the trial court ruled correctly that the interpleader funds are not assets of American Reserve, and that they are therefore not recoverable by the receivers under G.S. 58-155.12(b). This resolution accords with that of the only other court which has considered the issue, the Supreme Judicial Court of Massachusetts. *Massachusetts Motor Vehicle Reinsurance Facility v. Commissioner of Insurance*, 379 Mass. 527, 400 N.E. 2d 221 (1980) (the Massachusetts case). That court held specifically that the facility funds were not assets of the insolvent insurer. *Id.* at 532 n. 9, 400 N.E. 2d at 224 n. 9. It also considered the above private reinsurance cases, and it, too, held that they did not control.

The Uniform Act provides that it "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." G.S. 58-155.17. Our holding in accord with the Massachusetts case therefore furthers the express goal of the Uniform Act. Although the Massachusetts case was not decided under the Uniform Act, the court addressed its applicability and indicated that it would reach the same result thereunder. *Id.* at 532 n. 9, 400 N.E. 2d at 224 n. 9.

Our legislature requires that all automobile liability insurers be members of both the Association and the Facility. G.S. 58-155.46, 58-248.27. The purpose of the Association is to protect the policyholders of insolvent insurers. G.S. 58-155.42. The purpose of the Facility is to compel insurers to provide automobile liability

insurance to all eligible risks. G.S. 58-248.33(a). The legislature intended to keep the additional costs to insurance consumers for these measures as low as possible. *See* G.S. 58-155.48(a)(3), 58-248.33(l). The Association has priority in the use of available statutorily mandated resources in settling claims in insurer insolvencies. *See* G.S. 58-155.60, 58-155.51(b); *Ingram, supra.*

G.S. 58-155.48(a)(2) provides that the Association shall "[b]e deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Had American Reserve remained solvent, it would have paid the claims and had a right to the credit from the Facility. The Association is thus deemed the insurer with respect to the interpleader funds. Having paid the claims in full in the place of American Reserve, it is entitled to reimbursement equal to American Reserve's entitlement had it not become insolvent. G.S. 58-155.48(a)(2). This operates to place more funds in the hands of the member insurers, thus tending to lower the Association's costs, and consequently the premiums of policyholders of its members, in accord with legislative intent.

To hold otherwise would result in a windfall to the receiver, especially where the insolvent's liabilities on Facility-reinsured policies far exceed special deposits. The receivers correctly argue that the Facility proceeds are not generated by the Association, but by premiums. The policies reinsured were liability policies only, however, and neither the policyholder nor the insurer builds any "equity" in premiums paid into the Facility. No provision is made for refunds when a member withdraws from the Facility. *See* G.S. 58-248.27, 58-248.28. Disposition of Facility funds depends exclusively on payment of losses, not on who pays premiums. Without the Facility, these funds would not have been available except from American Reserve internal funds or private reinsurance. The Association still would have to pay the losses. It is therefore consistent with the purposes of these organizations to allow the Association to recover the interpleader funds.

Again, this decision accords with the Massachusetts case. The court there also reviewed the purpose of two state-created organizations, identical in purpose to the Association and the Facility, and held: "When the over-all statutory insurance scheme

is considered, it appears that the [l]egislature must have intended that the [equivalent of the Association] have a direct right to Facility proceeds by virtue of [the equivalent of G.S. 58-155.48(a)(2)], and we so hold." 379 Mass. at 535, 400 N.E. 2d at 225. Again, then, our holding serves the goal of consistent construction of the Uniform Act. G.S. 58-155.17.

EXPENSES

[4] Commissioner Ingram contends the court in the receivership action erred in allowing the expenses of the Association as a second priority claim against surplus special deposit proceeds. Our Supreme Court has stated:

> The Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent. However, *all* deposit funds must be paid to claimants pro rata as provided by G.S. 58-185. If all claimants are satisfied either directly by the Association or by the Commissioner (if the claim is under $100) and deposit funds remain, then and only then are such funds to be permanently credited to the Association for its expenses.

Ingram, supra, 303 N.C. at 635, 281 S.E. 2d at 23. The *Ingram* opinion does not distinguish between "allowing" and "paying" expenses, and neither it nor the statute it construed, G.S. 58-155.60, refers to "second priority" claims. Regardless of the terminology employed, however, the effect of the order here was approved in *Ingram*. We thus find this contention without merit.

Commissioner Ingram also asserts that G.S. 58-155.25 operates to bar Association expenses incurred after the order of liquidation. That statute provides:

> The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order . . . .

The Association does not fall within any of the described classes. Deposit proceeds do not become part of the "estate" until

after all expense claims have been satisfied. *Ingram, supra*, 303 N.C. at 634-35, 281 S.E. 2d at 23; *see* 65 Am. Jur. 2d *Receivers* §§ 152-59 (1972); 75 C.J.S. *Receivers* § 108 (1952) (defining estate). Even if the Association came within the provisions of G.S. 58-155.25, that statute must be read in conjunction with G.S. 58-155.60, which authorizes payment of "*all* expenses of the Association relating to the insurer." (Emphasis supplied.) As noted in *Ingram*, G.S. 58-155.60 applies "[n]otwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits" and thus "controls should there be any conflict in pre-existing provisions." 303 N.C. at 633, 281 S.E. 2d at 22.[3] Although in this case the Association's claim adjustment expenses had long become final when the liquidation order was issued, it is possible, particularly with domestic insurers, that in other cases the Association would continue to incur such expenses, in addition to its administrative expenses, subsequent to such an order. We do not believe the legislature intended to limit the Association's expense recovery under G.S. 58-155.60. The role of the Association in this context more closely resembles that of the receiver than of a creditor. The expenses of the receiver are not fixed as of the date of the liquidation order; he may continue to incur reasonable expenses and properly claim them. *See Surety Corp. v. Sharpe*, 236 N.C. 35, 52, 72 S.E. 2d 109, 124-25 (1952); 66 Am. Jur. 2d *Receivers* § 281 (1973); 75 C.J.S. *Receivers* § 379 (1952). By analogy, and by the terms of the statute, we find the order proper.

DISPOSITION OF REMAINING GENERAL ASSETS

[5] Commissioner Ingram finally contends the court erred in directing "immediate transfer" of all remaining surplus proceeds to Commissioner Caldarone, the domiciliary receiver. G.S. 58-155.12(b) gives the ancillary receiver "the same powers" as the domiciliary. This grant, Commissioner Ingram argues, includes the power to pay general creditors.

By its very terms, however, the statute subjects the general grant to its specific provisions, which limit the ancillary receiver's

3. G.S. 58-155.25 was adopted in 1947. Act of April 5, 1947, ch. 923, § 58-155.25, 1947 N.C. Sess. Laws 1284, 1296. G.S. 58-155.60 was adopted in 1979. Act of May 23, 1979, ch. 628, § 1, 1979 N.C. Sess. Laws 660, 660.

power to liquidating "special deposit claims and secured claims." "All remaining assets he [the ancillary receiver] shall promptly transfer to the domiciliary receiver." *Id.* The statutory mandate is clear, and the order was in accord therewith.

We note that the position urged by Commissioner Ingram is precisely the "evil sought to be remedied" by the Uniform Act.

> Creditors in non-domiciliary states are, generally speaking, at liberty to prefer themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. This, of course, results in inequity as to other creditors. (See *Clark v. Willard*, 294 U.S. 211, 55 S.Ct. 356 (1935) for such a case.)
>
> Wasteful conflicts are likely to arise between the domiciliary and the ancillary receivers during the administration of the assets since each receiver feels bound to seize as much of the company's property as possible in order that he may protect local creditors to the greatest possible extent.

Report of the Committee on a Uniform Reciprocal Liquidation Act for Insurance Companies, *supra*, at 370; *see also* Unif. Insurers Liquidation Act Commissioners' prefatory note, 13 U.L.A., *supra*, at 429-31. By requiring consolidation of general assets with the domiciliary receiver, while allowing local general creditors to prove their claims locally (*see* G.S. 58-155.14), the Uniform Act resolves problems both of unfair preferences for local creditors and of unnecessary hardship to them in participating in the domiciliary proceedings.

CONCLUSION

The questions presented were properly before this Court. The orders appealed from correctly applied the law to the undisputed facts. The court properly awarded the interpleader funds to the Association with appropriate restrictions. It did not err in allowing expenses or in ordering immediate transfer of the remaining assets to Commissioner Caldarone. The orders are therefore

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. ANDREW LYNN JONES

No. 8310SC912

(Filed 3 April 1984)

Constitutional Law § 34; Criminal Law § 128— declaration of mistrial—failure to find facts supporting—record not supporting declaration of mistrial—double jeopardy attaching

In a prosecution for the murder of defendant's wife's boyfriend, the trial court improperly entered a mistrial over defendant's objection, and defendant's plea of former jeopardy or motion to dismiss at his subsequent trial should have been granted and defendant should have been discharged. Before granting a mistrial, the trial judge failed to make findings of fact with respect to the grounds for the mistrial and assert the findings in the record as required by G.S. 15A-1064, and the record does not otherwise make clear the basis for the order. There was no positive indication of a deadlock of the jury and the court failed to make an inquiry and factual findings as to whether or not the jury was deadlocked. Further, the record substantiates a conclusion that the jury was carefully and conscientiously deciding a capital case; that their questions on malice indicated a consideration of at least second degree murder; that the jury's subsequent questions on provocation indicated that they had eliminated first degree murder and were considering either second degree murder, manslaughter, or acquittal; and that the judge, provoked by the actions of the prosecutor, suddenly declared a mistrial after answering the jury's last question. The improper order of mistrial was clearly prejudicial; not only did defendant lose his right to have his trial completed before the first jury without proper inquiry, but he also had to undergo the stress of another full trial on the first degree murder charge.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 27 July 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1984.

Defendant and his wife separated in early 1979 after six years of marriage. She moved out and shortly thereafter they signed a separation agreement. Defendant's wife became romantically involved with David Lee Height, a mutual friend. Defendant and his wife continued to see one another and apparently considered reconciliation. On 1 July 1979, however, defendant and his wife had a conversation in which she told him she would not return to him. In the early morning of 2 July 1979, defendant came to his wife's apartment. Height was there with her. After some discussion, defendant pulled out a .25 caliber pistol and shot Height once in the chest. Height died as a result of the shooting. Defendant turned himself in to the police four days later. Because

his wife could not testify against him, the murder indictment against him was dismissed. Following the decision of the Supreme Court in *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981), which changed the strict common law rule of spousal disqualification, defendant was reindicted for the murder of Height. From a conviction of second degree murder defendant appeals. Further facts are set out as necessary in the opinion.

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

Dement, Askew & Gaskins, by Johnny S. Gaskins, for defendant appellant.

JOHNSON, Judge.

The substantive facts outlined above are not seriously disputed. Rather, defendant raises errors of procedure resulting in violation of the constitutional guarantee against double jeopardy.

I

The underlying error which defendant asserts, and upon which all his other assignments of error are predicated, is that the trial court improperly declared a mistrial at his first trial. The proceedings leading up to the declaration of mistrial were as follows:

The trial began 18 April 1983 in Wake County Superior Court before the Honorable Samuel E. Britt and a duly empanelled jury. After presentation of evidence by both sides, the court gave its charge to the jury. (No errors are alleged, nor are any apparent, in these or any other instructions given.) The jury retired at 2:40 p.m. on 20 April. At approximately 3:40 p.m., the jury returned and asked the court to redefine murder in the first degree, murder in the second degree, and voluntary manslaughter. The court repeated the instructions as requested and repeated its mandate. At the request of the foreman, the court also gave a definition of malice. At 5:03 p.m., the court called the jury in, ordered the verdict sheet sealed, and declared a recess. At 9:30 a.m. the next morning, the court reconvened with all jurors present. Before they resumed deliberation, the foreman in-

dicated that several members had asked the day before for a redefinition of malice and under what conditions it could be eliminated from consideration, and "any other pertinent information you think might help us." The court carefully and correctly defined malice as it applies to the varying degrees of homicide. The jury retired at 9:45 a.m.

At 12:50 p.m., the jury returned again and the following ensued:

COURT: All right, all parties to the trial are now back in the courtroom in the case of State of North Carolina verses [sic] Andrew Lynn Jones. Will the foreman please rise. The baliff indicated you wanted me to call you in shortly before the lunch hour for the purpose of a question, is that correct?

FOREMAN: Yes, it is, Your Honor.

COURT: What's the question?

FOREMAN: Your Honor, the question arises from a question of law that the Prosecutor read concerning a case. I believe it said and stated that mere words alone cannot raise a heat of passion, something of that affect [sic]. Our question is: Can words alone provoke heat of passion? And the second question: What all can provoke heat of passion?

COURT: Thank you, you may be seated. It is true, members of the jury, that a true statement of the law is that mere words alone can provoke a passion, a state of passion, and I will instruct you that is a correct statement of law. Now your next question as to what possibly could provoke passion is beyond my ability to answer. I have no knowledge of all the endless list of things that might occur in this world that might provoke passion and could not express it in terms of the law.

FOREMAN: Your Honor, for clarification, it was our understanding that the Prosecutor, the case that he read said mere words alone cannot provoke a heat of passion.

COURT: Is that what you stated to this jury? I was out of the room during the argument. Is that what you stated to the jury?

MR. KNUDSEN [Assistant District Attorney]: I read a case from the State of North Carolina that stated mere words alone would not constitute adequate provocation, which I have reason to believe that's the case. I read from the Supreme Court of North Carolina.

COURT: We have reached an impasse. I withdraw Juror Number One and declare a mistrial. Thank you very much, members of the jury, for your services.

The court thereafter entered an order which read in its entirety as follows: "The judgment of this court is that the jury has reached an impasse and further deliberation would not resolve this matter. The Court therefore withdraws juror #1 and declares a mistrial." To this order defendant properly and timely objected.

A second trial took place before the Honorable Anthony M. Brannon and a jury on 20 June 1983; defendant moved to dismiss on the ground of former jeopardy and the court denied the motion. Defendant immediately gave notice of appeal, but the trial went forward nonetheless. It resulted in a mistrial on the motion of defendant. At a third trial before the Honorable Robert L. Farmer and a jury, defendant unsuccessfully renewed his motion to dismiss. That trial resulted in a verdict of guilty of second degree murder on 27 July 1983. The judgment entered on this verdict is the jurisdictional basis of this appeal; the earlier appeal was dismissed as interlocutory. *State v. Jones*, 67 N.C. App. 413, 313 S.E. 2d 264 (1984) (Johnson, J., dissenting). Defendant's only real contention here is that his motions to dismiss for former jeopardy were improperly denied because the first mistrial was erroneously ordered.

II

A defendant's right to have his trial completed before a particular tribunal is a "valued right," guaranteed by the constitutional prohibition of double jeopardy. *Wade v. Hunter*, 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834 (1949). As stated by the United States Supreme Court in *Arizona v. Washington*, 434 U.S. 497, 503-5, 54 L.Ed. 2d 717, 727-28, 98 S.Ct. 824, 829-30 (1978):

The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is

> not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. (Footnotes omitted.)

This right has also been recognized in North Carolina. *See State v. Williams*, 51 N.C. App. 613, 277 S.E. 2d 546 (1981) ("cherished right").

Consequently, a standard and long-established feature of American jurisprudence has been that the jury may only be discharged with the defendant's consent where "there is a manifest necessity for the act." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824); *see also Arizona v. Washington*, *supra*. North Carolina courts have long adhered to this rule, requiring either "physical necessity" or "the necessity of doing justice" to discharge the jury. *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954); *see also State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962). As pointed out in *Arizona v. Washington*, *supra* at 506, 54 L.Ed. 2d at 728, 98 S.Ct. at 830-31, such words "do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." Therefore, the trial court must exercise its discretion in applying the standard of necessity. *Id.; United States v. Perez*, *supra; State v. Birckhead*, *supra*.

This discretion is a limited one, however, and must be exercised with care, in view of the important rights at stake. True necessity must exist. Although the United States Constitution does not require that a state trial court make an explicit finding of "manifest necessity" or "articulate on the record all the factors which informed the deliberate exercise of his discretion," *Arizona v. Washington*, *supra* at 517, 54 L.Ed. 2d at 735, 98 S.Ct. at 836, it does require that the record adequately disclose the necessity on which the order rests. *Id.* North Carolina, however, requires more. Before 1977, trial courts, in capital cases such as this, had

to fully find the facts supporting mistrial orders and place them in the record so that their actions could be reviewed on appeal. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); *State v. Boykin*, 255 N.C. 432, 121 S.E. 2d 863 (1961). Findings were not required in non-capital cases, and the trial court's decision was reviewable only in cases of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972).

In 1977, the General Assembly enacted Article 62 of Chapter 15A of the General Statutes, "Mistrial." It codified existing law and spelled out the limited number of situations in which the court may declare a mistrial. More importantly for this case, the act included G.S. 15A-1064, which provides: "Before granting a mistrial, the judge must make findings of fact with respect to the grounds for the mistrial and insert the findings in the record of the case." This section is mandatory. As stated in *State v. Johnson*, 60 N.C. App. 369, 372, 299 S.E. 2d 237, 239, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983):

> Our statute specifically requires, and we strongly urge adherence thereto, that findings be made and entered into the record *before* a declaration of mistrial. Even the most exigent of circumstances do not justify circumvention of this rule. (Emphasis original.)

The purpose of G.S. 15A-1064 is clearly to ensure that mistrial is declared only where there exists real necessity for such an order. The right of the accused to completion of the proceedings before the same tribunal is thereby protected from sudden and arbitrary judicial action. Judicial action, before being taken, must have support in the record. The pre-1977 cases support this interpretation: required findings ensure that the court's power is "exercised with caution and only after a careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the court at the time judicial inquiry is made." *State v. Crocker*, *supra* at 452, 80 S.E. 2d at 248.

In *State v. Boykin*, *supra*, the trial judge suffered a heart attack at the courthouse. After three days of keeping the jury on call for his hoped-for return, the judge declared a mistrial from his hospital bed, finding *inter alia* that he had suffered a heart attack, that upon medical examination it had been determined he could not return, and that the defendant consented to mistrial.

The Supreme Court affirmed, finding that although the findings were "terse and succinct" that they justified the order.

In *State v. Crocker, supra*, the trial court ordered a mistrial upon discovery of an incident at the hotel where the jury spent the night, in which certain jurors became intoxicated and at least one required some thirty minutes to be quieted down. The Supreme Court held that the order was not justified, since no evidence was heard nor findings made as to the crucial question, *i.e.*, the jurors' fitness to serve when present in court. The trial court's findings here clearly do not suffice when compared with the standard implicit in *Boykin* and *Crocker, supra*.

In *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), the jury transmitted a note to the judge that it could not come to an agreement. The court then interrogated the jury foreman and elicited his opinion that the jury was hopelessly deadlocked. Upon inquiry, the other jurors indicated agreement with the foreman. In *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971), the jury told the court they were "six and six" upon which the court instructed them to resume deliberation. Upon their return, they stated they were still similarly divided and each juror indicated a personal opinion that they could never agree. The court then ordered a mistrial. In both *Alston* and *Battle* the Supreme Court held that the court properly exercised its discretion. In *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982), the Supreme Court again upheld a declaration of mistrial where the jury had sent a note to the judge indicating it was deadlocked. No such positive indication appears anywhere in this record. Nor did the court undertake any sort of inquiry as in *Alston* and *Battle*. The trial judge admitted that he made no inquiry as to whether the jury was deadlocked. Therefore, not only did no positive indication of deadlock enter the record, but the court also could not exercise its discretion whether or not to order the jury to continue deliberations. *State v. Battle, supra*. The trial court's failure to make both an inquiry and factual findings thus constituted a serious deviation from proper practice and precluded defendant's timely assertion of his rights. We, therefore, hold that the court erred in ordering a mistrial.

Our holding that the order of mistrial was error does *not* mean that a mistrial could not have been declared in this case. It

does mean that where a defendant insists on his right to have his trial completed before one jury, that right may only be denied after the demonstrated exercise of careful judicial inquiry and deliberation. In addition, that right is sufficiently important and once lost is irretrievable, so that absent compelling reasons, there is no excuse for the trial court's failure to make the mandated findings of fact before entering the order. Therefore, an order so entered, as here, is erroneous.

III

Nevertheless, argues the State, the real purpose of G.S. 15A-1064, which is to enable the reviewing courts to determine that manifest necessity for mistrial existed and that the judge exercised sound discretion, has been satisfied by the creation of an adequate record. The State relies on the federal constitutional requirement as set forth in *Arizona v. Washington, supra,* that explicit findings are not necessary where an adequate record is made, to argue that G.S. 15A-1064 should require nothing more.

It is elementary that all state laws in conflict with the United States Constitution and the laws of the United States are without effect. U.S. Const. Art. VI, cl. 2; *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed. 2d 576, 101 S.Ct. 2114 (1981). However, the states may of their own accord impose higher standards of procedural protection on their law enforcement system. *Cooper v. California,* 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788 (1967). The Constitution of North Carolina expressly grants the General Assembly the power to enact rules of criminal procedure such as G.S. 15A-1064. N.C. Const. Art. IV, § 13(2).

In construing the statutes of North Carolina, the intent of the legislature controls. *State v. Fulcher,* 294 N.C. 503, 243 S.E. 2d 338 (1978); *In re Hardy,* 294 N.C. 90, 240 S.E. 2d 367 (1978). A construction which will defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *In re Hardy, supra.* Furthermore, none of the statutory provisions of an act are to be deemed useless if they can reasonably be considered as adding something to the act. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972).

Applying the foregoing principles we must reject the State's contention. G.S. 15A-1064 clearly requires findings of fact. Had

the General Assembly wished to allow the matter to remain entirely in the discretion of the trial courts, it would have done so. Instead, in a departure from earlier law, the legislature made such findings mandatory for all orders of mistrial. The State's contention, if adopted, would make such findings necessary only where the record did not otherwise make clear the basis for the order. Such a rule, while satisfying the United States Constitution, would effectively render G.S. 15A-1064 meaningless; its provisions subject to virtually unlimited discretion of the trial courts to evaluate the state of the record and decide whether findings are required. The General Assembly's action is expanding existing law and its clear mandatory language indicate a contrary intent. Furthermore, this Court should not be subjected to needless litigation of the sufficiency of the record to warrant findings. The provisions of G.S. 15A-1064 are simple and clear; their uniform application will protect valued rights of defendants and greatly facilitate the process of appellate review.

The State's reliance on *Arizona v. Washington, supra,* overlooks one of the key features of that case. Although the trial judge there did not make explicit findings, he did allow substantial time for deliberation and allowed counsel for both sides full opportunity for argument on the record, after indicating the pertinent legal problems. Such an effort is entirely lacking here; the two cases are clearly distinguishable in this vital respect.

To repeat, it is only a secondary purpose of G.S. 15A-1064 to ensure that a full record is made. Its primary purpose is to protect the valued constitutional rights of criminal defendants. It would seriously weaken this protection if trial judges could *ex post facto* develop explanations for mistrial rulings. Findings must be made *before* the declaration to ensure full deliberation; the creation of a record subsequently is no substitute, except perhaps in a few isolated cases. *See State v. Johnson, supra* (judge, former heart attack victim, felt another attack coming on; failure to make findings in advance curable error).

IV

Assuming *arguendo* that cure was available, the record developed does not lend support to the State's contention. The trial judge testified at the habeas corpus hearing that the jurors' faces and demeanor led him to believe that the jury was divided

and confused. The requests for repetition of various parts of the charge and certain remarks by the foreman also constituted basis for this belief. Ordinarily appellate courts give great credence to findings of the trial court. Here, however, the judge's explanation for his action consists solely of subjective impressions first revealed twenty days after the trial, without contemporaneous inquiry having been made to substantiate them or opportunity given for the parties to be heard. Although the record supports an inference that the jury was experiencing difficulty understanding the law arising upon the evidence, the record also substantiates the conclusion that the jury was carefully and conscientiously deciding a capital case; that their questions on malice indicated consideration of at least second degree murder; that the jury's subsequent question on provocation indicated that they had eliminated first degree murder and were considering either second degree murder, manslaughter, or acquittal; and that the judge, provoked by the actions of the prosecutor, suddenly declared a mistrial after answering the jury's last question.

The impressions of the trial judge clearly do not rise to the level of compelling circumstances or clear deadlock required by North Carolina law. *State v. Birckhead, supra; State v. Alston, supra.* The absence of more definitive findings only underscores again the importance of complying with G.S. 15A-1064. The constitutional rights at stake are sufficiently important that they should not be left to speculation.

The State also contends that the order entered following the habeas corpus hearing is conclusive here. The only relevant parts of that order are (1) that there was ample evidence in the record from which the trial judge could have found the jury was hopelessly confused as to the law, (2) that the jury had deliberated more than five hours, almost as long as the evidence had taken, and (3) that their questions indicated they had not eliminated any possible verdict. These are not specifically labelled findings of fact, nor do they appear to be anything more than conclusions of law, relative to the issues presented here. In the record of both the trial and the hearing, the only real "facts" justifying mistrial are the trial judge's subjective impressions from the jury's faces, and his subjective interpretation of several remarks by the foreman. Assuming *arguendo* that the order entered following the

habeas corpus hearing *is* conclusive, it does not contain these crucial facts.

V

We have decided that the order of mistrial was erroneous, and that the error was not subsequently cured. The appropriate remedy must now be fashioned.

It is abundantly clear that jeopardy had attached at defendant's first trial. *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971). The jury had apparently eliminated the first degree murder charge when the mistrial was declared. The improper order of mistrial was thus clearly prejudicial; not only did defendant lose his right to have his trial completed before the first jury without proper inquiry, but he also had to undergo the stress of another full trial on the first degree murder charge.* Therefore, defendant was unconstitutionally subjected to double jeopardy for the same offense.

Although the cases are few, it is long and firmly established that where a mistrial is improperly entered over defendant's objection, a plea of former jeopardy or a motion to dismiss must be granted and the defendant discharged. *State v. Birckhead, supra; State v. Crocker, supra; State v. McGimsey*, 80 N.C. 377 (1879); *State v. Garrigues*, 2 N.C. 241 (1795). The holding in *State v. Crocker, supra* is especially relevant here, as it was "predicated solely upon the insufficiency of the facts as found to support the order of mistrial." 239 N.C. at 453, 80 S.E. 2d at 248. The Supreme Court ruled:

> Our holding here is that the facts and circumstances set forth in the findings of fact are not of such compelling nature as to justify a further relaxation of a rule of such importance in safeguarding the life and liberty of a citizen against repeated prosecutions for the same offense.

* This Court has recognized the possibility of harmless error in failure to comply with G.S. 15A-1064. *State v. Johnson, supra.* The holding in *Johnson* was based on its "peculiar" facts, however; the trial judge, a former heart attack victim, felt the now familiar pains coming on and ordered a mistrial. Physical necessity permitted the order, G.S. 15A-1063, and clearly excused the failure to find facts. Nothing in this case suggests that the rule in *Johnson* should apply.

> The preservation of the salutary principle underlying the plea of former jeopardy in capital cases is of far greater importance than the service by this defendant of the prison term imposed . . . The uncertainty, anxiety and expense of two trials for the capital felony of murder in the first degree, within themselves, constitute an ordeal that is the equivalent of substantial punishment.

Id. The Court, therefore, ordered the defendant's discharge. *A fortiori*, where the trial court makes no findings at all in the course of improperly ordering a mistrial over defendant's timely objection, and nothing prevents the court from doing so, the defendant cannot be tried again for the same offense. Therefore, defendant must be discharged and the charges against him dismissed.

The judgment appealed from is accordingly

Reversed.

Chief Judge VAUGHN and Judge WEBB concur.

IN THE MATTER OF: THE APPEAL OF COLONIAL PIPELINE COMPANY, A PUBLIC SERVICE COMPANY ENGAGED IN BUSINESS IN NORTH CAROLINA, FROM THE VALUATION OF ITS PROPERTY BY THE NORTH CAROLINA PROPERTY TAX COMMISSION FOR 1981

No. 8310PTC392

(Filed 3 April 1984)

Taxation § 25.7— petroleum pipeline—tax valuation—embedded cost of debt—investment tax credits—obsolescence

In determining the ad valorem tax valuation of a petroleum pipeline company's system property in North Carolina, the Department of Revenue and the Property Tax Commission did not err in using the embedded cost of debt rather than the market cost of debt in the income approach to value, in including investment tax credits based on credits for prior years in the income approach, or in the treatment of economic obsolescence in the cost approach to value. G.S. 105-336(a).

In re Colonial Pipeline Co.

APPEAL by Colonial Pipeline Company from a final decision of the North Carolina Property Tax Commission on 4 November 1982. Heard in the Court of Appeals 6 March 1984.

Attorney General Edmisten by Assistant Attorney General Marilyn R. Rich for North Carolina Department of Revenue, appellee.

Hunton & Williams by Robert C. Howison, Jr., Henry S. Manning, Jr., and William L. S. Rowe for Colonial Pipeline Company, appellant.

BRASWELL, Judge.

The underlying question of this case relates to ad valorem tax valuation for the year 1981 of Colonial Pipeline Company's system property in North Carolina. The North Carolina Department of Revenue established the valuation at $160,000,000, which is 13.162% of the whole system value of $1.216 billion. Colonial contends the true value is $127,956,000, which results mathematically in a difference of $32,044,000. Upon Colonial's appeal to the North Carolina Property Tax Commission, that trial tribunal issued its final agency decision upholding the valuation of the Department of Revenue. Colonial now appeals to this Court.

Colonial Pipeline Company, incorporated in Delaware, is a common carrier of petroleum products owned by ten petroleum related corporations. Colonial is the nation's largest volume petroleum pipeline.

Colonial has a capital structure of 94% debt (almost all of which is long-term) and 6% equity. All of this long-term debt is guaranteed by its stockholders, the ten oil companies, and this guaranteed debt cannot be assumed by a purchaser of Colonial's assets. Colonial's authorized rate of return is externally controlled by the tariff policies of the Federal Energy Regulatory Commission (FERC). These policies permit it to earn on the average not more than a 10% rate of return on its FERC valuation.

Colonial is a public service company and its system property is subject to North Carolina ad valorem appraisal and taxation pursuant to the North Carolina Machinery Act. *See* G.S. 105-335.

The statute specifies that a unit value appraisal shall be made by the Department of Revenue. The purpose of the appraisal is to determine the true value of the system as defined in G.S. 105-283. First, the system as a whole is valued; secondly, a value is established for that part of the system apportionable to North Carolina under G.S. 105-337. True value is defined by G.S. 105-283 as market value.

Unit value appraisals for ad valorem taxation for 1981 of the system were made by two sources: one by the Department of Revenue through W. R. Underhill, in an amount of $1.216 billion; and one by Colonial through Robert H. McSwain, in an amount of $970 million, which was 20% less than Underhill's valuation. The underlying facts on which the appraisers based their opinions are not disputed. What is disputed is the manner in which the appraisers interpreted the statutory requirements of taxation on the market value of the Colonial system properties.

North Carolina's unit valuation procedure is set out in G.S. 105-334, G.S. 105-335, and G.S. 105-283. Under this unit value system approach the market value of Colonial's whole system property is determined without geographical or functional division of the whole. The pipeline runs generally from Texas through the south to the northeast, goes through 13 eastern states and covers about 5,000 miles of line. System property means the operating properties used in the rendition of the company's service, G.S. 105-333(17), and not the business enterprise.

In making its appraisal of whole system property of a public service company, G.S. 105-336(a) requires the Department of Revenue to consider four specific approaches in determining true or market value:

(1) the stock and debt approach,

(2) the cost approach, also known as the depreciated cost method, or book value,

(3) the income approach, also known as the capitalized earnings method, or gross receipts and operating income,

(4) "[a]ny other factor or information that in the judgment of the Department has a bearing on the true value of the company's

system of property." [Note: Neither side offered evidence of this 4th approach.]

Our Court has heretofore interpreted G.S. 105-336(a) as follows:

> A careful reading of the statute reveals that all four approaches are to be used in establishing the appraised value, but no guidelines are set out establishing the weight to be given any single system of valuation. Rather, based on the judgment of the Ad Valorem Tax Division, the Department may exercise its discretion on valuation. The appraisal must not be arbitrary, must be based on substantial evidence, and must be based on lawful methods of valuation.

In re Southern Railway, 59 N.C. App. 119, 121, 296 S.E. 2d 463, 466 (1982), *disc. rev. allowed*, 307 N.C. 468, 299 S.E. 2d 222 (1983). The function of the Property Tax Commission, while this case was before it, as reinforced in *In re McElwee*, 304 N.C. 68, 87, 283 S.E. 2d 115, 126-127 (1981), was "[t]o 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."

As we focus on our scope of review, certain standard principles of law emerge as controlling. There is a presumption of correctness in the taxing authority's assessment. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E. 2d 752, 761 (1975). To overcome this presumption the burden of proof is upon the taxpayer, Colonial, to show that:

(1) Either the Department of Revenue, or the final agency, the Property Tax Commission, "used an *arbitrary method* of valuation;" *Id.* at 563, 215 S.E. 2d at 762; or

(2) The Department or Commission "used an *illegal method* of valuation;" *Id.* and

(3) "[T]he assessment *substantially* exceeded the true value in money of the property." *Id.* [Emphasis in original.] *See also In re Odom*, 56 N.C. App. 412, 413, 289 S.E. 2d 83, 85, *cert. denied*, 305 N.C. 760, 292 S.E. 2d 575 (1982); G.S. 105-345.2.

The nature of the scope of our review is the whole record test. G.S. 105-345.2(c). Through it we review the record, the exceptions, and the assignments of error, being admonished by the same statute to take "due account" of the "rule of prejudicial error." Our task is to examine and see if the agency decision, the Property Tax Commission's decision, including its findings of fact and conclusions of law, are supported by competent, material, and substantial evidence in view of the whole record. *In re Southern Railway, supra*, at 124, 296 S.E. 2d at 468.

The thrust of Colonial's assignments of error and argument maintains that the Department of Revenue appraised "Colonial, the business," and "not Colonial's system property in a market exchange." Colonial asserts that the going business enterprise was appraised, not its real and personal property in an ad valorem setting. In making our examination of the issues and contentions we are obliged to analyze the two competing appraisals which were before the Department and Commission. One is exemplified by the appraisal of W. R. Underhill for the Department and the other by Robert H. McSwain for the appellant, Colonial. "[B]oth appraisers relied on essentially the same information and employed the same basic methodology in making their appraisals," as concluded by the Commission.

Specifically Colonial challenges the use by Mr. Underhill of the embedded cost of debt instead of the market cost of debt in the income approach to value, the failure to allow depreciation attributable to economic obsolescence in the cost approach, and inclusion of exhausted investment tax credits in the income streams capitalized under the income and the stock and debt approaches. These factors are alleged to be specific errors of law which, used arbitrarily and unlawfully, resulted in Colonial's system property receiving a value by both the Department and Commission substantially in excess of its market value.

In the agency's final order, finding of fact No. 32, to which no exception was taken, says: "Both appraisers placed primary emphasis on the income and cost indicators of value, giving very little, if any, weight to the stock and debt indicator." In its corresponding conclusion of law the agency says: "We have, therefore, not relied on this indicator [meaning stock and debt] of value in reaching this decision."

After analyzing the evidence and in full consideration of its conflicts, and after considering the approaches of determining market value required by G.S. 105-336(a) to be considered, the Commission concluded "that the Cost Approach is the most reliable indicator of value of . . . Colonial Pipeline Company." The Commission also concluded that it was "reasonable to use the embedded cost of debt because in a typical purchase, the debt would likely be assumed." Mr. McSwain, on the other hand had used "the current cost of debt, which he calculated to be 12.5%." Under McSwain's reasoning and figures the income indicator of value (cost of debt of 12% and return to equity of 15%) would yield $1,107,460.00. Since the Department's income appraisal was $1,186,941,543, the McSwain figure would be 93.3% of the Department's figure. Even though the Commission did not feel equal weight should be given to McSwain's income figure and the Department's cost figure, the arithmetic result of their use would be $1,193,516,944, which sum "is 98.2% of the Department's appraisal of $1,216,000,000." The Property Tax Commission concluded, as do we, that this appraisal figure by the Department (Underhill) was "clearly within the 'zone of reason' as expressed in *Electric Membership Corp. v. Alexander,*" 282 N.C. 402, 192 S.E. 2d 811 (1972). In addition, we hold that in our own application of the rule of prejudicial error, as required by G.S. 105-345.2(c), that the final market value sum in money is not one-sided or warped in favor of the Department.

In making an ad valorem tax valuation the concept of fair value (or market value) as used in the statute is the end product of the methods employed. Since the public service company is not being sold in the market place it becomes necessary to make an estimation of value, to determine a final figure at which the typical willing buyer and seller would transact business. Of necessity, because of no present sale, the appraisers must resort to appraisal and accounting methods required by the statutes and those methods common among businessmen in the field. "To 'appraise' means to value property at what it is worth." 3A Words & Phrases, "Appraise" (Cum. Supp. 1983). The Department of Revenue fulfilled its task. The facts and figures are in the record. There is in this record a rational basis for the conclusions and decision of the Commission upon a review of the evidence in the whole record.

Colonial raises the far-reaching question of whether an appraiser, such as the Department of Revenue, should properly use the current cost of debt approach or the embedded cost of debt approach in determining the capitalization rate under the income approach to value. Colonial cites *Washtenaw County v. Tax Commission*, 126 Mich. App. 535, 337 N.W. 2d 565 (1983) as support for its position. In the Michigan case the plaintiff County had alleged "that the commission erred in refusing to discount the sales price of real estate to reflect the effect of so-called 'creative financing,' [current cost of debt argument in N.C.] which involves some form of seller-extended credit and which results in the enhancement of the selling price." *Id.* The Michigan court held that:

> [A] tax assessment system which does not consider creative financing is in fact unconstitutional. Two people owning identical pieces of real property, both worth precisely the same amount and both bought simultaneously, should not be taxed at different rates merely because they purchased their properties under different financing arrangements.

Id. at 541, 337 N.W. 2d at 568.

We recognize in North Carolina as in Michigan and other states that "sales price does not necessarily determine the true cash value of property," *Id.* at 540, 337 N.W. 2d at 568; however, the statutory scheme in North Carolina of true value, meaning market value, does authorize an appraiser to consider the willing buyer and willing seller approach. As stated in *In re Southern Railway, supra*, at 125, 296 S.E. 2d at 468, "For public service companies, the true value of property is its tax value, and 'appraisal' and 'assessment' are synonymous." After analyzing the income approach in *Southern Railway* and in considering and discussing in different language the same principles as examined in the Michigan case of *Washtenaw County, supra*, our court failed to adopt the Michigan holding or rationale. We quote from *In re Southern Railway*:

> We note that an expert witness for the Railroads testified he "had a feeling that fifty per cent of the taxing jurisdictions use the current cost of debt" and "the other fifty per cent use the embedded cost of debt." The Department uses the interest rate expressed on the face of the credit instrument, i.e., the "embedded" cost of debt. To adopt

> Railroads' position would invite further questions, *e.g.*, What is the *current* cost of interest for *this* railroad under all the circumstances? We adopt the position that the "other fifty percent" of the taxing jurisdictions using the embedded cost of debt are correct.

In re Southern Railway, supra, at 129, 296 S.E. 2d at 470. Thus, although North Carolina has failed to adopt the Michigan position, we feel our result is valid as keeping within the holdings of the other 50% of the several states. *See, Southern Railway Company v. State Board of Equalization*, --- Tenn. ---, --- S.W. 2d --- (1983), for a holding in accord with North Carolina.

We hold that the use of embedded debt will support a calculation of market value. It is not unreasonable for the Commission and Mr. Underhill to have considered the sale of the pipeline from a hypothetical willing seller to a willing buyer. Even Mr. McSwain's testimony reveals that the most likely purchaser of the subject property would be a joint venture of oil company shippers similar to Colonial. On all the evidence it was well within the province of the Commission to conclude that "the most likely purchase price for the subject property would be reproduction cost less depreciation," which calculations produced a figure of $1,484,363,743. The final valuation of $1,216,000,000 is well below a value which could have been chosen by the Commission under the procedures applicable to this case. Again, the appellant has failed to show prejudice. G.S. 105-345.2(c). In the business of making an appraisal the function is to consider typical attributes, and the asserted feature that Colonial's embedded debt is nonassumable has no relevance. Appraisers for hypothetical willing buyers and sellers would not resort to being bound by only valuing financing peculiar to the owner. The Commission was not required to accept Mr. McSwain's theory that his hypothetical willing buyer would be required to refinance the debt. It was within the power of the Commission to accept Mr. Underhill's appraisal theory that the typical willing buyer of a similar system on the open market would buy it by purchasing the seller's equity and assuming its debt. The conclusion of the Commission to accept Underhill's testimony about his use of embedded cost of debt was supported by competent, material, and substantial evidence in view of the whole record. We hold that the use of embedded debt

will support a calculation yielding a usable, typical market value of a public service company's property, to wit: Colonial's.

As to the treatment of investment tax credit in the income approach to value we have considered Colonial's argument that it has no current plans for expansion and has heretofore used up all available income tax credits, and find this assignment to be of no relevance in this appraisal. In making its appraisal the Department was required to consider the typical willing buyer of Colonial's property. Just as Colonial has made capital investments, improvements, and expansions in the years preceding 1981, so would the reasonable and prudent typical purchaser make such investments, improvements, and expansions so as to earn investment tax credits for itself. Even if a disgruntled and unsuccessful bidder at market price of Colonial's system property chose to compete by building its own system reasonably adjacent to Colonial's lines, it is self-evident that such conduct would generate new and additional investment tax credits for this hypothetical competitor. Appropriate appraisal methods and theory have made Mr. Underhill's use of investment tax credits a sound basis upon which to apply his answers to his consideration of this income approach, and we find no error. Further, the record as a whole does support this use by competent, material, and substantial evidence of Colonial's previous year's tax credits.

However, we find it even more striking that Colonial has not shown prejudice by the use of Underhill's methods because they produced an income stream nearly $4,000,000 lower than McSwain's figures. This lowered, not raised, Colonial's system's value.

As to the assignment of error on the treatment of economic obsolescence we find no error. Mr. McSwain's figures on economic obsolescence were a product of his capitalization rate of 14%. The Commission found from the evidence that a rate of 12% was more appropriately indicated. It is noted that McSwain did not use the embedded cost of debt in his income approach analysis. Also, Mr. McSwain testified, "if my capitalization rate were in error, then as a consequence my obsolescence factor and further my cost indicator of value would also be in error." We hold that the Commission's evaluation and findings on the treatment of economic obsolescence were fully supported by competent, material, and substantial evidence in the whole record, and no prejudice has been shown.

We have carefully examined all assignments of error and arguments of counsel. We hold that the appraisal of the Department of Revenue, as upheld in the Property Tax Commission's detailed findings of fact and conclusions of law are fully supported by competent, material and substantial evidence. The Commission's order does not result in a taxing of non-system values of Colonial's property. We find no errors of law in the acts or decision of the Commission. The Commission and Department did not act arbitrarily or capriciously.

Affirmed.

Judges ARNOLD and WEBB concur.

LUCIUS R. CHAPPELL v. MARSHALL S. REDDING

No. 831SC222

(Filed 3 April 1984)

1. Husband and Wife § 24— alienation of affections—sufficiency of evidence

The trial court properly denied defendant's motions for directed verdict on plaintiff's claim for alienation of affections where the evidence tended to show that plaintiff and his wife were happily married until the summer of 1979; the couple began to have problems in June of 1979 after plaintiff's wife returned from a medical convention which she, a nurse, had attended in Houston with defendant, her ophthalmologist employer; after defendant and plaintiff's wife returned from Houston in June, his wife became independent of him, began avoiding him, began wearing more makeup and more revealing clothes than she had formerly worn, and eventually removed herself from his bed and began sleeping alone on a couch; that after the Houston trip, defendant would call plaintiff's wife at home and spent increasing amounts of time with her at work; that defendant and plaintiff's wife were seen together at lunch with their chairs close and knees and legs touching and were seen together after work in a darkened room in defendant's office; and that plaintiff asked his wife in October of 1979 to "get him (defendant) out of our personal life" and when she refused, plaintiff moved out of the marital home for several weeks.

2. Husband and Wife § 28— criminal conversation—sufficiency of evidence

The evidence was insufficient to withstand defendant's motions for directed verdict on the issue of criminal conversation where plaintiff failed to present sufficient evidence of sexual intercourse between defendant and plaintiff's wife to take the case to the jury.

3. Husband and Wife §§ 26, 29— one issue of compensatory damages on both alienation of affections and criminal conversation causes of action—error

Because the trial court erred in denying defendant's motions for directed verdict as to plaintiff's criminal conversation cause of action, and because the trial court submitted one issue of compensatory damages on the alienation of affections and criminal conversation causes of action, the case must be remanded for a rehearing on damages so that the jury can reconsider its award of damages, basing their award on the alienation of affections claim exclusively.

4. Husband and Wife § 26— alienation of affections—punitive damages—error

The trial court erred in failing to direct a verdict for defendant as to the punitive damages element of plaintiff's claim in an action for alienation of affections where, while plaintiff's evidence of the problems caused in his marriage by defendant's actions and the increasing amounts of time spent with plaintiff's wife was enough to permit the alienation of affections issue to go to the jury, plaintiff failed to show additional circumstances of aggravation sufficient to justify the submission of the punitive damages issue.

5. Husband and Wife § 26; Rules of Civil Procedure §§ 7, 8— alienation of affections—failure to reply to counterclaim—instructions that failure to reply "oversight"—no prejudicial error

Although it may have been better practice for the trial judge to omit characterizing plaintiff's attorneys' failure to file a reply to defendant's counterclaim as an "oversight" in the charge to the jury, because the law and the issues concerning the counterclaim were correctly explained to the jury, there was no prejudicial error in the judge's instructions.

6. Evidence § 27— tapes of telephone conversations—never introduced into evidence

A trial judge's ruling that tapes of telephone conversations would be received into evidence "for the limited purpose of being identified as such" did not violate the rule set forth in 18 U.S.C. 2515 and *Rickenbaker v. Rickenbaker*, 290 N.C. 373 (1976) since the contents of the tapes were never introduced into evidence.

7. Evidence § 12— cross-examination of plaintiff's wife in criminal conversation action—privilege waived

Where defendant offered plaintiff's wife as a witness in an action for criminal conversation and alienation of affections, he waived any objection to her competency to testify. G.S. 8-56.

APPEAL by defendant from *Reid, Judge.* Judgment entered 12 August 1982 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 7 February 1984.

Plaintiff filed this action in November of 1980, alleging that defendant, his wife's employer, alienated the affections of and had criminal conversation with plaintiff's wife. Plaintiff sought

$500,000 compensatory damages and $500,000 punitive damages. Defendant counterclaimed for actual and punitive damages for violation of his right to privacy and infliction of mental anguish and emotional distress. Plaintiff did not file a reply to the counterclaim.

At trial, the jury's verdict was for plaintiff in the amount of $150,000.00 in actual damages and $50,000.00 in punitive damages and, on the counterclaim, $1.00 to defendant in actual damages and $1.00 to defendant in punitive damages. Defendant's motions for judgment notwithstanding the verdict and a new trial were denied. Defendant appeals.

Hunter, Wharton & Howell by John V. Hunter, III, and LeRoy, Wells, Shaw, Hornthal & Riley, by Terrence W. Boyle, for defendant-appellant.

Trimpi, Thompson & Nash, by C. Everett Thompson and John G. Trimpi, for plaintiff-appellee.

EAGLES, Judge.

I.

Defendant assigns as error the trial court's denial of his motions for directed verdict, at the close of plaintiff's evidence and at the conclusion of all the evidence, on the issue of alienation of affections. Defendant contends that plaintiff did not present sufficient evidence that any alienation of affections was caused by wrongful acts of defendant. We do not agree.

[1] Defendant's motion for a directed verdict presents the question whether, as a matter of law, the evidence is sufficient to entitle plaintiff to have the jury pass on it. The evidence must be considered in the light most favorable to plaintiff, and he is entitled to all reasonable inferences that can be drawn from it. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). In order to withstand defendant's motions for directed verdict, plaintiff must have presented evidence to show that: (1) plaintiff and his wife were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections. *Litchfield v.*

Cox, 266 N.C. 622, 146 S.E. 2d 641 (1966); *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E. 2d 142 (1982). The "malicious acts" required for alienation of affections refer to "unjustifiable conduct causing the injury complained of." *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E. 2d 434, 436 (1980).

Plaintiff testified to the love and affection that existed between his wife and him prior to the summer of 1979. Plaintiff also offered testimony by neighbors, the father and sisters of plaintiff's wife, and a babysitter to the effect that plaintiff and his wife were happily married until the summer of 1979. Plaintiff and these other witnesses all testified that the couple began to have problems in June of 1979, after plaintiff's wife returned from a medical convention which she, a nurse, had attended in Houston with defendant, her ophthalmologist employer. Plaintiff offered further testimony that, after defendant and plaintiff's wife returned from Houston in June of 1979, his wife became independent of him, began avoiding him, began wearing more makeup and more revealing clothes than she formerly had worn, and eventually removed herself from his bed and began sleeping alone on a couch. Plaintiff also offered the following testimony: that after the Houston trip, defendant would call plaintiff's wife at home and spent increasing amounts of time with her at work; that defendant and plaintiff's wife were seen together at lunch with their chairs close and knees and legs touching and were seen together after work in a darkened room in defendant's office; and that plaintiff asked his wife in October of 1979 to "get him (defendant) out of our personal life" and when she refused, plaintiff moved out of the marital home for several weeks.

While defendant offered testimony that plaintiff's marriage was in trouble before June of 1979, this conflict in evidence does not require a directed verdict against plaintiff on the alienation of affections issue. The plaintiff presented sufficient competent evidence, when viewed in the light most favorable to plaintiff, to show a happy marriage between plaintiff and his wife and affection existing between them which was alienated and destroyed by unjustifiable conduct by defendant. We hold, therefore, that the trial court properly denied defendant's motions for directed verdict on the issue of alienation of affections.

II.

[2] Defendant also assigns as error the trial court's denial of his motions for directed verdict on the issue of criminal conversation. In order to withstand defendant's motions for directed verdict, plaintiff was required to present evidence to show: (1) marriage between the spouses and (2) sexual intercourse between defendant and plaintiff's spouse during the marriage. *Sebastian v. Kluttz*, 6 N.C. App. 201, 209, 170 S.E. 2d 104, 109 (1969). It is uncontradicted that there was a marriage between the spouses. We find that plaintiff failed to present sufficient evidence of sexual intercourse between defendant and plaintiff's wife to take the case to the jury.

Plaintiff presented no direct evidence of sexual intercourse. Plaintiff's best circumstantial evidence of sexual intercourse involved an incident when defendant and plaintiff's wife were alone together for about two hours at defendant's motor home. Plaintiff and plaintiff's brother-in-law each testified without objection that in early 1981, several months after plaintiff's wife had moved out of the marital home and two months after the complaint in this action was filed, they went to the property where defendant's motor home was located and observed plaintiff's wife's car and defendant's car parked outside the motor home. When they began watching, the lights in the motor home were bright, the lights were then dimmed for about an hour, and the lights were then brightened again. Plaintiff's wife and defendant then came out, and plaintiff's wife got in her car. Plaintiff's wife and defendant talked, and plaintiff's wife drove away. We hold that, even when viewing this evidence in the light most favorable to the plaintiff, there is not enough evidence of sexual intercourse to take the issue of criminal conversation to the jury.

This court has commented on the sufficiency of evidence on sexual intercourse: "Given the highly emotional nature of the subject matter, and the degree to which individual jurors' attitudes regarding propriety may vary, we feel a . . . definite line must be drawn between permissible inference and mere conjecture." *Horney v. Horney*, 56 N.C. App. 725, 727, 289 S.E. 2d 868, 869 (1982). To hold here that evidence that plaintiff's wife and defendant spent two hours alone together was sufficient to take the issue of criminal conversation to the jury would allow the jury to

act on mere conjecture. The trial court erred in denying defendant's motions for directed verdict on the issue of criminal conversation.

III.

We now address two aspects of the damages awarded to the plaintiff. The issues submitted to the jury as to plaintiff's damages and the jury's answers were as follows:

1) Did the defendant alienate the affections of the plaintiff's wife?

ANSWER: Yes

2) Did the defendant commit criminal conversation with the plaintiff's wife?

ANSWER: Yes

3) What amount, if any, is the plaintiff entitled to recover of the defendant as compensatory damages?

ANSWER: $150,000

4) What amount, if any, is the plaintiff entitled to recover of the defendant as punitive damages?

ANSWER: $50,000

(A)

[3] The trial court submitted one issue of compensatory damages on the alienation of affections and criminal conversation causes of action (Issue number 3). This court has approved that practice where the two causes of action and the elements are connected and intertwined to a great extent. *Sebastian v. Kluttz*, 6 N.C. App. at 220, 170 S.E. 2d at 116. However, because we hold here that the trial court erred in denying defendant's motions for directed verdict as to criminal conversation, we must remand for a rehearing on damages so that the jury can reconsider its award of damages, basing their award on the alienation of affections claim exclusively.

(B)

[4] Defendant assigns as error the trial court's failure to direct a verdict for defendant as to the punitive damages element of plaintiff's claim. Defendant contends that he should have been granted a directed verdict on punitive damages because there was no evidence of willful, wanton, aggravated or malicious conduct by defendant. We agree.

Because we have reversed on the issue of criminal conversation, we need only address the issue of punitive damages as it may relate to alienation of affections. In actions for alienation of affections, punitive damages may be awarded in addition to compensatory damages where the defendant's conduct was willful, aggravated, malicious, or of a wanton character. *Sebastian v. Kluttz*, 6 N.C. App. at 220, 170 S.E. 2d at 116. In order to take the question of punitive damages to the jury, there must be some evidence of circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages. *Heist v. Heist*, 46 N.C. App. at 527, 265 S.E. 2d at 438. Here, while plaintiff's evidence of the problems caused in his marriage by defendant's actions and the increasing amounts of time spent with plaintiff's wife was enough to permit the alienation of affections issue to go to the jury, plaintiff has not shown additional circumstances of aggravation to justify the submission of the punitive damages issue. The trial court erred in denying defendant's motions for directed verdict on this issue, and we vacate the judgment of $50,000.00 on the punitive damages issue.

IV.

[5] Defendant assigns as error the fact that the trial judge instructed the jury that plaintiff's admission of the allegations of defendant's counterclaim (for invasion of privacy and intentional infliction of emotional distress) was the result of an "oversight" by plaintiff's attorneys. We find no prejudicial error.

On the last day of trial, plaintiff sought to file a reply to defendant's counterclaim, alleging that plaintiff's counsel had simply overlooked the filing of a formal reply. The trial judge, in his discretion, declined to allow the filing of a reply at that point,

finding that defendant was entitled to rely on the fact that no reply had been filed before that stage of the trial. In instructing the jury, the trial judge said:

> Now, in this case, members of the jury, the defendant, by omission of his counsel, has failed to file a reply to the counterclaim which was contained in the defendant's answer to the original complaint. The law in this state provides, under Rule 1(A)-1, Section 8, Subparagraph D, of the Rules of Civil Procedure, and I quote, averment in a pleading to which a responsive pleading is required other than those that the amount of damages are admitted when not denied in the responsive pleading. The counsel for the plaintiff quite candidly has admitted to you that he neglected to file a responsive pleading; therefore, the averments, or the allegations set forth in the counter-claim of the defendant's lawsuit have been, by Statute, deemed to have been admitted. Since, by virtue of this oversight, the plaintiff has not denied the allegations of this counter-claim, and it is, therefore, your duty to consider the facts alleged in the counter-claim to be true, and no further proof of them is required.

The issues presented to the jury on defendant's counterclaim were: (1) What amount, if any, is the defendant entitled to recover of the plaintiff as compensatory damages for invasion of privacy and the intentional infliction of emotional distress? (2) What amount, if any, is the defendant entitled to recover of the plaintiff as punitive damages for the invasion of privacy and the intentional infliction of emotional distress?

The trial judge was correct in not submitting an issue on *whether* plaintiff invaded defendant's privacy or intentionally inflicted emotional distress on defendant. Rule 8(d) of the North Carolina Rules of Civil Procedure provides that allegations in a pleading are deemed admitted when not denied if a responsive pleading is required. Because defendant's counterclaim was denominated as such in the answer, a reply was required. N.C. R. Civ. P. 7(a). Thus, all allegations of the counterclaim with the exception of the amount of damages were deemed admitted. *Patrick v. Mitchell*, 44 N.C. App. 357, 260 S.E. 2d 809 (1979). In the charge to the jury, the trial judge clearly stated that because plaintiff had not denied the allegations of defendant's counterclaim, the

facts in the counterclaim were deemed to be true and no further proof of them was required. As to damages, the judge told the jury that "[f]or the invasion of his privacy, the defendant is entitled to recover at least nominal damages such as one dollar ($1.00), or some similar amount, without proof of any actual damages," and then went on to give a proper instruction on compensatory damages. These instructions were a correct statement of the law, and the issues presented to the jury were appropriate. It may have been better practice for the trial judge to omit characterizing plaintiff's attorneys' failure to file a reply as an "oversight" in the charge to the jury, but because the law and the issues concerning the counterclaim were correctly explained to the jury, we find no prejudicial error in the judge's instructions.

V.

We now address several assignments of error by defendant which allege reversible error in the admission of certain evidence and the judge's summary of plaintiff's evidence during the charge to the jury. We find that all of these assignments of error are without merit.

[6] Defendant asserts that the trial court erred in admitting into evidence tapes of telephone conversations between defendant and plaintiff's wife. Defendant contends that plaintiff made these tapes in violation of federal law and that they were thus inadmissible. We find that because the contents of these tapes were never admitted into evidence there was no error.

18 U.S.C. 2515 provides that whenever any wire or oral communication has been willfully intercepted, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence." Our Supreme Court has held that such evidence may not be received in any trial. *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E. 2d 347 (1976). Here, plaintiff sought to introduce the tapes "to have them available for impeachment purposes." The trial judge allowed the tapes to be received into evidence "for the limited purpose of being identified as such" and went on to state that "[t]he Court does not rule at this time on the question of whether or not these tapes could be played for the purpose of impeachment, if they were at some future time in the course of the trial tendered for such purpose." Because the contents of the tapes were never introduced into

evidence, there was no violation of the rule set forth in 18 U.S.C. 2515 and *Rickenbaker* and, thus, there was no error.

[7] Defendant asserts that the trial judge erred in allowing plaintiff to cross examine plaintiff's wife because G.S. 8-56 provides that a spouse is not "competent or compellable to give evidence for or against the other" in an action for criminal conversation. The statute provides that, in an action for criminal conversation, a wife as defendant's witness may refute charges assailing her character. *Chestnut v. Sutton*, 204 N.C. 476, 168 S.E. 680 (1933). Here, defendant had offered plaintiff's wife as a witness, thereby waiving any objection to her competency to testify.

Defendant assigns as error the trial judge's failure to exclude plaintiff's testimony that plaintiff's wife telephoned from Florida in April of 1980 and told him that she was in Port New Richey and was having a good time. Defendant contends that this testimony was hearsay and that the trial judge committed reversible error in admitting it. We do not agree. This testimony was not hearsay, because it was offered, not for the purpose of asserting the truth of the statement, but to show the fact that the statement was made. Plaintiff offered further evidence to show that plaintiff's wife was not in Port New Richey when she called. Thus, plaintiff's testimony was offered only to show that plaintiff's wife said she was in Port New Richey, Florida. Upon defendant's objection, the trial judge gave a limiting instruction to the jury, so there was no error in admitting this testimony.

The judgment of the trial court is reversed as to criminal conversation and vacated as to punitive damages; and because there was error with respect to the submission of a single damages issue on both alienation of affections and criminal conversation, the cause is remanded for a new trial on the amount of compensatory damages for alienation of affections.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. CLICK LONZO BENNETT

No. 8320SC1018

(Filed 3 April 1984)

1. **Homicide § 28.4— lack of duty to retreat in own home—failure to instruct—defendant as aggressor**

The trial court in a homicide and assault case did not err in failing to instruct on defendant's "lack of obligation to retreat when he is assaulted in his own home" where defendant's own evidence showed that he was the first person to resort to physical force and that he was thus not free from fault in bringing on the difficulty.

2. **Criminal Law § 163.1— insufficient objection to failure to charge**

Defense counsel failed to "state distinctly that to which he objects" within the meaning of App. Rule 10(b)(2) so as to preserve for appellate review the trial court's failure to instruct that defendant could be found guilty of voluntary manslaughter on the basis of imperfect self-defense where defendant submitted a handwritten request that the court instruct "on voluntary manslaughter, involuntary manslaughter and self-defense," the trial court allowed the request and instructed on each of the three topics listed, the trial court inquired as to whether counsel had specific requests or corrections or additions to the charge, and defense counsel then asked "to preserve any differences" between the charge given and his written request.

3. **Criminal Law § 163— failure to instruct on imperfect self-defense—no plain error**

The trial court's failure in a homicide case to instruct on imperfect self-defense did not constitute "plain error" where an examination of all the evidence leads to the conclusion that such error could not have had a probable impact on the jury's finding of guilt.

4. **Homicide § 19— ability to perceive life threatening situation—exclusion of expert testimony**

The trial court in a homicide and assault case did not err in excluding expert psychiatric testimony offered by defendant to show that he possessed the ability to perceive accurately a life threatening situation where the State's evidence tended to show that defendant was never confronted with such a situation and that his actions were unprovoked, no issue was raised by the evidence as to defendant's normalcy, and the evidence thus had no tendency to prove a fact at issue in the case.

5. **Constitutional Law § 63— procedure of "death qualifying" jury—constitutionality**

The procedure of "death qualifying" the jury did not violate defendant's constitutional rights.

State v. Bennett

APPEAL by defendant from *Lamm, Judge.* Judgment entered 5 March 1982 in Superior Court, ANSON County. Heard in the Court of Appeals 15 March 1984.

Defendant was charged in proper bills of indictment with the murder of Maggie Lee Bennett, his wife, the murder of Clissie B. Gaddy, his daughter, and with assault with a deadly weapon with intent to kill inflicting serious injuries on Carol Bennett, his daughter. At trial the State presented evidence tending to show the following:

Defendant and his wife had an argument on the afternoon of 4 October 1981, the day of the incident. Carol noticed a cut on her mother's face and loudly stated, "I don't want nobody to touch my momma." Defendant then "started at" her and, when Clissie pushed him away, told Carol he was going to "blow [her] brain out" and left the room. When defendant returned, he carried a .22 caliber rifle, pointed it at his daughters and began to fire. Carol, hit in the upper lip by the second shot, was pushed out the door by her sister and ran to a neighbor's house. As Carol left the house, she heard a third shot and saw Clissie fall. Seven shots were fired in all. When police arrived at the scene, they found the bodies of Clissie Gaddy and Maggie Bennett. Clissie had been shot twice and Maggie three times.

Defendant offered evidence tending to show that he had "discipline problems" with Carol, that his sixteen-year-old daughter was difficult to control and subject to "spells [when] she was just like the devil," and that Carol had threatened him with a knife approximately two weeks prior to the incident. On 4 October 1981 Carol became upset when her father told her not to "mess with [his] food," and an argument ensued. Defendant "slapped at" Carol, who then went into her bedroom. Carol came back into the room holding a knife and told defendant she was going to kill him. As she approached, defendant picked up a rifle and fired. Defendant testified that he acted in fear of Carol, that he had no intention of shooting Maggie or Clissie, and that he did not know how many times he fired or what he hit. He also testified that his daughter Carol was strong, that he was disabled by asthma and hypertension, and that he was afraid of her.

Defendant was found guilty of the second degree murders of Maggie Bennett and Clissie Gaddy and of assault with a deadly

weapon inflicting serious injury on Carol Bennett. After a sentencing hearing the trial judge found aggravating and mitigating factors and, upon a finding that factors in mitigation outweighed factors in aggravation, imposed prison sentences of 2 years in the case wherein defendant was found guilty of assault with a deadly weapon inflicting serious injury, 13 years in the case wherein defendant was found guilty of the second degree murder of his daughter, and 13 years in the case wherein defendant was found guilty of the second degree murder of his wife, the sentences to run consecutively. The sentence imposed in each case was less than the statutory presumptive term. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard H. Carlton and Associate Attorney Victor H. E. Morgan, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant, appellant.

HEDRICK, Judge.

[1] Defendant first assigns error to the court's refusal to instruct the jury "concerning a defendant's lack of obligation to retreat when he is assaulted in his own home." Defendant relies on cases in which the appellate courts of this State have found reversible error in the refusal of the trial court to give the requested instruction when raised by the evidence. *See State v. Frizzelle*, 243 N.C. 49, 89 S.E. 2d 725 (1955); *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975); *State v. Browning*, 28 N.C. App. 376, 221 S.E. 2d 375 (1976). Defendant fails to note, however, the equally well-settled requirement that the defendant be "free from fault in bringing on a difficulty." *Frizzelle*, 243 N.C. at 51, 89 S.E. 2d at 727; *Pearson*, 288 N.C. at 42, 215 S.E. 2d at 603; *Browning*, 28 N.C. App. at 378, 221 S.E. 2d at 377. In the instant case defendant's own testimony was that he responded to his daughter's verbal aggression by attempting to slap her. Because defendant's own evidence shows that he was the first person to resort to physical force, we cannot say the evidence shows that defendant "was free from fault in bringing on [the] difficulty." It follows that he was not entitled to an instruction on his "lack of obligation to retreat when he is assaulted in his own home." The assignment of error is overruled.

Defendant next contends that the court erred in failing to instruct the jury "that it could find the defendant guilty of voluntary manslaughter on the basis of imperfect self-defense" where there was "substantial evidence from which the jury could infer that defendant used excessive force or that he was the initial aggressor."

[2] Before discussing the merits of defendant's argument, we must first consider whether he has properly preserved the question for appellate review. Rule 10(b)(2), North Carolina Rules of Appellate Procedure, provides in pertinent part:

> 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. . . .

In the instant case, defendant submitted a handwritten list of requested instructions, Item No. 5 of which stated: "Instruct on voluntary manslaughter, involuntary manslaughter and self-defense." The record shows that Judge Lamm "allowed" defendant's request for instructions under Item 5 and in fact instructed on each of the three topics listed. After Judge Lamm instructed the jury, he inquired as to whether counsel had "specific requests or corrections or additions to the charge." The record shows that defense counsel then asked "to preserve any differences" between the charge given and "the written request . . . previously submitted." Defendant now concedes that "the instruction as requested could have been more clearly stated" but asks that this Court view the requested instruction and subsequent "preservation of differences" as sufficient compliance with Rule 10(b)(2). This we cannot do. Rule 10(b)(2) is clear in its requirement that counsel "stat[e] distinctly that to which he objects." It is well acknowledged that the purpose of the Rule 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." *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983). To find, as defendant requests, sufficient compliance with Rule 10(b)(2) on these facts would frustrate the purpose of the Rule. Our decision in this regard is bolstered by the fact that Judge Lamm "allowed" defendant's request for this in-

struction, according to his notes in the margin, and proceeded to instruct on the three topics listed. It thus seems likely that the court did not understand defendant's request to be one for instruction on imperfect self-defense as it relates to voluntary manslaughter.

[3] Defendant asks in the alternative that we "find the failure of the trial court to give an instruction on imperfect self-defense to be plain error." The so-called "plain error" rule was adopted by our Supreme Court in *State v. Odom*, in acknowledgment of "the potential harshness of Rule 10(b)(2)." *Id.* "In deciding whether a defect in the jury instruction constitutes '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 378-79. We thus turn our attention to "the whole record."

The evidence presented by the State in the instant case suggested that defendant had an altercation with his teenage daughter which led to his threatening her and then firing at her with a semi-automatic rifle. Maggie Bennett was shot three times and Clissie Gaddy was shot twice. None of the victims were armed. Testimony by Carol indicating that defendant did not act in self-defense was corroborated by Christopher Gaddy, a nine-year-old child, who witnessed the incident.

Defendant testified that he acted in self-defense, and he introduced statements made by him after the incident that were consistent with his trial testimony. Family members and neighbors testified that defendant had a good reputation in the community. Defendant's character and credibility were significantly impeached, however, by evidence that he shot a man with a twenty-two caliber pistol in 1970, that he pleaded guilty to assault on a female, his wife, in 1972, that he was convicted of carrying a concealed weapon in 1977, and that he "paid the costs of court" in a case involving assault and battery on his daughter in 1977. Our examination of all the evidence leads us to conclude that the instructional error complained of cannot be said to have "had a probable impact on the jury's finding of guilt." This assignment of error is thus overruled.

[4] By Assignment of Error No. 5 defendant contends:

> The court erred in excluding the testimony of Drs. Bradbard and Rose concerning the existence and likely effect of defendant's organic brain damage on his perceptions and conduct on the day of the shooting, because this evidence was admissible and relevant to the issue of whether defendant was, in fact, motivated by a reasonable apprehension of death or great bodily harm when he fired his rifle at Carol Bennett.

The record shows that defendant offered into evidence the testimony of Dr. Steven Bradbard, a clinical psychologist, and Dr. Selwyn Rose, a psychiatrist, concerning the results of psychiatric and psychological evaluations performed on defendant. When the State objected to admission of this testimony, the court conducted a *voir dire* and then ruled the testimony inadmissible based on its finding that the offered evidence was "not competent or relevant at the guilt phase of a trial of these matters."

Defendant contends the offered evidence was both competent and relevant because it tends to show "that under the facts, as he describes them, on October 4, 1981, he would be likely to perceive and act in a straight forward and uncomplicated fashion." Defendant goes on to say:

> Defendant's position was not that his culpability should be reduced because he lacked the intelligence to fully appreciate the criminality of his act. To the contrary, defendant was attempting to prove that he was confronted by an apparently life threatening situation on the day in question, that he perceived it as such, and that his act of force was, in fact, motivated by that perception.

"[E]vidence is relevant if it has any logical tendency to prove a fact at issue in a case." *State v. Pate*, 40 N.C. App. 580, 585, 253 S.E. 2d 266, 270, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979). We agree with the trial court that the offered evidence had no tendency to prove a fact *at issue* in the case. The State introduced no evidence calling into question defendant's ability to accurately perceive a life-threatening situation. Indeed, the State's position was that the evidence tended to show that defendant was never confronted with such a life-threatening situation, and that his actions were unprovoked. Because no issue had been raised by the evidence as to defendant's normalcy, we believe defendant was not entitled to introduce expert testimony tending only to

show that he possesses the ability to perceive accurately and behave accordingly. We thus hold the assignment of error to be without merit.

[5] Defendant's final contention is that the court erred in allowing the State to "death qualify" the jury. Defendant acknowledges that our Supreme Court "has consistently and recently rejected the claim" that this procedure violates the constitutional rights of criminal defendants. *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982). We find these cases dispositive of the issue and overrule the assignment of error.

No error.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. ANDREW LYNN JONES

No. 8310SC757

(Filed 3 April 1984)

Constitutional Law § 34; Criminal Law § 148.1— appeal from denial of motion to dismiss indictment on double jeopardy grounds—premature

Defendant does not have a right to appeal a denial of a motion to dismiss an indictment on double jeopardy grounds prior to being put to trial a second time since defendant is given adequate protection by his right to petition the appellate courts for a prerogative writ so as to obtain discretionary review prior to retrial. G.S. 1-277; G.S. 7A-27.

Judge JOHNSON dissenting.

APPEAL by defendant from *Brannon, Judge.* Order entered 20 June 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1984.

On 13 April 1981, defendant was charged in a proper bill of indictment with the murder of David Lee Height. Defendant's first trial, which commenced on 18 April 1983, was declared a mistrial by the presiding judge, the Honorable Samuel E. Britt, who believed the jury was deadlocked. Defendant filed objections

and exceptions to the order declaring a mistrial, moved to dismiss the indictment against him on double jeopardy grounds, and petitioned the court for a writ of habeas corpus to release him from custody. Both the motion to dismiss and the petition for a writ of habeas corpus were denied.

Subsequently, defendant petitioned the Supreme Court for writs of supersedeas, mandamus, and habeas corpus based on his double jeopardy claim. The Supreme Court issued an order on 3 May 1983 vacating Judge Britt's mistrial order and remanding the case to the Wake County Superior Court for a *de novo* plenary hearing to be conducted before a judge other than Judge Britt. The Honorable James H. Pou Bailey presided over the *de novo* hearing, and after hearing the evidence and arguments of counsel, denied defendant's petition for a writ of habeas corpus. Defendant again petitioned the Supreme Court for writs of supersedeas and certiorari arguing that his retrial was barred by double jeopardy principles, but both petitions were denied. Defendant filed a similar motion and petition in the United States District Court for the Eastern District of North Carolina but did not succeed in blocking his retrial.

Defendant's second trial commenced before the Honorable Anthony M. Brannon on 20 June 1983. Prior to the start of the trial, defendant moved to dismiss the indictment on the grounds that his retrial was barred by the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. Judge Brannon denied the motion to dismiss and defendant gave immediate notice of appeal. Judge Brannon refused to stay the trial proceedings pending the outcome of the appeal, and the second trial began. That same day, defendant filed petitions in this Court for writs of supersedeas and prohibition to block the trial which were denied. The second trial ended in a mistrial on 22 June 1983. At his third trial, defendant was convicted of second degree murder and sentenced to a term of imprisonment.

The present appeal relates to the denial of defendant's motion to dismiss the indictment on 20 June 1983 prior to his second trial. Defendant has separately appealed from the judgment entered at his third trial.

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

DeMent, Askew and Gaskins, by Johnny S. Gaskins, for defendant appellant.

WEBB, Judge.

The only question presented by this appeal is whether defendant has a right to appeal the denial of his motion to dismiss the indictment on double jeopardy grounds prior to being put to trial a second time. We hold that he does not have such a right.

Defendant, citing *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed. 2d 651 (1977), contends that as a matter of constitutional law, an appeal from the denial of a motion based on double jeopardy must be litigated to completion before a second trial may begin. In *Abney,* the Supreme Court addressed the narrow issue of "whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." *Id.* at 653, 97 S.Ct. at 2037, 52 L.Ed. 2d at 655-56. The Supreme Court held that such orders are "final decisions" within the meaning of § 1291 and thus are immediately appealable. The Court in *Abney* was concerned only with interpreting a federal appellate jurisdiction statute and did not address the question of whether there is a *constitutional* right to appeal a pretrial order denying a motion based on double jeopardy prior to retrial. For this reason, only federal courts are bound by *Abney.*

The Supreme Court explicitly recognized in *Abney* that there is no constitutional right to an appeal and stated further "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute. . . ." *Id.* at 656, 97 S.Ct. at 2038-39, 52 L.Ed. 2d at 658. The applicable statutes in this case are G.S. 7A-27 and G.S. 1-277. G.S. 1-277 and 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment. *Blackwelder v. Dept. of Human Resources,* 60 N.C. App. 331, 299 S.E. 2d 777

(1983); *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), *reh'g denied*, 286 N.C. 547 (1974).

It is without dispute that the pretrial order in the present case is interlocutory but defendant contends it is immediately appealable because it affects a substantial right. Our courts have defined a substantial right as one which will clearly be lost or irremediably adversely affected if the order is not reviewed before final judgment, *Blackwelder v. Dept. of Human Resources, supra* at 335, 299 S.E. 2d at 780, and have interpreted the term narrowly. *See Blackwelder, supra* at 334 and the cases cited therein. Our courts have previously held that the avoidance of a rehearing or trial is not considered to be such a substantial right. *See Tridyn Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979) and *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). Nor is there a right of immediate appeal from the refusal of a motion to dismiss because such refusal generally will not seriously impair any right of the defendant that cannot be corrected upon appeal from the final judgment. *See Consumers Power v. Power Co., supra.*

We do not agree that the interlocutory order here deprives the defendant of a substantial right which he would lose if the order is not reviewed prior to final judgment. Rather, we believe defendant is given adequate protection by his right to petition the appellate courts for a prerogative writ so as to obtain discretionary review prior to retrial. Defendant sought such discretionary review in the Supreme Court and the Court of Appeals but both Courts refused to exercise their discretion to review his claim. We believe defendant received all of the interlocutory review of his double jeopardy claim to which he was entitled. We hold that defendant's appeal from the court's order denying his motion to dismiss is premature and must be dismissed.

Appeal dismissed.

Chief Judge VAUGHN concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority's holdings (1) that defendant has no immediate right to appeal, and (2) that no substantial right is affected by the denial of his motion to dismiss on the grounds of former jeopardy.

The "sacred principle of common law" that no person can twice be put in jeopardy for the same offense is a right guaranteed to criminal defendants both by the Constitution of North Carolina, *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971), and by the United States Constitution. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969).

The guarantee against double jeopardy not only protects a person against twice being *convicted*, but also against twice being *put to trial* for the same offense. *Price v. Georgia*, 398 U.S. 323, 26 L.Ed. 2d 300, 90 S.Ct. 1757 (1970). This focus on the *risk* of conviction "assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. *It thus protects interests wholly unrelated to the propriety of any subsequent conviction.*" *Abney v. United States*, 431 U.S. 651, 661, 52 L.Ed. 2d 651, 661, 97 S.Ct. 2034, 2041 (1977) (emphasis supplied); *see also Green v. United States*, 355 U.S. 184, 2 L.Ed. 2d 199, 78 S.Ct. 221 (1957).

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he still has been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. (Emphasis original) (footnote omitted).

Abney, supra at 662, 52 L.Ed. 2d at 661-662, 97 S.Ct. at 2041. Therefore, the Supreme Court held that defendants had a right of immediate appeal from an order denying their motion to dismiss for former jeopardy.

The majority correctly points out that the "right of appeal" as defined in *Abney* is entirely statutory, and that the statute considered in *Abney* was the federal, not the North Carolina, jurisdictional statute. However, North Carolina also provides a statutory right of direct appeal, G.S. 7A-27, and there is no difference, other than the terminology used, between a "final decision" under the federal statute, 28 U.S.C. § 1291, and a "final judgment" under G.S. 7A-27(b). The constitutional principles of *Abney* are, in my opinion, therefore, equally applicable to North Carolina law.

By requiring defendant to wait the outcome of the second trial to obtain full appellate review, this Court focuses improperly on the State's securing of the subsequent conviction. Defendant first must "run the gauntlet" again to raise the question of the correctness of the order denying his motion to dismiss. Regardless of the *outcome* of the second trial, defendant has been *subjected to the trial itself*; an important right protected by a meritorious double jeopardy defense is thus irretrievably lost. The holding in the companion case that defendant must be discharged because his claim is in fact meritorious cannot remedy this loss. *See State v. Andrew Lynn Jones*, 67 N.C. App. 377, 313 S.E. 2d 808 (1984).

Furthermore, the majority holds that being subjected to a rehearing or retrial does not "affect a substantial right," when the very right "affected" is *the right not to be subjected to a rehearing or retrial*, a right guaranteed by our constitutions. They rely only on civil cases for this Kafkaesque proposition. In *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), it was held that the *possibility* of a second trial on a contract damages claim involved a "substantial right." It strains credulity and ignores fundamental constitutional guarantees to imply, as the majority does, that the *virtual certainty* of a second trial on charges of first degree murder involves a *less substantial* right.

The majority also holds that the availability of the prerogative writs provides sufficient opportunity for review. *See* G.S. 7A-32. The appellate files in this very case clearly demonstrate the fallacy of this argument. Nothing in them indicates that the appellate courts considered the merits of defendant's various petitions, despite clear evidence of patently arbitrary judicial action.

See Supreme Court File No. 221P83, Court of Appeals File Nos. 83SC426PS and 83SC427P.

Statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims, such as meritorious former jeopardy claims, to be lost, and potentially irreparable injuries to be suffered. *Mathews v. Eldridge*, 424 U.S. 319, 331 n. 11, 47 L.Ed. 2d 18, 31 n. 11, 96 S.Ct. 893, 901 n. 11 (1976). Therefore, I would hold that an order denying a motion to dismiss for former jeopardy is a "final judgment" within the meaning of G.S. 7A-27(b) and immediately appealable.

The prosecutor in this case, as in *Abney, supra*, raised the specter of dilatory appeals as a justification for strict construction of the rule against interlocutory appeals. As noted in *Abney*, however, it is well within the supervisory power of the appellate division to establish summary procedures and calendars to weed out frivolous appeals and ensure that non-frivolous appeals are expedited and limited solely to the issue of former jeopardy. *Id.* at 662 n. 8, 52 L.Ed. 2d at 662 n. 8, 97 S.Ct. at 2042 n. 8; *see* N.C. Const. Art. IV, § 13(2); G.S. 7A-33.

Finally, it should be noted that interlocutory orders in criminal cases have been held appealable in at least one case as a matter of North Carolina law. *State v. Bryant*, 280 N.C. 407, 185 S.E. 2d 854 (1972).

STATE OF NORTH CAROLINA v. JEFFREY JOE LEFEVER

No. 8325SC887

(Filed 3 April 1984)

1. Bills of Discovery § 6— recorded conversation between prosecutrix and police officer—no pretrial discovery

The trial court in a rape case did not err in the denial of defendant's pretrial motion for discovery of a recorded conversation between the prosecutrix and a police detective. G.S. 15A-903; G.S. 15A-904(a).

2. Criminal Law § 91— indictment after finding of no probable cause—beginning of speedy trial period—exclusion of time after voluntary dismissal

Where defendant was arrested for rape on 23 July 1982, a finding of no probable cause was entered on 16 August, defendant was indicted for rape on

30 August, and an order of arrest and bill of indictment were served on defendant on 10 September, the statutory speedy trial period began to run when defendant was arrested and served with the bill of indictment on 10 September. Furthermore, the time between the State's taking of a voluntary dismissal of the rape charge on 18 November 1982 until he was arrested on 25 February 1983 after being reindicted for such offense was properly excluded from the statutory speedy trial period pursuant to G.S. 15A-701(b)(5). G.S. 15A-701(a1)(1) and (3).

3. **Constitutional Law § 51— delay between indictment and trial—no denial of constitutional right to speedy trial**

Defendant's constitutional right to a speedy trial was not violated by a delay of 224 days between the date of the indictment for rape and the commencement of the trial.

4. **Criminal Law § 102.8— statements by prosecutor—no comment on failure to testify**

The prosecutor's jury argument in a rape case that the evidence was "uncontradicted" and that there had "not been any evidence you have heard but what you find she has told you the truth" did not constitute an improper comment on defendant's failure to testify.

5. **Criminal Law § 99.1— failure to recapitulate evidence—no expression of opinion**

The trial court in a rape case did not express an opinion on the evidence when it denied defense counsel's request to recapitulate evidence regarding testimony by the prosecutrix that she removed her own clothing, especially where the trial court emphasized to the jury that it had not summarized all of the evidence and that it was the duty of the jury to remember all the evidence.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 13 April 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 14 February 1984.

Defendant was indicted for second degree rape, found guilty by a jury and sentenced to 12 years. Defendant appeals his conviction.

Attorney General Edmisten, by Special Deputy Attorney General Davis S. Crump, for the State.

Whisnant, Simmons & Groome, by H. Houston Groome, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant brings forward assignments of error regarding (1) the State's failure to provide discovery of a statement by the prosecuting witness, (2) the denial of a defendant's motion to dismiss for a speedy trial violation, (3) the admission of evidence over defendant's objections, (4) the State's closing argument to the jury and (5) the jury charge. For the reasons that follow, we find no error in the trial.

Evidence for the State tends to show that on the evening of 23 July 1982, the prosecuting witness decided to drive around Lenoir after visiting her mother in the hospital. She ran over some wood in the road, and parked her car at Hardee's to check for damage. While she was examining her car, defendant and a male companion drove up in a pickup truck. Defendant asked the prosecuting witness if she needed help. He then invited her to a party at his house. The prosecuting witness got in the truck and drove away with the defendant and his companion. The defendant dropped his companion off and proceeded to his house. Upon arrival, the prosecuting witness noticed that the house was dark. She hesitated, but went inside with defendant. The defendant picked her up, carried her to a bedroom and began making advances. She started screaming and told him to let her go. Defendant finally agreed to return the prosecuting witness to her car. As the two were driving back to Hardee's, defendant stopped the truck and pinned the prosecuting witness to the seat. He jerked her pants off and had sexual intercourse with her against her will. Defendant then drove the prosecuting witness to her car. Within hours after the alleged crime, the prosecuting witness was examined by a physician. He confirmed that she had recently had sexual intercourse.

Defendant did not testify. Through cross-examination, however, he elicited testimony that the prosecuting witness voluntarily left Hardee's with him; and that the examining physician's findings were not inconsistent with consensual intercourse.

[1] Defendant first argues that the trial court erred in denying his pretrial motion for discovery of a recorded conversation between the prosecuting witness and a detective with the Lenoir Police Department. Defendant contends that this document was relevant because it "contains contradictory statements and ut-

terances suggestive of consensual intercourse between herself (the prosecuting witness) and the Defendant." The defendant further points out that the trial judge failed to make findings of fact when ruling on the motion for discovery of the prosecuting witness's statement as required by *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

In *Hardy*, the North Carolina Supreme Court established the procedure whereby a judge must order an in-camera inspection and make appropriate findings of fact where defendant makes a request at trial for disclosure of evidence in the State's possession, such as a statement of the prosecuting witness. If the judge rules against the motion for discovery, he should order the document sealed and placed in the record for appellate review. This procedure does not apply here where defendant's *pretrial* motion for discovery was denied.

The trial court's denial of defendant's pretrial motion for discovery is dictated by statute. G.S. 15A-904(a) restricts pretrial discovery of a statement by a State's witness except as provided in G.S. 15A-903. G.S. 15A-903(f)(1) provides that no statement made by a State's witness and in possession of the State "shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case." Subsection (2) of this statute provides: "After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified." If the State claims that the statement contains matter not relating to the witness's testimony, then the trial court shall make an in-camera inspection of the statement. G.S. 15A-903(f)(3).

The record before us reveals that prior to trial the court examined the prosecuting witness's statement and ruled that the defendant was not entitled to the statement pursuant to the Rules of Criminal Procedure under G.S. 15A. As shown, the court's ruling was dictated by G.S. 15A-903 in conjunction with G.S. 15A-904. The record further shows that after the prosecuting witness testified at trial, the defendant failed to move for production of the statement or an in-camera inspection. Such an inspection was, therefore, not required. *See State v. Miller*, 61 N.C.

App. 1, 300 S.E. 2d 431 (1983). The trial judge, nevertheless, inspected the statement before ruling on the motion for discovery. He then sealed the excluded document and preserved it in the record. This Court has reviewed the statement and finds no substantial inconsistency in this statement and the prosecuting witness's testimony at trial. In this assignment of error we find no error.

[2] Prior to trial defendant also moved to dismiss the charge for failure of the State to provide him a speedy trial. The trial court denied this motion and defendant now assigns error.

In its order the court found that defendant was arrested for second degree rape on 23 July 1982. On 16 August 1982 a finding of no probable cause was entered on the charge. On 30 August 1982 defendant was indicted for second degree rape. An order of arrest and bill of indictment were served on defendant on 10 September 1982. On 18 November 1982 the State took a voluntary dismissal because of insufficient evidence as to the issue of consent. Defendant was reindicted for the same offense on 21 February 1983. The bill of indictment and order of arrest were served on 25 February 1983. The matter was called for trial on 11 April 1983. The trial court further found:

> 9) That the Speedy Trial time commenced with the service of the Bill of Indictment upon defendant on September 10, 1982, in case 82-CRS-7125;
>
> 10) That the period of time from November 18, 1982, until February 21, 1983 would be excluded from computation of the time within which defendant should have been tried under the provisions of the Speedy Trial Act.
>
> 11) That 120 days including excludable periods of time has not elapsed since service of the Bill of Indictment (in case 82-CRS-7125) on September 10, 1982.

Both the present law and the evidence in the record support the order denying defendant's motion to dismiss for failure to comply with the Speedy Trial Act. The Act requires that the trial of a criminal defendant must begin "within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment or is indicted, whichever occurs last. . . ." G.S. 15A-701(a1)(1). G.S. 15A-701(a1)(3), as interpreted by this Court, implies that when a charge is dismissed as a result of a

finding of no probable cause and defendant is later indicted for the same offense or for an offense based on the same act or transaction, the 120 days commences from the last of the listed items ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge. *State v. Boltinhouse*, 49 N.C. App. 665, 272 S.E. 2d 148 (1980).

Defendant argues that pursuant to this Court's holding, in *State v. Koberlein*, 60 N.C. App. 356, 299 S.E. 2d 444 (1983), his indictment on 30 August 1982 after no probable cause had been found, and not his post-indictment arrest on 10 September 1982 began the running of the 120-day period. He argues that his trial therefore began beyond the 120-day limit. Since defendant's appeal, the North Carolina Supreme Court has reversed and remanded our decision. *State v. Koberlein*, 309 N.C. 601, 308 S.E. 2d 442 (1983). The Court interpreted subsections (1) and (3) of G.S. 15A-701(a1) to mean that the time limits would begin to run from the named event occurring "*last in fact.*" *Id.* at 605, 308 S.E. 2d at 445.

The record indicates that the event occurring "last in fact" was defendant's post-indictment arrest on 10 September 1982. There also appears to be supporting authority for the trial court's finding that the speedy trial process began with service of the bill of indictment on the same date. In *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), the Court discussed the meaning of "criminal process" and noted that in terms of the Speedy Trial Act the Legislature chose "to begin the time running upon *service* of criminal process rather than when the criminal process begins." *Id.* at 590, 308 S.E. 2d at 314. When defendant was served with the bill of indictment on 10 September 1982, he was therefore "served with criminal process" pursuant to G.S. 15A-701(a1)(1) and the speedy trial process began.

Application of the foregoing statutory and case law to the evidence here shows that the last relevant event with regard to the Speedy Trial Act began on 10 September 1982, the date defendant was arrested and served with the bill of indictment. The trial on 11 April 1983 ended the time limit. When the time from the voluntary dismissal on 18 November 1982 to defendant's subsequent arrest on 25 February 1983 is excluded from the period

beginning 10 September 1982 and ending 11 April 1983 as provided by G.S. 15A-701(b)(5), we calculate that defendant's trial began 114 days from the last listed events relating to the new charge.

[3] We also find no merit to defendant's assertion that his constitutional right to a speedy trial was violated. Even if the statutory time is calculated from defendant's indictment on 30 August 1982, and the period from the voluntary dismissal to defendant's subsequent arrest is considered in our calculation, only 224 days elapsed from the date of indictment until commencement of trial. This Court has found that 319 days from the date of indictment until the date of trial is not a sufficient time, standing alone, to constitute "unreasonable or prejudicial delay." *State v. Hartman*, 49 N.C. App. 83, 86, 270 S.E. 2d 609, 612 (1980). Furthermore, defendant has failed to show that the delay was caused by neglect or willfulness on the part of the State, or that he has been prejudiced by the delay. Defendant did not assert his constitutional right to a speedy trial until the first day of his trial, thus making it difficult to prove that he was denied a speedy trial. *See State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981).

Defendant has failed to show that he was denied either his constitutional or statutory right to a speedy trial.

Defendant's next six assignments of error involve the admission of evidence by the State's witness over defendant's objections. We have carefully reviewed each assignment of error and find no prejudicial error.

[4] In his closing argument to the jury the prosecutor commented several times that the evidence was "uncontradicted." He further commented, "There has not been any evidence you have heard but what you find she has told you the truth." Defendant objected to these statements and moved for a mistrial. The trial court denied the objections and motion for mistrial. Defendant now argues that the prosecutor's statements constituted improper comments on defendant's failure to testify.

The North Carolina courts have taken the position "that a bare statement to the effect that the State's evidence is uncontradicted is not an improper reference to the defendant's failure to testify. (Citations omitted.)" *State v. Smith*, 290 N.C. 148, 168,

226 S.E. 2d 10, 22, *cert. denied*, 429 U.S. 932 (1976). We deem it unlikely that the jury would have so interpreted the comments here. Under these circumstances, we find no prejudicial error.

[5] We also find no error in the trial court's charge to the jury. Defendant contends that the court expressed an opinion on the evidence when it denied defense counsel's request to recapitulate the evidence regarding the prosecuting witness's testimony that she removed her own clothing. This request was made after the charge. "The trial judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto." *State v. Oxendine*, 300 N.C. 720, 726, 268 S.E. 2d 212, 216 (1980). The trial court here emphasized to the jury that it had not summarized all of the evidence, and that it was their duty to remember all the evidence whether it had been called to their attention or not. We find no expression of opinion by the court, particularly in light of the foregoing instruction.

Defendant received a trial free of prejudicial error.

No error.

Judges WHICHARD and BECTON concur.

V. ODELL ROUTH v. JACK B. WEAVER

No. 8318DC502

(Filed 3 April 1984)

1. Bills of Discovery § 6; Rules of Civil Procedure § 37— failure to comply with discovery order—sanctions—no abuse of discretion

The trial court's findings provided ample support for an order granting plaintiff's motion for sanctions and entering a default judgment in favor of plaintiff where the court found that defendant's failure to comply with an order compelling discovery was willful and without cause, that defendant has had and presently has the ability to comply with the orders of the court and such compliance is not unduly burdensome to the defendant, that defendant made no good faith effort to comply with previous court orders despite the

fact that defendant was warned by the court of the consequences of his failure to comply, and that defendant made no objection to plaintiff's request for production of documents until plaintiff had twice been forced to seek the court's assistance in obtaining the requested documents.

2. Judges § 1.2— assignment of judge to preside over motion proper—recusal of judge scheduled to hear motion

A trial judge was properly assigned by the chief district judge, who recused himself, to hear a motion where the record clearly revealed that the judge was assigned by the chief district judge to hear plaintiff's motion; that all parties were notified of the assignment; and that no objection was raised. G.S. 7A-192 reveals that the underlying legislative concern is that judges be properly *assigned* by the chief district judge to preside over cases and motions, and that it does not matter whether the session to which a judge is assigned involves one case or many, so long as the presiding judge has been properly assigned to hear the matters.

APPEAL by defendant from *Yeattes, Judge.* Order entered 23 December 1982 in District Court, GUILFORD County. Heard in the Court of Appeals 15 March 1984.

This is a civil action in which plaintiff seeks to recover for claims arising out of an alleged partnership between plaintiff and defendant. The record discloses the following:

On 21 July 1980 plaintiff filed his complaint, in which he alleged that plaintiff and defendant had formed a partnership in 1976, that the partnership business was sold in 1977, and that defendant collected the proceeds of sale and accounts receivable. Plaintiff further alleged that in 1979 defendant agreed to pay plaintiff the sum of $3,500.00 in "full satisfaction of all claims that the Plaintiff might have in regard to the partnership," and that defendant had failed and refused to pay plaintiff this or any amount.

On 9 February 1981 defendant filed his answer, in which he denied all of plaintiff's material allegations and in which he asserted a counterclaim. On 29 September 1981 the court entered an order postponing trial of the matter until "additional discovery" was completed and directing both parties to conduct such discovery "pursuant to the Rules of Civil Procedure." That same day plaintiff filed a request for production of documents pursuant to Rule 34, North Carolina Rules of Civil Procedure, and to the court order. On 12 November 1981 plaintiff filed a "motion for

sanctions," alleging that defendant had failed to produce the requested documents. By order entered 23 November 1981 Judge William Daisy ordered defendant to comply with plaintiff's request for production of documents and "reserve[d] ruling on sanctions pending compliance with this Order." On 17 September 1982 plaintiff again filed a motion for imposition of sanctions against defendant, asserting as grounds defendant's failure to comply with the discovery order entered 23 November 1981. On 22 October 1982 defendant filed a "motion for relief from discovery orders." On 23 December 1982 the court made findings of fact and conclusions of law and entered an order denying defendant's motion for relief and granting plaintiff's motion for sanctions. The court entered a default judgment in favor of the plaintiff and against the defendant decreeing that defendant was indebted to plaintiff in the sum of $3,500.00. Defendant appealed.

James W. Lung and G. S. Crihfield for plaintiff, appellee.

R. Walton McNairy and Michael R. Nash for defendant, appellant.

HEDRICK, Judge.

At the outset we note that defendant filed a counterclaim that has not been disposed of in the trial court. This appeal is thus premature and subject to dismissal because it is from an order which adjudicates fewer than all of the claims of the parties. North Carolina Rules of Civil Procedure, Rule 54(b). We note as well that an order imposing sanctions is ordinarily interlocutory. Nevertheless, we choose to exercise our discretion and pass on the merits of defendant's appeal from the default judgment imposed as a sanction for defendant's failure to comply with the order for discovery.

The only exception noted in the record is to the judgment. Such an exception raises for review only "the question whether the facts found support the conclusions of law and judgment entered." *Employers Insurance v. Hall*, 49 N.C. App. 179, 180, 270 S.E. 2d 617, 618 (1980), *cert. denied*, 301 N.C. 720, 276 S.E. 2d 283 (1981). Such an exception does not present for review the question of the sufficiency of the evidence to support the findings of fact. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982).

[1] Rule 37(b)(2), North Carolina Rules of Civil Procedure, authorizes the court to "make such orders in regard to the failure [to obey an order to provide or permit discovery] as are just," including "[a]n order . . . rendering a judgment by default against the disobedient party." The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. *Silverthorne v. Land Co.*, 42 N.C. App. 134, 256 S.E. 2d 397, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 302 (1979).

In the instant case the trial judge found as a fact that defendant's failure to comply with court orders compelling discovery was willful and without just cause. The court further found that defendant "has had, and presently has, the ability to comply with the Orders of this Court," and that such compliance "is not unduly burdensome as to the Defendant." The record reveals and the court found that defendant made no good faith effort to comply with previous court orders, despite the fact that defendant was warned by the court of the consequences of his continued failure to so comply. Finally, the court's findings indicate that defendant made no objection to plaintiff's requests for production of documents until 21 October 1982, by which time plaintiff had twice been forced to seek the court's assistance in obtaining the requested documents. We believe these findings, considered with the detailed findings of fact not herein discussed, provide ample support for the conclusions of law and judgment entered. Further, we think it clear that the court's choice of sanction on these facts was well within the scope of its discretionary power. We find the statement of this Court, made in a case involving similar facts, appropriate here:

> In summary, we discern no abuse of discretion on the part of the trial court. Rather, we are presented with a defendant who committed dilatory, inconsiderate and reprehensible abuse of the discovery process for which it was justly sanctioned.

Laing v. Loan Co., 46 N.C. App. 67, 72, 264 S.E. 2d 381, 385, *disc. rev. denied and appeal dismissed*, 300 N.C. 557, 270 S.E. 2d 109 (1980).

[2] Defendant next contends that Judge Yeattes "lacked jurisdiction to hear or enter the judgment" because he had not been

properly assigned to hear the matter as required by N.C. Gen. Stat. Sec. 7A-192.

Sec. 7A-192 in pertinent part provides: "Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside." In discussing this portion of the statute our Supreme Court has said:

> [B]efore a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of G.S. Sec. 7A-146 to preside at such session.

Stroupe v. Stroupe, 301 N.C. 656, 660, 273 S.E. 2d 434, 437 (1981). N.C. Gen. Stat. Sec. 7A-146 in pertinent part provides:

> The chief district judge . . . has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:
>
> (1) Arranging schedules and assigning district judges for sessions of district courts;

In the instant case, the record reveals that the motion for imposition of sanctions was calendared for hearing before Chief District Judge Cecil during the civil non-jury session of 13 December 1982. In an affidavit contained in the record, Judge Cecil states:

> 3. That the undersigned Judge had represented Jack B. Weaver, Defendant, while engaged in the practice of law some seven (7) or eight (8) years previously and thus recused himself from the case and specifically assigned the hearing of said Motion to the Honorable John F. Yeattes, Jr., District Court Judge for the Eighteenth Judicial District;
>
> 4. That the Honorable John F. Yeattes, Jr., was then assigned to hear traffic cases during that week; that the attorney for the Defendant was informed of the assignment to

the Honorable John F. Yeattes, Jr., and did not object to the assignment of the hearing when made; that the hearing was to be scheduled at a time certain in keeping with Judge Yeattes' other Courtroom schedule and when the attorney for the Plaintiff and the attorney for the Defendant could be present to present the case;

5. That the Honorable John F. Yeattes, Jr., in accordance with the specific assignment of the undersigned affiant, heard the matter during the week of December 13, 1982 and entered Judgment which appears of record in the cause; that the undersigned Chief District Judge, through oversight, failed to sign a written assignment of the case but there was no question that the assignment of the case was made to the Honorable John F. Yeattes, Jr., and that he had full and complete authority by the oral assignment to schedule the matter for hearing and to rule on all matters then before the Court.

Defendant argues that "[a] judge must be assigned to preside over a session of the District Court; an assignment to a particular case is not authorized by the statutes nor the case law." Defendant contends that the word "session" is properly understood to mean "a continuous series of sittings or meetings of a court."

The word "session" is defined in Black's Law Dictionary as follows:

> The sitting of a court, Legislature, council, commission, etc., for the transaction of its proper business. Hence, the period of time, within any one day, during which such body is assembled in form, and engaged in the transaction of business, or, in a more extended sense, the whole space of time from its first assembling to its prorogation or adjournment *sine die. Ralls v. Wyand,* 40 Okl. 323, 138 P. 158, 162.

BLACK'S LAW DICTIONARY 1536 (rev. 4th ed. 1968). We believe that the definition of the word "session" offered by defendant, while not incorrect, is unnecessarily restrictive. Indeed, were we to adopt the definition offered by defendant, the Chief District Judge would be barred from assigning a judge to preside over just one case. We do not believe this was the intent of the legislature. We thus choose instead to adopt Black's definition set out above. Furthermore, we believe that defendant's emphasis on

the meaning of "session" in interpreting N.C. Gen. Stat. Sec. 7A-192 is misplaced. A reading of the statute in its entirety reveals that the underlying legislative concern is that judges be properly *assigned* by the Chief District Judge to preside over cases and motions. It matters not whether the session to which a judge is assigned involves one case or many, so long as the presiding judge has been properly assigned to hear the matters. In the instant case, the record clearly reveals that Judge Yeattes was assigned by Chief District Judge Cecil to hear plaintiff's motion. Furthermore, all parties were notified of this assignment and no objection was raised. We hold that Judge Yeattes was properly assigned to hear the motion in question.

The result is: the default judgment that plaintiff have and recover of the defendant $3,500.00 will be affirmed; the cause will be remanded to the District Court for further proceedings with respect to defendant's counterclaim.

Affirmed in part, remanded in part.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. RAYNARD BLACKWELL

No. 839SC724

(Filed 3 April 1984)

1. Criminal Law § 121— necessity for instruction on entrapment

In a prosecution for felonious possession for the purpose of sale and the felonious sale of marijuana, defendant was entitled to an instruction on the defense of entrapment where defendant presented evidence tending to show that an undercover agent knew that defendant was unemployed and in need of money; the agent told defendant that he was interested in opening a pool hall and that defendant could manage it before there was any discussion of drugs; the agent was the first one to raise the subject of drugs; defendant made no drug buy for the agent at their first meeting; the agent sought out defendant and continued to imply that he was going to open the pool hall and that defendant would manage it; the agent sometimes gave defendant money; defendant sought out information on how to buy drugs and actually bought drugs for the agent only because he needed a job and he believed that the agent had promised him a job; and defendant made no profit on either of the drug buys he made for the agent.

2. Narcotics § 4.5— failure to instruct on elements of sale of marijuana

The trial court erred in failing to instruct on the elements of the offense of sale or delivery of marijuana because it found as a matter of law that there was no entrapment and because defendant had admitted the transfer of the marijuana where the evidence required the trial court to instruct on entrapment.

APPEAL by defendant from *Smith, Donald L., Judge.* Judgment entered 31 March 1983 in Superior Court, PERSON County. Heard in the Court of Appeals 19 January 1984.

Defendant was charged with felonious sale of marijuana and felonious possession of marijuana for the purpose of sale on 6 March 1982. Defendant tendered a plea of not guilty.

At trial, the State's evidence tended to show: Undercover agent Rick Barney was in Roxboro on 6 March 1982. Late that afternoon, while he was "standing around," agent Barney struck up a conversation with defendant. The two men were standing in the doorway of a building which had formerly housed a pool hall. Barney learned that defendant was working parttime washing cars. Barney asked defendant about the possibility of buying "some acid or LSD." Defendant responded that he could get "acid, marijuana or cocaine" for Barney. Barney told defendant that he was thinking about opening up the pool hall. Barney told defendant that he managed a pool hall in Wilson and that he had talked to a business partner about opening this Roxboro pool hall. Barney "implied" to defendant that the defendant could become an employee of the pool hall. The conversation then returned to drugs, and defendant told Barney that he could find drugs. Barney said that he was interested in some acid or LSD. Defendant left and returned, saying that "there was no good dope on the street right now." Defendant asked if Barney wanted some marijuana. Barney replied that he wanted "a nickel" and gave defendant $5.00. Defendant left and returned with a plastic bag of what SBI tests later showed to be marijuana.

On or about 14 March 1982, defendant took agent Barney to Caswell County. On the way, defendant talked with Barney about setting up the pool hall, indicating that he perceived Barney as a prospective employer. In Caswell County, defendant introduced Barney to a man named Sherman. Barney sought to buy marijuana from Sherman, but Sherman did not have any drugs on

hand. Defendant then went across the street. When he returned, defendant sold a quarter pound of marijuana and two LSD blotter acid units to Barney for $120.00. Agent Barney never saw defendant smoking marijuana.

Defendant's evidence tended to show: Defendant first met agent Barney on the street, in front of the building that used to be a pool hall. Barney asked defendant how business was before the pool hall closed. Defendant told him that there had been a good business there. Defendant told Barney that he was unemployed and occasionally washed cars to make some money. Barney commented that defendant could manage a pool hall, noting that people seemed to know him. Barney then asked defendant about drugs. Defendant replied that he "couldn't find any." Barney told defendant that he owned several pool halls and that he would talk to his business partner about the pool hall in Roxboro. There was no drug sale at this first meeting.

Several days later, defendant heard that Barney was "asking around" for him. They met and talked again about opening the pool hall. They went to talk to the former proprietor of the pool hall. They inquired about the rent and got the name and address of the owner of the building. Barney then asked defendant how easy it was to get drugs on the street. Defendant replied that he "didn't bother with the stuff" but that anyone his age on the street had knowledge of it. Defendant said, "I could probably find it for you." Barney asked him to try and gave him $5.00 to buy marijuana. After several attempts, defendant bought some marijuana and handed it to Barney. Defendant did this because: "I trusted the guy. He was going to give me a job. I needed a job desperately. I had been out of work for six months." At this meeting, Barney told defendant that he had pool halls in Wilson, Cary, and four or five other places and that he thought defendant would be "perfect" as manager of the Roxboro pool hall. Barney told defendant that he could give defendant a "blank check" to fix up the place.

Barney "kept coming back and forth," checking on defendant and trying to find him. Barney asked about defendant around town and would meet him on the streets. Barney met with defendant every six or seven days over a three week period. Barney would sometimes give defendant money, saying: "Well, here's a

few dollars for your trouble. I know you have things that you'd rather be doing." On 14 March 1982, Barney stopped defendant on the street and asked: "Do you know where I could make a big buy?" Defendant replied, "Well, I don't know. I'll ask around." Defendant got directions to a house in Caswell County and was told to ask for Sherman Stewart. Defendant did not know Sherman Stewart and had never before been to his house. Defendant and Barney went to Caswell County. Defendant spoke to Sherman Stewart and then went to another house. Defendant bought a quarter pound of marijuana and got some LSD for Barney. Defendant would not have made the inquiries or bought the drugs if Barney had not led him to believe that Barney would give him a job. At this time, Barney had long hair and looked like he had been working on a construction site.

About a week after Barney and defendant had gone to Caswell County, Barney returned by himself and made a buy of a quarter pound of marijuana. It was after that, on 28 March 1982, that defendant was arrested for sale and possession of marijuana, charges arising out of the transaction of 6 March 1982.

In the past, defendant had been convicted of possession of marijuana, giving a worthless check, and concealing merchandise. He was also convicted of possession of marijuana and LSD in Caswell County, charges arising out of the 14 March 1982 transaction.

At the close of the evidence, defendant requested that the trial judge instruct on entrapment. The judge denied this request, saying: "There was no entrapment." The judge also announced that, because defendant "had admitted a sale and delivery," he was going to give a peremptory instruction on sale and delivery:

> I am not going into the elements. I am going to instruct that if they believe the State's evidence beyond a reasonable doubt or the defendant's evidence beyond a reasonable doubt or either one or both that they would return a verdict of guilty of sale or delivery of marijuana.

The judge instructed the jury accordingly. The judge noted that, before the jury retired, defendant "objected again to the Court's denial of his request for instruction on the defense of entrapment and that he further specifically objects to the Court's peremptory

instruction on the charge of sale or delivery of marijuana." Both objections were overruled, and defendant took exception thereto.

The jury returned verdicts of guilty of sale and delivery of marijuana and guilty of possession of marijuana with intent to sell. Defendant was sentenced to two years in prison. Defendant appeals.

Attorney General Edmisten by Assistant Attorney General Douglas A. Johnston, for the State.

Ramsey, Hubbard, Galloway & Cates, by Mark Galloway, for defendant-appellant.

EAGLES, Judge.

[1] Defendant assigns as error the trial court's failure to instruct on entrapment. Defendant contends that the evidence concerning entrapment was in conflict and that it was thus an issue for the jury. We agree.

It is the duty of the court to instruct the jury on all the substantive features of a case raised by the evidence, and all defenses arising from the evidence constitute substantive features of a case. *State v. Brock*, 305 N.C. 532, 540, 290 S.E. 2d 566, 572 (1982). The defense of entrapment requires proof of two essential elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, and (2) that the criminal design originated in the minds of the law enforcement officers, rather than the innocent defendant, such that the crime was the product of the creative activity of law enforcement authorities. *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Grier*, 51 N.C. App. 209, 275 S.E. 2d 560 (1981). The State's evidence and defendant's evidence both tend to show "acts of persuasion" by Barney to induce defendant to purchase drugs, thus satisfying the first requirement for entrapment. The critical and more difficult question here is whether there was evidence that defendant was induced by Barney to take action that he was not predisposed to take.

It is clear from the record that the evidence concerning defendant's predisposition to criminal activity was in conflict. The

State's evidence tends to show that defendant told Barney that he could get drugs for Barney *before* there was any discussion about opening the pool hall; that defendant bought drugs for Barney at their first meeting; and that defendant knew where to make a big drug buy in Caswell County.

Defendant's evidence tended to show that Barney knew that defendant was unemployed and in need of money; that Barney told defendant that he was interested in opening the pool hall and that defendant could manage it *before* there was any discussion of drugs; that Barney was the first one to raise the subject of drugs; that defendant told Barney that he "couldn't find any" and made no drug buy for Barney at their first meeting; that Barney sought out defendant and continued to imply that he was going to open the pool hall and that defendant would manage it; that defendant had difficulty locating drugs to buy for Barney; that Barney sometimes gave defendant money; that defendant had never been to Caswell County to buy drugs before 14 March 1982; and that defendant made no profit on either of the drug buys he made for Barney.

In *State v. Grier, supra,* the State's evidence tended to show that defendant first raised the issue of drug purchase; that defendant knew where and how to make a drug buy; and that others viewed defendant as someone involved in drug trafficking. Defendant's evidence tended to show that the undercover agent knew defendant was unemployed and in need of money; that the agent offered defendant financial assistance and bought beer, food, and cigarettes for defendant; that the agent first raised the subject of a drug buy; that the agent drove defendant to the locations where defendant bought drugs; and that defendant did not profit on the drug buys. Based on that evidence, this court held that: "Since evidence of entrapment must be uncontradicted in order for the judge to take the issue from the jury, the trial judge acted properly in charging the jury on the defense and leaving it to their determination as an issue of fact." 51 N.C. App. at 212-13, 275 S.E. 2d at 563. Our Supreme Court has also noted: "Ordinarily, if the evidence presents an issue of entrapment it is a question of fact for the jury to determine. 1 Whartons Criminal Law and Procedure, s. 132 (supp.)" *State v. Stanley,* 288 N.C. at 32, 215 S.E. 2d at 597.

We find here that defendant presented evidence that he was not predisposed to buy drugs but sought out information on how to and actually did buy drugs only because he needed a job and he believed that Barney had promised him a job. We do not find entrapment as a matter of law but find that the evidence here does present the issue of entrapment. The trial judge should have charged the jury on entrapment and left it to their determination as an issue of fact.

[2] The trial court declined to submit instructions on the elements of the offense of sale or delivery of marijuana because it found as a matter of law that "there was no entrapment" and because defendant had admitted the transfer of marijuana. Because we hold that the jury should have been instructed as to the defense of entrapment, we hold that it was error for the trial judge to refuse to charge the jury on the elements of the sale or delivery offense. Because we remand for a new trial based on the trial judge's denial of defendant's request for an instruction on entrapment and the trial judge's refusal to instruct on the elements of the offense, we need not address defendant's remaining assignments of error.

New trial.

Judges HEDRICK and HILL concur.

FRANK J. CLIFFORD, AND DOLORESE R. CLIFFORD v. RIVER BEND PLANTATION, INC.

No. 823SC1280

(Filed 3 April 1984)

Contracts § 26.1— contract for sale of home—insufficient evidence of warranty against flooding

In an action arising from the sale of a house and lot, the trial court erred in failing to grant defendant's motion to dismiss as to a claim for breach of warranty against flooding where the contract did not provide for warranties against flooding or for materials and workmanship; where the contract provided that it was the entire contract between the parties; and where conversations between plaintiff and defendant's agent subsequent to the signing of the

contract which concerned whether the house was subject to flooding did not create an express warranty against flooding.

Judge EAGLES dissenting.

APPEAL by plaintiffs and defendant from *Smith, Judge.* Judgment entered 10 July 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 26 October 1983.

This is an action arising from the sale of a house and lot in New Bern. The case has previously been in this Court. *See Clifford v. River Bend Plantation,* 55 N.C. App. 514, 286 S.E. 2d 352 (1982). The claims of the plaintiffs pertinent to this appeal are for breach of warranty as to materials and workmanship on the house, personal injury to plaintiffs for breach of warranty, and breach of express warranty as to flooding of the premises.

The evidence showed that the defendant owned a house and lot which it had purchased from a third party. This house and lot were sold to the plaintiffs pursuant to a written sales contract dated 19 March 1976 which contained the following paragraph:

> "Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties hereto."

The written contract did not contain a warranty against flooding or for materials and workmanship.

Prior to the trial the court granted a motion in limine prohibiting the plaintiffs from introducing evidence of personal injuries sustained as a result of a breach of warranty. The plaintiffs' evidence showed that after they moved into the house there was flooding under it and that some of the materials and workmanship were not as warranted. The court granted the defendant's motion to dismiss as to the claim for breach of warranty as to materials and workmanship. The jury awarded the plaintiffs damages for breach of warranty against flooding.

Plaintiffs and defendant appealed.

Perdue, Voerman and Alford, by David P. Voerman, for plaintiff appellants and appellees.

White, Allen, Hooten, Hodges and Hines, by John M. Martin, for defendant appellant and appellee.

WEBB, Judge.

This case brings to the Court questions involving the parol evidence rule. The parol evidence rule is not a rule of evidence but of substantive law. *See* E. Allan Farnsworth, *Contracts*, 447 *et seq.* (1982) for an excellent discussion of the rule. If parties agree to integrate all prior and simultaneous negotiations into a contract, the contract governs their relationship and anything which varies or adds to it is irrelevant. In this case the parties signed a written contract which provided that it was the entire contract between the parties. We conclude from this that the parties intended to integrate all prior and simultaneous negotiations into the contract. The contract did not provide for warranties against flooding or for materials and workmanship. Under our law, there was no warranty for either of them. For this reason it was proper to grant the defendant's motion to dismiss as to the claim for breach of warranty as to materials and workmanship. It was error not to grant the defendant's motion to dismiss as to the claim for breach of warranty against flooding.

The plaintiffs argue that all the evidence shows that there were warranties. They argue that the contract should be interpreted to give effect to the entire agreement and it is evident that the parties intended that there be warranties. The difficulty with this argument is that when the parties executed a contract which integrated all prior and simultaneous agreements, any evidence which varied or added to its terms could not be considered whether or not such evidence was admitted with or without objection. To hold otherwise, we would have to rewrite the contract, which we cannot do.

The plaintiffs contend that the warranty against flooding was made after the contract was executed and such warranty may be proved. *See Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606 (1935). They base this argument on testimony by Frank J. Clifford that he dealt with J. Frank Efird, president of the defendant, in negotiating the contract of sale. Mr. Clifford testified that when

Mr. Efird accepted the plaintiffs' offer to purchase the property, he asked Mr. Efird whether it was subject to flooding, and Mr. Efird told him it was not and that the ground was damp under the house because the plumbing system under the house had been drained. Mr. Clifford testified that he relied on this statement in purchasing the property. He testified further that on 12 June 1976 he discussed the flooding problem with Mr. Efird who told him they had nothing to worry about, that "he would take care of the whole matter; and the house was warranted." We do not believe this evidence supports a finding that a warranty against flooding was given after the contract was executed. We believe we are bound to hold under *Griffin v. Wheeler-Leonard & Co., Inc.*, 290 N.C. 185, 225 S.E. 2d 557 (1976) that the statement to Mr. Clifford by Mr. Efird on 19 March 1976 was not a warranty. In that case there was testimony that a real estate agent had told the plaintiff that water in a crawl space under a house "was probably left over from construction and it should dry up in a short time now that everything was covered over and water couldn't get in there any more." Our Supreme Court held that this did not constitute an express warranty that water in the crawl space under the house would create no problems. Chief Justice Sharp said the real estate agent "did not expressly say, nor did his words reasonably imply, that he personally assumed a contractual obligation by warranting a dry crawl space." We believe that if no warranty was given in that case none was given in this one. Under *Griffin*, Mr. Efird's words expressed his opinion as to the cause of the dampness under the house and that there would be no problem with flooding. This is not enough to constitute an express warranty. That Mr. Efird may have later told Mr. Clifford not to worry, that he would take care of the flooding, and the house was warranted did not create a warranty. The fact that Mr. Efird attempted to remedy the problem does not prove he did it pursuant to a warranty. If Mr. Efird referred to a warranty, we do not believe this makes a warranty. He may have thought there was one but there is no evidence in the record that anyone representing the defendant made a warranty with either of the plaintiffs after the contract was made. Absent such evidence, we hold the defendant's motion to dismiss should have been allowed as to the plaintiffs' claim for express warranty against flooding.

Plaintiffs also argue that the contract was executed by Mr. Efird and it does not show he was acting for defendant River Bend Plantation, Inc. For this reason, defendant cannot take advantage of the parol evidence rule. The difficulty with this argument is that whatever rights the plaintiffs had against the defendant they received through the defendant's agent J. Frank Efird. They are bound by their dealings with him.

The plaintiffs also contend that the defendant may not deny the existence of the warranties under the doctrine of equitable estoppel. We do not believe the record shows the defendant did anything to mislead the plaintiffs. Without such evidence, equitable estoppel does not apply. *See* 5 Strong's N.C. Index 3d, *Estoppel* § 4.1 (1977).

We affirm as to plaintiffs' appeal and reverse as to the defendant's appeal.

Affirmed in part; reversed in part.

Judge PHILLIPS concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent from that portion of the majority opinion which reverses the trial court's decision to permit the jury to consider and award damages under the plaintiffs' claim for damages for breach of warranty against flooding.

The parol evidence rule relied upon by the majority is subject to several exceptions, which were detailed by Chief Justice Stacy in *Jefferson Standard Life Ins. Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606 (1936). One of these exceptions provides that: "[T]he rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument is not violated . . . by showing a *subsequent* parol modification, provided the law does not require a writing." *Id.* at 176, 183 S.E. at 608. (Emphasis added.)

The record is clear that the modifying conversation here occurred in June, *after* the original written sales contract was ex-

ecuted on 19 March 1976. Thus, the parol evidence rule does not require that evidence of this conversation be excluded.

Further, I differ with the majority's determination that the language granting a warranty here is no stronger than that disallowed in *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976). I do not share the view that *Wheeler-Leonard* requires the result reached by the majority. *Wheeler-Leonard* is distinguishable from the case *sub judice* in that the words used here are clear and unambiguous, while in *Wheeler-Leonard*, plaintiff's testimony about conversations with Wheeler was insufficient to establish a warranty. In *Wheeler-Leonard* the conversations were to the effect that ". . . he [Wheeler] just made the comment that it [water] was probably left over from construction and it should dry up in a short time now that everything was covered over and water couldn't get in there anymore"; that "I asked him [Wheeler] questions on the quality of the house and how these things were done in North Carolina. The warranties, guarantees and things like that, and he responded in the affirmative to all of my questions"; and that Wheeler said the contractor "was a good contractor and he built good homes and that they were substantial." *Id.* at 189, 225 S.E. 2d at 560.

Here, plaintiff's testimony notes that defendant's agent Efird said that "he would take care of the whole matter; and *the house was warranted.*" The clarity and unambiguous nature of Efird's representation distinguishes this case on its facts from *Wheeler-Leonard.* Defendant's agent could not have been more clear in his warranty language. To hold that his language is not evidence sufficient to show a warranty has the practical effect of saying that no oral utterance will be sufficient. I would vote to affirm the judgment and verdict insofar as it allows the jury to consider and award damages under the claim for breach of warranty against flooding.

RUBY B. BENFIELD v. VIRGINIA B. COSTNER AND HUSBAND, LESTER S. COSTNER; AND L. S. STROUPE AND WIFE, BARBARA H. STROUPE

No. 8327SC276

(Filed 3 April 1984)

1. **Cancellation and Rescission of Instruments § 8; Fraud § 9; Rules of Civil Procedure §15— constructive fraud—insufficiency of complaint—trial by implied consent**

In an action to set aside a deed and a change of a life insurance beneficiary executed by the mother of the parties, plaintiff's complaint was insufficient to state a claim based on constructive fraud where it failed to allege the necessary confidential relationship between defendant and her mother. However, the issue of constructive fraud was tried by "implied consent" where plaintiff's evidence of the fraudulent act put defendant on notice of the constructive fraud theory, defendant failed to object to such testimony, and plaintiff's evidence tended to show a confidential relationship. G.S. 1A-1, Rule 9(b); G.S. 1A-1, Rule 15(b).

2. **Fraud § 13— constructive fraud in conveyance of homeplace—damages**

In an action based on constructive fraud by defendant in obtaining her mother's conveyance of the homeplace to her, plaintiff was entitled to recover one-half the value of the homeplace without deducting therefrom certain debts, expenses and taxes paid by defendant for the mother's estate.

APPEAL by defendants from *Saunders, Judge.* Judgment entered orally 2 September 1982 but signed 6 January 1983 *nunc pro tunc* in Superior Court, GASTON County. Heard in the Court of Appeals 9 February 1984.

Frank Patton Cooke, by R. C. Cloninger, for defendant appellant.

Kennedy & Black, by K. Dean Black, for plaintiff appellee.

BECTON, Judge.

I

On 20 May 1979, Mrs. Susan Bivens died testate, leaving all of her property, share and share alike, to her two surviving daughters—plaintiff Ruby B. Benfield and defendant Virginia B. Costner. Mrs. Bivens had executed her will on 30 June 1978. After the execution of her will, Mrs. Bivens deeded the homeplace to the defendant, Virginia Costner, on 27 December 1978. About the same time, Mrs. Bivens also changed the beneficiary

designation on one of her life insurance policies from plaintiff to defendant. After Mrs. Bivens' death, defendant sold the homeplace to Mr. and Mrs. L. S. Stroupe, on 13 July 1979, for approximately $10,000.00.

On 24 October 1979, plaintiff Benfield sued defendant Virginia Costner, her husband, and the Stroupes, alleging that her mother did not have sufficient mental capacity to make the transfers and averring further that defendant Costner obtained the property from her mother through duress, coercion and fraud. Plaintiff sought to set aside the conveyance of the homeplace, to set aside the change in beneficiary on the insurance policy, and also sought damages from the Costners in the amount of $10,000.00 for the alleged wrongful conveyance of the homeplace and $785.85 for the alleged wrongful change of beneficiary on the insurance policy.

Prior to trial, plaintiff took a voluntary dismissal of her action as to the Stroupes. At trial, and upon the conclusion of all the evidence, the trial court dismissed all the original causes of action and instructed the jury on constructive fraud. The jury answered the issue in favor of the plaintiff, and judgment was then accordingly entered. Defendant appeals, contending that she is entitled to a dismissal since (a) the complaint fails to allege constructive fraud as a cause of action, and (b) the plaintiff's "evidence was not sufficient to go to the jury upon the issue of whether a relationship of special trust and confidence existed." Defendant also argues, alternatively, that if we "uphold the verdict of the jury, . . . the plaintiff should be entitled only to one-half of the difference between the [stipulated value] of the Bivens' homeplace ($10,500.00) minus those debts, expenses and taxes paid by the defendant and which were chargeable to the estate of Mrs. Bivens."

For the reasons that follow, we reject defendant's arguments and find no error in the trial.

II

[1] North Carolina is a notice pleading State, and detailed fact pleading generally is no longer required. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). However, allegations of fraud are specifically excepted from the notice pleading approach. N.C. Gen.

Stat. § 1A-1, Rule 9(b) (1983) states: "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Actual fraud and constructive fraud satisfy the particularity requirement in varying ways. *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981).

> The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances '(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'

Terry, 302 N.C. at 85, 273 S.E. 2d at 679 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E. 2d 725, 726 (1950)). Consequently, we must analyze the averments in the Complaint.

The Complaint fails to allege constructive fraud as a cause of action. Although the Complaint adequately alleges the fraudulent acts defendant committed, it does not establish the necessary confidential or fiduciary relationship between mother and defendant. Paragraph 3 of the Complaint alleges that "the plaintiff and defendant, Virginia B. Costner are the daughters of the late Susan Bivens . . ." An allegation of a "mere family relationship" is not particular enough to establish a confidential or fiduciary relationship. *Terry*, 302 N.C. at 86, 273 S.E. 2d at 679; *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). The allegations in paragraph 5 actually undermine a constructive fraud theory. "[T]he deceased was afraid and fearful of her daughter, Virginia B. Costner; . . . the said Virginia B. Costner had on numerous occasions, harassed, annoyed and coerced her mother in an attempt to have her convey all of her property. . . ."

Were we to decide the action on the sufficiency of the pleadings alone, the defendant would prevail. But a defective complaint does not foreclose the submission of the constructive fraud issue to the jury. *Mangum.* In *Mangum* the complaint did not "state 'with particularity' the circumstances constituting the alleged [constructive] fraud." 281 N.C. at 96, 187 S.E. 2d at 700. However, plaintiff's testimony and evidence fleshed out the fraudulent act, making out a *prima facie* case of constructive fraud. The trial court refused to submit the issue to the jury. Our

Supreme Court reversed and remanded for a new trial after tracing the history of pleading from detailed fact pleading, in which failure to allege the facts constituting fraud absolutely barred jury consideration of the issue, to the present system of notice pleading. The pleading "with particularity" required by G.S. § 1A-1, Rule 9(b) "[i]n all averments of fraud" is complemented by N.C. Gen. Stat. § 1A-1, Rule 15(b) (1983). Rule 15(b) was enacted "to eliminate the waste, delay, and the injustice which sometimes resulted from belated confrontations between insufficient allegations and plenary proof. . . ." *Mangum*, 281 N.C. at 96, 187 S.E. 2d at 700. Rule 15(b) provides, in pertinent part:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues.

Therefore, if the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his "implied consent." *Mangum; see also* 1 McIntosh, *North Carolina Practice and Procedure* § 970.80 (Supp. 1970). The defendants in *Mangum* did not object—they impliedly consented by their silence—and the court held that the issue of fraud should have been submitted to the jury.

Having held that the pleadings in the case before us were inadequate, we now determine if the evidence supports the submission of the constructive fraud issue to the jury. Did the defendant impliedly consent to try the issue of constructive fraud? We believe so.

Before calling defendant as an adverse witness, plaintiff and her witnesses sought to establish that plaintiff was primarily responsible for caring for, and handling the business affairs of, Mrs. Bivens. Defendant, first as an adverse witness, and then in her case-in-chief, testified that she performed the major role in caring for and looking after Mrs. Bivens. Indeed, the eight witnesses called by plaintiff and the nine witnesses called by the defendant took almost diametrically opposed positions concerning

the care, concern, and expression of love shown to Mrs. Bivens by the party that called them as witnesses.

Defendant strenuously contends that plaintiff should not be allowed to abandon her original theory—that defendant did nothing to deserve the homeplace or insurance proceeds—in favor of her new constructive fraud theory—that defendant did so much for her mother that a confidential relationship was established. As defendant puts it, "[t]he defendant was unfairly 'hoist by her own pitard'; a pitard which was offered and was relevant to her defense of the original issues." If anything, defendant hoist herself by her own pitard. Conceding that defendant's testimony may also have been relevant to her defense of the original issues, we find that plaintiff's prior evidence put defendant on notice of plaintiff's constructive fraud theory. Before defendant testified, as an adverse witness, plaintiff had raised the issue of constructive fraud by presenting testimony on the second "element"—the "fraudulent act."

> Q. Did your sister make any other comments to you during that meeting in Mr. Grigg's office concerning your mother making that deed?
>
> A. Well, she kept telling me all the way to Gastonia that we would divide things right. That she had told mama she would do that and she said you know why mama did that. She said if she does it this way we won't have to pay any inheritance taxes and another thing, if she gets sick and with that little bit of property, she can't get no help from the county and so this way she can get more help from the county.
>
> Q. Did she make any other comments to you during your meeting that day concerning the disposition of your mother's property?
>
> A. Well, she told me that she had promised mama she'd divide it and said I'll do exactly as I said I'd do.

While in no way as specific or as compelling as plaintiff's testimony, the testimony of Gene Grigg, the attorney who prepared Mrs. Bivens' will, is also instructive. Recalling a conference he had in his office with plaintiff and defendant several days after Mrs. Bivens' death, Mr. Grigg testified:

> Anyway, during the course of the conversation, I asked Mrs. Costner, you know, if she was willing to deed half the real estate to Mrs. Benfield and she did not ever say in my presence she was willing to do that. What she would say, she said, as I recall, I will do what's right and she looked at Ruby and she said I would do what I told you I'd do. She never in my presence stated what she told her she would do. So, I don't know but she repeated that statement two or three times because one time Ruby asked her about it and Mrs. Costner looked at her and said well, I'll do what's right. I'll do what I told you I'd do. What she said she'd do, she never said to me.

The testimony did not go to an issue raised by the pleadings. Defendant failed to object. The issue was tried by "implied consent." Any conflicts in the evidence were for the jury to resolve.

Again, in considering defendant's motion for a directed verdict, the trial court does not pass upon the weight or credibility of the evidence, the sole duty of the court being to determine whether there is sufficient evidence upon which a jury could base a verdict. *Roberts v. William N. & Kate B. Reynolds Mem. Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). Finding evidence in the record to support the theory of a constructive fraud, we find no error in the trial court's decision denying defendant's motion for a directed verdict and submitting the case to the jury.

III

[2] We summarily reject defendant's alternative argument that plaintiff is not entitled to one-half of the value of the Bivens' homeplace, "since said sum should have been awarded through the estate of Susan Bivens, in order that the expenses chargeable against the estate could be credited against that amount." Before the case was submitted to the jury, both the plaintiff and defendant stipulated that the real property had a one-half value in the amount of $5,250 and that the proceeds of the life insurance policy in controversy had a value of $785.00, the total amount in controversy being $6,035. The court entered judgment in favor of the plaintiff in the amount of that stipulated sum, and we find no error. Further, defendant has not made, individually or on behalf of Mrs. Bivens' estate, any claim or counterclaim against the plaintiff for reimbursement of the expenses incurred by Mrs. Bivens.

Based on the foregoing, we conclude that defendant had a trial free of prejudicial error.

No error.

Judges ARNOLD and WHICHARD concur.

IN THE MATTER OF: THE APPEAL OF MITCHELL-CAROLINA CORP. FROM THE ASSESSMENT OF AD VALOREM TAXES ON ITS INVENTORY BY MECKLENBURG COUNTY FOR 1982

No. 8310PTC307

(Filed 3 April 1984)

Taxation § 25.5— time for listing inventory for tax purposes—end of fiscal year as opposed to calendar year—distributor of heating and air conditioning equipment and parts covered by statute

A 1973 amendment to G.S. 105-285 did not exclude a strictly mercantile business enterprise such as the taxpayer in this case, a distributor of heating and air conditioning equipment and parts, from its terms. The omission of a comma between the words "mercantile" and "manufacturing" in G.S. 105-285(c) did not give rise to the nonsensical term "mercantile manufacturing business enterprise" but rather indicated that the comma was inadvertently omitted when the statute was revised, and taxpayer, after having chosen the end of its fiscal year as the time it listed inventory for tax purposes, was required to list its inventory as of that date and not as of the end of the calendar year.

APPEAL by taxpayer from the final decision of the North Carolina Property Tax Commission entered 26 January 1983. Heard in the Court of Appeals 14 February 1984.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by William J. Waggoner, for appellant Mitchell-Carolina Corp.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade, for appellee Mecklenburg County.

ARNOLD, Judge.

The sole issue before this Court is whether Mitchell-Carolina Corp. (hereinafter Taxpayer) is required to list and value its inventory for tax purposes as of the end of its fiscal year or as of 1 January. Both the North Carolina Property Tax Commission and Mecklenburg County contend that the established principles of

statutory construction as well as common sense mandate that Taxpayer is subject to the provisions of G.S. 105-285(c) and is required to value its property at the end of its fiscal year on 31 October. Taxpayer argues that the clear and ordinary meaning of the words in the 1973 revision of this statute requires Taxpayer to value its inventory as of 1 January. We hold, upon application of the elementary rules of statutory construction to the stipulated facts, that the County correctly valued Taxpayer's inventory as of the end of Taxpayer's fiscal year and the Commission properly affirmed this assessment.

Taxpayer is the North and South Carolina distributor of heating and air conditioning equipment and parts which are manufactured by the Bryant Heating and Equipment Company. At its principal place of business in Mecklenburg County, Taxpayer receives and warehouses the equipment and parts in the original cartons and resells the same to its dealers. Small parts may be sold in less than carton quantities. The equipment and parts constitute inventory and are delivered by motor freight or picked up by local dealers at the city counter. Taxpayer does not manufacture, modify or install accessories to items of inventory.

Since prior to 1973, Taxpayer's fiscal year has begun on 1 November and ended on 31 October. Prior to the 1982 tax year, and since 1973, when G.S. 105-285(c) was enacted, Taxpayer reported the value of its inventory to the Mecklenburg County Tax Supervisor as of the end of its fiscal year. The value of its other assets was reported as of 1 January of each year.

On 31 October 1981, Taxpayer owned an inventory of heating and air conditioning parts and accessories having a market value of $1,534,878. On 11 December 1981, a fire caused a substantial portion of Taxpayer's inventory to be damaged or destroyed. After the fire, on 1 January 1982, the market value of all inventory at Taxpayer's place of business was reduced to $815,816.

The provisions governing the listing, appraisal and assessment of Taxpayer's property and collection of its property taxes are compiled in the Machinery Act, G.S. 105-317.1 *et seq.* For purposes of this appeal the pertinent portion of the Act is G.S. 105-285. *Date as of which property is to be listed and appraised.*

Prior to 1973, G.S. 105-285(b) provided:

> (b) Except as otherwise provided in this subsection (b), the values and ownership of personal property, both tangible

and intangible, shall be determined annually as of January 1. The value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, processing, producing, or other business enterprise of a taxpayer whose fiscal year closes at a date other than December 31 shall be determined as of the ending date of the taxpayer's latest completed fiscal year. . . .

In 1973, G.S. 105-285 was amended as follows:

(b) Personal Property; General Rule.—Except as provided in subsection (c) below, the value, ownership, and place of taxation of personal property, both tangible and intangible, shall be determined annually as of January 1.

(c) Business Inventories.—The value, ownership, and place of taxation of inventories held and used in connection with the mercantile manufacturing, processing, or producing business enterprise of a taxpayer having a place of business in this State, whose fiscal year closes at a date other than December 31, shall be determined annually as of the ending date of the taxpayer's latest completed fiscal year. . . .

Taxpayer now contends that since the Legislature deleted the comma between the words "mercantile" and "manufacturing" in the 1973 revision of G.S. 105-285, the plain and ordinary meaning conveyed by the statute has changed. Taxpayer suggests that the statute now requires only a mercantile manufacturing, mercantile processing or mercantile producing enterprise to list its inventory for tax purposes at the end of its fiscal year; and that the revision excludes a strictly mercantile business enterprise such as Taxpayer. The County responds that the omission of the comma in the revision of G.S. 105-285 constitutes a clerical error. We agree that this punctuation was inadvertently omitted, and hold that Taxpayer's contentions would lead to consequences that are both absurd and inconsistent with the manifest purpose of the statute.

The rules of statutory construction provide that "the language of a statute will be interpreted so as to avoid an absurd consequence. . . ." *State v. Spencer*, 276 N.C. 535, 547, 173 S.E. 2d 765, 773 (1970). "Where a literal reading of a statute 'will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of

the law shall control and the strict letter thereof shall be disregarded.' (Citation omitted.)" *Taylor v. Crisp,* 286 N.C. 488, 496, 212 S.E. 2d 381, 386 (1975).

A literal reading of G.S. 105-285(c), with the omission of the comma between "mercantile" and "manufacturing," gives rise to the nonsensical terms "mercantile manufacturing business enterprise," "mercantile processing business enterprise," and "mercantile producing business enterprise." The word "mercantile" means "having to do with trade or commerce or the business of buying and selling merchandise." Black's Law Dictionary 1138 (rev. 4th ed. 1968). The buying and selling of goods is an entirely different activity from either manufacturing, processing or producing goods; and it is therefore illogical to assume that "mercantile" was meant to represent a category of these three activities.

Moreover, as the Commission noted in its decision, Taxpayer's interpretation of the statute would require a business taxpayer who both manufactures goods and buys finished goods for resale to determine the value of its manufactured goods at their fiscal-year-end value, while the value of its finished goods held for resale would be determined as of 1 January. Clearly the Legislature did not intend such harsh results.

The intent of the Legislature can be collected from the language in G.S. 105-285 and other sections of the Machinery Act.

> [A] provision in a statute must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. Its meaning must sound a harmonious—not a discordant—note in the general tenor of the law.

Watson Industries v. Shaw, Comr. of Revenue, 235 N.C. 203, 210, 69 S.E. 2d 505, 511 (1952).

The second paragraph of G.S. 105-285(c), as revised in 1973, provides:

> For purposes of this section, the word "inventories" means goods held for sale in the regular course of business, raw materials, and goods in process of manufacture or processing, it also means other goods and materials that are used

> or consumed in manufacture or processing or that accompany and are sold with the goods manufactured or processed.

When this second paragraph is read in conjunction with the first paragraph of the statute, it is clear that the Legislature intended that goods "held for sale in the regular course of business" should refer to the following phrase in the first paragraph: "inventories held and used in connection with the mercantile . . . business enterprise of a taxpayer. . . ." The other items of "inventories" listed in the second paragraph of G.S. 105-285(c) refer to "inventories held and used in connection with the . . . manufacturing, processing, or producing business enterprise of a taxpayer. . . ." G.S. 105-285(c).

The parties on appeal stipulated that Taxpayer's inventory consisted of heating and air conditioning equipment and parts which are received and warehoused by Taxpayer until they are resold. This inventory constitutes "goods held for resale in the regular course of business. G.S. 105-285(c). A finding that Taxpayer's inventory is not covered by section (c) would contradict a portion of the definition of "inventories" and make its inclusion within the statute meaningless.

The language in G.S. 105-317.1 of the Machinery Act provides further support for the conclusion that the Legislature inadvertently omitted a comma in G.S. 105-285(c). G.S. 105-317.1 lists the elements to be considered in appraising personal property. In particular, subsection (b) of this statute reads:

> (b) In determining the true value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider the valuation of such property as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes. . . .

Here we find a comma between the words "mercantile" and "manufacturing." The Commission concluded, and we agree, that if the Legislature intended to omit the comma in G.S. 105-285(c), then it is logical to assume that they would have omitted it here.

Finally, in the Institute of Government's *1973 Supplement to the Annotated Machinery Act of 1971,* the revised Act was reprinted with a comma inserted in brackets between the words "mercantile" and "manufacturing" in G.S. 105-285(c). *Id.* at p. 76. In his comments to subsection (c), the annotator, Henry W. Lewis, wrote:

> As rewritten, the statute provides that, "The value, *ownership, and place of taxation* of inventories held and used in connection with the mercantile, manufacturing, processing, or *producing* business enterprise of a taxpayer *having a place of business in the State,* whose fiscal year closes at a date other than December 31, shall be determined *annually* as of the ending date of the taxpayer's latest completed fiscal year." The words in italics denote alterations from the 1971 version.

Id. at 78. This language clearly indicates that the comma was inadvertently omitted when the statute was revised.

Since the revision of G.S. 105-285(c) in 1973, Taxpayer has consistently valued its inventory as of the end of its fiscal year as required by the language of this revised statute. The fact that the value of Taxpayer's inventory was substantially reduced by fire after its fiscal-year-end and prior to 1 January, has no effect upon the clear meaning and application of this statute.

The decision of the North Carolina Property Tax Commission is affirmed in all respects.

Affirmed.

Judges WHICHARD and BECTON concur.

THE NORTH CAROLINA STATE BAR v. ROLAND C. BRASWELL, ATTORNEY AT LAW

No. 8310NCSB235

(Filed 3 April 1984)

1. **Attorneys at Law § 11— attorney disciplinary proceeding—notice of charges**

The Disciplinary Hearing Commission of the N.C. State Bar did not lack jurisdiction over charges against an attorney because the attorney never received a letter of notice setting forth the charges before formal action was taken against him. Rather, the filing of a formal complaint satisfied the attorney's right to be informed of the charges against him.

2. **Attorneys at Law § 12— attorney discipline—misrepresentations concerning unperfected appeal**

The evidence before the Hearing Committee of the Disciplinary Hearing Commission of the N.C. State Bar was sufficient to support a charge that an attorney engaged in conduct involving fraud or deceit by falsely representing to a criminal defendant that an appeal for which the attorney was court-appointed counsel had been perfected where it tended to show that the attorney was appointed to represent the criminal defendant on appeal, that the appeal was not perfected, that the criminal defendant never requested the attorney to discontinue pursuit of the appeal, and that when the criminal defendant asked the attorney about his appeal, the attorney assured the defendant that his appeal was being pursued. DR 6-101(A)(3); DR 7-101(A) and DR 1-102(A)(5) and (6).

3. **Attorneys at Law § 11— attorney disciplinary hearing—questions to witness by hearing committee**

In an attorney disciplinary hearing, it was within the discretion of the hearing committee to question a witness to clarify matters material to the issues.

APPEAL by defendant from an order of discipline of the hearing committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Order entered 15 September 1982. Heard in the Court of Appeals 8 February 1984.

The North Carolina State Bar received a complaint about the actions of defendant, a Bar member, related to his representation of William J. Neal, Jr. As a result of this complaint and defendant's response thereto, the Bar filed this disciplinary action against defendant.

Following a hearing conducted pursuant to N.C. Gen. Stat. §§ 84-28 to -32 (1981 & 1983 Cum. Supp.), the Hearing Committee

made findings of fact and concluded as a matter of law that defendant had engaged in conduct constituting grounds for discipline. They concluded that he had failed to perfect the appeal of William J. Neal, Jr., in two cases after being appointed by the court to do so, in violation of N.C. Gen. Stat. App. VII, Code of Professional Responsibility of The North Carolina State Bar, DR 6-101(A)(3) (Cum. Supp. 1983) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by representing to Mr. Neal and his parents that the appeal had been perfected. Finally, the Committee concluded that defendant had violated G.S. § 84-28(b)(3) by making a knowing misrepresentation of facts in response to a formal inquiry of the North Carolina State Bar. Upon these conclusions, the Committee entered an order suspending defendant from the practice of law for a period of ninety days. From this order defendant appealed.

David R. Johnson for The North Carolina State Bar.

Hulse & Hulse, by Herbert B. Hulse, for defendant.

WELLS, Judge.

[1] Defendant raises nine questions on appeal based upon thirty assignments of error. Defendant first contends that the Committee erred by denying his motion to dismiss the second and third claims for relief for want of jurisdiction over those matters. The second claim for relief alleged that defendant engaged in conduct involving fraud or misrepresentation by representing to Neal and his parents that the appeal had been perfected when this was not the case. The third claim for relief alleged that defendant knowingly made false representations to the North Carolina State Bar in his response to their inquiry regarding Neal's complaint. Defendant's contentions that the Committee did not have jurisdiction over these charges are based upon the fact that he never received a letter of notice setting forth those allegations.

The Disciplinary Hearing Commission of the North Carolina State Bar obtains jurisdiction over attorney misconduct charges pursuant to the authority of G.S. §§ 84-28(a) and 84-28.1(b) and N.C. Gen. Stat. at VI, Art. IX (Cum. Supp. 1983). Article IX, Section 12 *supra*, provides that once a grievance has been received, the counsel of the state Bar must make an investigation and submit his finding to the chairman of the Grievance Committee. The

chairman may then elect to follow any of the following three courses of action: (1) he may treat the report as final and advise the counsel to discontinue the investigation; (2) he may have the counsel conduct further investigation; or (3) he may send a letter of notice to the accused. There is no requirement that a letter of notice must be issued before formal action is taken.

Once the Grievance Committee has determined that there is probable cause to believe that a violation of the disciplinary rules has occurred, a formal complaint is filed. The filing of a formal complaint satisfies defendant's right to be informed of and respond to the charges against him. These rights are enumerated in Article IX, Section 14 *supra.*

In support of his contention that he had a right to be informed at an earlier stage of the proceeding, defendant cites *In re Trulove,* 54 N.C. App. 218, 282 S.E. 2d 544 (1981), *disc. rev. denied,* 304 N.C. 727, 288 S.E. 2d 808 (1982). This case is inapposite to this issue. In *Trulove,* the court vacated a decision of the North Carolina Board of Registration for Professional Engineers and Land Surveyors revoking respondent's license. The basis for this decision was the board's failure to give respondent a short and plain statement of the allegations against him. In *Trulove,* because of the insufficiency of the statement of charges, respondent was unable to prepare his defense at his adjudicatory hearing.

In this case, defendant does not contend that he was unable to prepare for his adjudicatory hearing, but rather he argues that he should have had an opportunity for more input during the investigatory phase of the proceeding. We find no authority to support his position and cannot accept it as valid. This assignment of error is overruled.

Next defendant contends the Committee erred by limiting his cross-examination of Neal regarding Neal's prior acts of misconduct. On cross-examination, the Committee allowed defendant to place before it evidence that Neal had been tried and convicted of several criminal offenses, including possession of marijuana and possession with intent to sell and deliver a controlled substance. The defendant then asked Neal whether he "carried on any transactions in drugs for profit" during the period from 1974 to 1980. The Committee in its discretion sustained plaintiff's objection to

this line of questions, but allowed Neal's response to be placed in the record. The responses reveal that had Neal's answers been allowed into evidence, he would have denied involvement in any illegal drug transaction other than those for which he had been tried and convicted. We are therefore unable to find any prejudice to defendant by the exclusion of this evidence. The assignment of error is overruled.

[2] Next defendant contends that the Committee erred by denying his motion to dismiss paragraph 16(a) of the first claim for relief at the close of the plaintiff's evidence, because the evidence presented was insufficient to support the charge. Paragraph 16(a) of the first claim for relief alleges that after defendant had been appointed to perfect Neal's appeal in Wayne County cases 78CR8995 and 78CR8996, he failed to do so, in violation of DR 6-101(A)(3), 7-101(A) and 1-102(A)(5) and (6). The Bar presented evidence to the Committee which tended to show that defendant was appointed to represent Neal on appeal, that the appeal was not perfected, and that Neal never requested defendant to discontinue the pursuit of his appeal. Defendant seems to argue that there was insufficient evidence to show that he knew of his appointment to represent Neal. The evidence in the record of the superior court's order appointing defendant to represent Neal, coupled with Neal's testimony that he asked defendant about his appeal and testimony that defendant had assured Neal that his appeal was being pursued was clearly sufficient to overcome defendant's motion to dismiss.

Secondly defendant makes reference to the fact that Neal did not complain about defendant's failure to perfect the appeal for two years. We are unsure what relevance this fact has to the issue of whether defendant's motion to dismiss for insufficient evidence should have been granted. However, even if relevant, Neal's failure to complain is explainable, because during much of this time the evidence showed that defendant had been misleading Neal and his parents by telling them that all the work on the appeal had been completed and that they were now awaiting word from Raleigh on the decision.

Finally, defendant argues his motion should have been granted because Neal's affidavit was insufficient to inform him of the charges against him. Again we are at a loss to understand

what relevance this argument has to this issue. We would reiterate, however, that it is not the grievances filed with the Bar, but the Bar's complaint against the attorney which must be sufficiently specific to inform defendant of the charges against him. Defendant does not challenge the sufficiency of these facts. This assignment of error is overruled.

[3] In his fourth argument, defendant contends the Committee erred during its questioning of him. He contends that the questions assumed facts not in evidence and revealed that the Committee was biased and hostile toward him. In such proceedings, the Committee sits as both judge and jury and it was within their discretion to question the witness to clarify matters material to the issues. *N.C. State Bar v. Talman,* 62 N.C. App. 355, 303 S.E. 2d 175, *disc. rev. denied,* 309 N.C. 192, 305 S.E. 2d 189 (1983). We have carefully reviewed the questions to which defendant objects and while we find them probing and the questioning vigorous, we believe that the Committee's actions were well within the bounds of its discretion. These assignments of error are overruled.

We have carefully examined defendant's remaining assignments of error and arguments and find them redundant to those assignments and arguments we have discussed, raising no additional meritorious questions.

For the reasons stated, the order of the Hearing Committee must be and is

Affirmed.

Judges BRASWELL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JEFFERY LEVON EASON

No. 8311SC854

(Filed 3 April 1984)

1. Criminal Law § 113.1— instructions—summary of evidence—no "plain error"

In a prosecution for first degree burglary, a trial court's summary of the evidence did not constitute "plain error" where the court gave no summary of defendant's evidence and stated only portions of the State's evidence since the

evidence was sufficiently uncomplicated that failure to summarize it was unlikely to have "had a probable impact on the jury's finding of guilt." G.S. 15A-1232.

2. Criminal Law § 138— aggravating factor that victim particularly vulnerable—supported by evidence

In a prosecution for first degree burglary, the evidence supported an "additional" aggravating factor that the victim was particularly vulnerable because of the fact that she was 8-½ months pregnant and defendant was aware of her condition. G.S. 15A-1340.4(a).

Judge BECTON dissenting.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 4 February 1983 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 February 1984.

Defendant appeals from a judgment of imprisonment entered upon his conviction of first degree burglary.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

WHICHARD, Judge.

GUILT PHASE

[1] G.S. 15A-1232 provides, in pertinent part: "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 [thereto]." Defendant contends he is entitled to a new trial because the court here "gave no summary of [his] evidence and stated only so much of the State's evidence and contentions as was necessary to support a guilty verdict."

Defendant, however, did not object to this at trial. After the jury retired, but before it began deliberations, the court asked if defendant had any objections to the instructions or any requests for additional instructions. Defense counsel replied in the negative. Defendant thus has waived his right to assign error to the instructions. N.C. R. App. P. 10(b)(2).

Defendant argues, nevertheless, that the asserted defects in the instructions affect a substantial right, and should be considered under the "plain error" rule despite his failure to object. While our Supreme Court has approved the "plain error" rule, *see State v. Odom*, 307 N.C. 655, 660-61, 300 S.E. 2d 375, 378 (1983), it has noted that " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 661, 300 S.E. 2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212, 97 S.Ct. 1730, 1736 (1977)). It has instructed that "[i]n deciding whether a defect in the jury instruction constitutes '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 378-79.

A careful review of the entire record reveals no "plain error" mandating a new trial. The evidence clearly established that someone, without consent, broke into the victim's residence in the nighttime and got into bed with her. The only significant question was whether defendant was the offender.

The evidence which tended to identify defendant as the offender was circumstantial. There was testimony that defendant at times wore around his neck a blue towel with a cord attached. A blue towel with a cord attached was found in the victim's bed. There was evidence that blue fibers were found on the victim's window sill; that officers subsequently removed some blue socks from a bag of clothing which defendant identified as his; and that the fibers in defendant's socks were consistent with the fibers found on the victim's window sill. A hair found on the victim's bed was generally similar to defendant's hair, though insufficiently so to permit a firm conclusion that it was his. A witness, who stated that he knew defendant's voice, testified that sometime subsequent to the offense he stood behind a hedge "seven or eight or ten yards" away and overheard defendant describe his involvement in an incident which fit the victim's description of the incident here. The victim here was pregnant, and the woman the witness heard defendant describe was pregnant. The victim here was cut on the hand with a knife, and the witness heard defendant state that he cut the woman he described with a knife.

Defendant testified to an alibi defense. Other witnesses in his behalf corroborated his story.

We find this evidence sufficiently uncomplicated that failure to summarize it is unlikely to have "had a probable impact on the jury's finding of guilt," *Odom, supra*, or to have affected defendant's fundamental or substantial rights. *See State v. Best*, 265 N.C. 477, 480, 144 S.E. 2d 416, 418 (1965); *State v. Owens*, 61 N.C. App. 342, 344, 300 S.E. 2d 581, 582 (1983). Following the *Odom* standard, we thus hold that this is not "the rare case" in which application of the "plain error" rule is appropriate. This assignment of error is therefore overruled.

SENTENCING PHASE

[2] Defendant contends the court erred in finding the following as an "additional" aggravating factor: "The victim . . . was particularly vulnerable because . . . she was in an advance[d] stage of pregnancy and the Defendant was specifically aware of this vulunerability [sic] and made a calculative decision to proceed with the commission of this offense." We find no error.

The victim testified during the guilt phase that she had told the offender that she "had a baby" and "was pregnant," and that the offender responded that he knew these things. The victim also testified that she was eight and one-half months pregnant at the time. There was no contrary evidence. A preponderance of the evidence thus supported the finding. G.S. 15A-1340.4(a).

While the court entered the finding as an "additional" rather than a "statutory" aggravating factor, the finding is clearly analogous to the statutory factor that "[t]he victim was very young, or very old, or mentally or *physically infirm*." G.S. 15A-1340.4(a)(1)(j)(emphasis supplied). Our Supreme Court has stated that "*vulnerability* is clearly the concern addressed by this factor." *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983). This Court has stated that "the underlying policy of [this] . . . factor is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity." *State v. Mitchell*, 62 N.C. App. 21, 29, 302 S.E. 2d 265, 270 (1983). It has held that *age* of the victim is not "reasonably related to the purposes of sentencing," as required by G.S. 15A-1340.4(a), unless culpability is enhanced by defendant's having taken advantage of

the victim's relative defenselessness occasioned by age. *See State v. Rivers*, 64 N.C. App. 554, 557-58, 307 S.E. 2d 588, 590 (1983); *State v. Monk*, 63 N.C. App. 512, 523, 305 S.E. 2d 755, 762 (1983); *Mitchell, supra*, 62 N.C. App. at 29, 302 S.E. 2d at 270; *State v. Gaynor*, 61 N.C. App. 128, 130-31, 300 S.E. 2d 260, 262 (1983).

We believe the victim's advanced stage of pregnancy could properly be viewed as an infirmity which, under the circumstances of the offense, enhanced her vulnerability and rendered her relatively defenseless. This condition generally would diminish the victim's capacity to resist the offender. It would augment the potential adverse consequences of the offense, in that not only the victim, but her unborn child as well, are vulnerable to the offender's intrusion. The trauma to the victim is enhanced by concern for her unborn child added to normal concern for herself. The impact of the crime on the victim is relevant to the question of sentencing and is properly considered under G.S. 15A-1340.4(a)(1). *State v. Blackwelder*, 309 N.C. 410, 413 n. 1, 306 S.E. 2d 783, 786 n. 1 (1983).

We further believe the evidence that defendant proceeded despite knowledge of the victim's condition could properly be viewed as demonstrating a greater degree of depravity than would commission of such an offense absent this condition. His knowledge of the condition thus could properly be viewed as a factor which increased his culpability. G.S. 15A-1340.3.

For the foregoing reasons, we hold that the aggravating factor in question was "reasonably related to the purposes of sentencing," G.S. 15A-1340.4(a), and that the court did not err in finding it.

Defendant contends the court erred in finding as an aggravating factor that he had been convicted of prior offenses. He does not dispute existence of the convictions, which the State established by introduction of certified copies of judgments. He argues, however, that the State did not sustain its burden of proving that at the time he either was not indigent, was represented by counsel, or had waived counsel.

Our Supreme Court has now established that defendant has the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction. *State v. Thompson*,

309 N.C. 421, 307 S.E. 2d 156 (1983). Defendant did not raise the issue in the trial court, and he thus cannot now do so here.

No error.

Judge ARNOLD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that the trial court's failure to summarize defendant's evidence affected defendant's substantial rights under *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416 (1965), and was plain error under *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), I dissent.

Only when the evidence is simple and direct and without equivocation and complication is the failure to summarize any evidence harmless error. *State v. Best.* In my view, the evidence presented at defendant's trial was far from unequivocal. The State relied almost entirely on circumstantial evidence, the implications of which were often ambiguous.

The prosecuting witness awoke to discover an intruder astraddle her as she lay on her side in the bed in her dark bedroom. When the intruder threatened her with a knife, she grabbed the blade of the knife, pushed it away, and screamed. The intruder yanked back the knife, cutting her hand, and fled through an open window. Although the prosecuting witness at trial described the intruder as dark and muscular with short hair, wearing something white on the upper part of his body, the prosecuting witness admitted on cross-examination that she had made two prior statements to the police in which she stated that the only thing she had observed about the intruder was that he appeared to be wearing a short-sleeved white shirt. She also admitted that she had previously failed to identify the defendant as the person who had been in her room that night. The only other direct evidence offered by the State on the issue of identity came from Ed Towler, who testified that he overheard defendant admitting involvement in a crime very similar to the one at issue in this case. Towler then testified that he immediately entered his

house and spoke with his daughter, who was living with him at that time. Significantly, Towler's daughter testified that she had not, as her father testified, been living with him on the night in question. Although evidence relating to four items of physical evidence (hair, fingerprints, knife, and fiber) was presented, S.B.I. agent Troy Hamlin could only testify that he received a "negroid hair fragment"; detective Larry Carter testified that the fingerprints did not match the defendant's, that no blood residue was found on the knife, and that the fiber from the window and from the socks were both light blue acrylic fibers that could have originated from the same source.

Given the defendant's alibi testimony, the testimony of several of his witnesses that they had never seen defendant with a towel like the one offered in evidence by the State, and the testimony of Ed Towler's daughter, among other things, I cannot say that the failure to summarize defendant's evidence had no probable impact on the jury's finding of guilt.

KIRK B. BENNETT AND BARBARA BENNETT v. H. WALTER FULLER AND NORMA J. FULLER

No. 8325SC442

(Filed 3 April 1984)

Vendor and Purchaser § 3.1— contract to convey realty—insufficient description

A contract to convey realty which described the property as "Located in the City of Morganton, N.C., County of _____, State of North Carolina, being known as and more particularly described as: Street Address—Industrial Boulevard, Legal Description: BK 235 P 126 Metes & Bounds" contained a patently ambiguous description and was void under the Statute of Frauds, G.S. 22-2, where the sellers conceded that they do not own all of the property described in Deed Book 235 at page 126 and contend that incorrect book and page numbers were placed in the contract by mutual mistake.

APPEAL by plaintiffs from *Sitton, Judge.* Judgment entered 9 March 1983 in BURKE County Superior Court. Heard in the Court of Appeals 8 March 1984.

This is a civil action wherein plaintiffs seek specific performance of a contract to purchase land. The complaint alleges that on

17 April 1981 plaintiffs and defendants entered into a contract whereby defendants agreed to purchase certain property owned by plaintiffs. The contract described the property as 'Located in the City of Morganton, N.C., County of _____, State of North Carolina, being known as and more particularly described as: Street Address—Industrial Boulevard, Legal Description: BK 235 P 126 Metes & Bounds.' Plaintiffs alleged that they were willing and able to transfer title on the date for closing but that defendants repudiated the contract. Plaintiffs prayed for specific performance of the contract.

Defendants answered, denying the essential allegations in plaintiffs' complaint, and asserted two counterclaims. In their first counterclaim defendants allege that the property description, the purchase price, and the terms of the condition precedent were patently ambiguous and therefore unenforceable; that the real estate agent misrepresented the size of the structure located on the property; and that they are entitled to recover the earnest money held in escrow by plaintiffs' realtor. In their second counterclaim defendants allege that should they be required to specifically perform the contract, then plaintiffs should be required to convey all the property described in Book 235 at Page 126 of the Burke County Registry.

Plaintiffs replied alleging that the reference to a deed located in Deed Book 235 Page 126 was included by mutual mistake and that the property which was the subject of the agreement was only a portion of the property described in Book 235 at Page 126. On 9 August 1982, plaintiffs moved to amend their complaint to allege that the legal description set forth in the contract was incorrect and was included as a result of mutual mistake between the parties and that it was the intent of the parties to identify the property as that described in Book 448 at Page 207 of the Burke County Registry.

On 22 February 1983, defendants moved for summary judgment, alleging that the contract was so patently ambiguous as to violate the Statute of Frauds, and, therefore, they were entitled to judgment as a matter of law. In support of their motion, defendants submitted their pleadings and plaintiffs' answers to interrogatories. On 9 March 1983, Judge Sitton first allowed plaintiffs' motion to amend, and then entered summary judgment for

defendants, stating that it appeared to the court "that the legal description in the 'Offer to Purchase and Contract' which plaintiffs seek to have specifically enforced is patently ambiguous and therefore unenforceable by plaintiffs." From this judgment plaintiffs appealed.

Mitchell, Teele, Blackwell & Mitchell, by Marcus W. H. Mitchell, Jr., for plaintiffs.

Martin & Poovey, by Mark N. Poovey, for defendants.

WELLS, Judge.

The sole question presented for review is whether the trial court erred in granting defendants' motion for summary judgment on the grounds that the legal description of the property contained in the contract was so patently ambiguous as to render the contract unenforceable under the Statute of Frauds.

N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure in pertinent part provides: that summary judgment ". . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

> The purpose of the rule is to eliminate formal trials where only questions of law are involved . . . The procedure under the rule is designed to allow a preview or forecast of the proof of the parties in order to determine whether a jury trial is necessary . . . Put another way, the rule allows the trial court 'to pierce the pleadings' to determine whether any genuine factual controversy exists . . . An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense.

Lowe v. Bradford, 305 N.C. 366, 289 S.E. 2d 363 (1982). (Citations omitted.)

If plaintiffs are to recover under the contract, the instrument must comply with the requirement of the Statute of Frauds. N.C. Gen. Stat. § 22-2 (1965 & 1983 Cum. Supp.) provides: "All con-

tracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

An essential feature of a contract to convey land is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E. 2d 908 (1983). The contract cannot contain a patent ambiguity. A patent ambiguity exists when the description leaves the land to be conveyed ". . . in a state of absolute uncertainty and which refers to nothing extrinsic by which it might possibly be identified with certainty. . . ." *Id.* When this occurs parol evidence is not admissible to explain the description and the contract is void. *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964). Whether a description is patently ambiguous is a question of law. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E. 2d 783 (1970).

Plaintiffs concede that they do not own all of the property described in that deed recorded in Book 235, at Page 126, of the Burke County Registry, but argue, however, that because of a mutual mistake, they should be allowed to reform the contract by substituting the Book and Page numbers of the property they do own on Industrial Boulevard for the incorrect numbers included in the contract. We cannot agree. If appellants were allowed to reform the contract by inserting the corrected Book and Page numbers they would be creating a new description in violation of the parol evidence rule. The rule in such cases is:

> If the description is so vague and indefinite that effect cannot be given the instrument without writing new, material language into it, then it is void and ineffectual . . .
>
> . . .
>
> . . . The purpose of parol evidence . . . is to fit the description to the property—not to create a description. There must be language in the . . . [instrument] sufficient to serve as a pointer or a guide to the ascertainment of the location of the land. The expression of the intention of the parties to the . . . [instrument] must appear thereon. Parol

evidence is resorted to merely to bring to light this intention—but never to create it.

Thompson v. Umberger, 221 N.C. 178, 19 S.E. 2d 484 (1942). (Citations omitted.)

Although it may appear inconsistent for the trial judge to have allowed plaintiffs to amend their complaint to assert a theory of recovery he promptly ruled to be invalid, nevertheless, we hold that, because the contract to purchase property contains a patently ambiguous description which cannot be corrected without doing violence to the requirements of the Statute of Frauds the trial court properly awarded summary judgment in favor of the defendants.

Affirmed.

Judges ARNOLD and BRASWELL concur.

REDEVELOPMENT COMMISSION OF GREENSBORO v. ELBERT R. FORD, JR., AND WIFE, JULIA P. FORD; AND NATIONAL ADVERTISING COMPANY, INC.

No. 8318SC407

(Filed 3 April 1984)

1. **Municipal Corporations § 30.13— restrictions imposed by subservient governmental agency more restrictive than those of city council—validity of restrictions**

Where plaintiff conveyed two lots in an area zoned light industrial to defendants and, by deed, restricted the size of billboards to 300 sq. feet, subsequent amendments by the city council to the zoning ordinance allowing billboards up to 775 sq. feet in light industrial areas did not compel a change in the restrictive covenants in the deeds between plaintiff and defendants. G.S. 160A-512(6), G.S. 160A-514(f), and G.S. 160A-390.

2. **Deeds § 20.4; Municipal Corporations § 30.13— restrictive covenant in deed concerning billboards—not invalidated by less restrictive zoning ordinance**

The subsequent enactment of a less restrictive zoning ordinance concerning billboards by a city governing body did not invalidate a more restrictive covenant imposed by a servient governmental agency by deed given and recorded prior to passage of the less restrictive zoning ordinance.

Redevelopment Commission of Greensboro v. Ford

APPEAL by defendants from *Lane, Judge.* Judgment entered 28 February 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 March 1984.

Plaintiff conveyed two lots in an area zoned light industrial to the defendants Elbert R. Ford, Jr., and wife Julia P. Ford. The deed contained the following limitation:

> Signs and billboards shall be permitted in such area as allowed by the Zoning Ordinance of the City of Greensboro presently in effect or as hereinafter amended; provided, however, that each sign or billboard shall not exceed a total area of 300 square feet in size.

At the time this restriction was placed on record, the zoning ordinance for the City of Greensboro did not address any limitation on size of billboard signs. Rather the ordinance merely defined a "billboard" as any sign with an area of 300 or more square feet and further defined areas where billboards could be placed. After the conveyance to the Fords, the zoning ordinance was amended to allow signs up to 500 square feet in size in the areas zoned light industrial. Subsequently, the ordinance was further amended to permit signs up to 775 square feet in size in the light industrial areas.

In the area where the Ford property is located, the Redevelopment Commission did not condemn each tract of land. Hence, some tracts are governed by the 775 foot limitation under the city ordinance, while the Ford tract is subject to the 300 square foot limitation under the deed restriction.

On 11 December 1980 the Fords leased their property to the defendant, National Advertising, for the erection of a billboard. The billboard constructed on the property is in excess of 300 feet, but is in compliance with the city ordinance at the time of erection. Plaintiff sought a permanent injunction restraining and enjoining the defendant from placing or displaying any billboard on the property in excess of 300 feet.

The trial judge entered an order granting plaintiff's motion for summary judgment. Defendant National Advertising appeals.

Coggin, Hoyle & Blackwood by L. James Blackwood, II for plaintiff appellee.

Konrad K. Fish and Paul E. Marth for defendant appellant.

HILL, Judge.

The sole issue is whether the trial court erred in granting plaintiff's motion for summary judgment. Defendant submits two arguments that summary judgment was improperly granted: restrictions imposed by a subservient government agency may not be more restrictive than those enacted by the dominant governmental unit, the city council, under its zoning ordinance; and the burden placed on the land involved in this controversy does not bear a reasonable relationship to the surrounding lands in light of the characteristics of the neighborhood involved. We find that summary judgment was properly granted.

[1] Defendant concedes in his first argument that when a restriction is placed on property by a non-governmental agency, and subsequently there is a zoning change, such change will neither nullify nor supersede a valid restriction in the use of real property. See *Mills v. Enterprises, Inc.*, 36 N.C. App. 410, 244 S.E. 2d 469, *disc. rev. denied*, 295 N.C. 551, 248 S.E. 2d 727 (1978). However, defendant contends such rule does not apply with two governmental units, one servient to the other, imposing restrictions in conflict with each other.

G.S. 160A-512(6) and G.S. 160A-514(f) provide the Redevelopment Commission of the City of Greensboro with authority to place restrictive covenants on any property it is deeding to developers so that the property being conveyed will be subject to such restrictions ". . . as the commission may deem necessary to prevent a recurrence of blighted areas or to effectuate the purposes of this Article [Article 22, Urban Redevelopment Law]."

In the case under review the restrictive covenants were adopted in the redevelopment plan prepared by the plaintiff Redevelopment Commission of Greensboro in accordance with the Urban Redevelopment Law, G.S. 160A-500 *et seq.* The restrictive covenant is a verbatim repetition of the language which was submitted in the redevelopment plan that was approved by the city council and which provided among other things as follows:

Land Use Provisions and Building Requirements

In addition to the controls of the plan here set forth, the provisions of the City of Greensboro Zoning Ordinance, as amended, will control. In all cases, the more restrictive control governs.

The plan and restrictive covenants further provided specifically that:

Signs and billboards shall be permitted in such areas as allowed by the Zoning Ordinance of the City of Greensboro presently in effect or as hereafter amended; provided, however, that each sign or billboard shall not exceed a total area of 300 square feet in size.

Under the enabling legislation for local zoning ordinances, G.S. 160A-381 *et seq.*, specific provision is made in G.S. 160A-390 that

[w]hen the provisions of any other statute or local ordinance or regulation . . . impose other higher standards than are required by the regulations made under authority of this Part [Part 3, Zoning Article 19. Planning and Regulation of Development] the provisions of that statute or local ordinances or regulation shall govern.

The language heretofore set out specifically provides for the possibility that the standards imposed by the zoning ordinances may be changed and standards eased at a future date. Zoning ordinances are designed to classify all the users of land lying within the jurisdiction of the city similarly situated, and cases indicate that zoning ordinances may not speak to "spot zoning." See *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972). In contrast, the restrictions imposed under the deed in this controversy are concerned with carrying out a redevelopment plan in a specific area. It was not the intent of the governing body of Greensboro to amend the redevelopment law so as to compel a change in restrictive covenants in deeds executed and delivered under statutes and ordinances in force at the time of delivery of the deed by a governmental agency created by it. Therefore, defendant's first argument presents no triable issue of fact.

[2] Defendant next argues that the burden placed on the Ford tract does not bear a reasonable relationship to the surrounding land considering the character of the neighborhood involved. The area in which the property subject to this lawsuit is situated was zoned light industrial when acquired by the Fords, and it is still zoned as such. Not all the property in the neighborhood was acquired by the Redevelopment Commission at the time this property was obtained. The only change affecting the neighborhood is the increased permissible size of billboards. Hence, some of the property is subject only to the 775 foot billboard limitation, while the Ford tract is limited to the 300 foot billboard limitation. Defendant contends that because surrounding properties are not subjected to the same requirement imposed by the restrictive covenant on the Ford tract, there has been a change of circumstances which should invalidate the restrictive covenant.

Although a valid restriction on the use of property is not superseded by the enactment of a zoning ordinance, such ordinance may be considered with other competent evidence in determining whether or not there has been a fundamental change in the restricted subdivision. *Shuford v. Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903 (1956); *Mills v. Enterprises, Inc., supra.* The less restrictive limitation imposed by the zoning ordinances applies herein to properties never acquired by the Redevelopment Commission. Indeed, the record is void of any change of circumstances relating specifically to any of the properties that are subject to the restrictive covenant in question. The trial judge therefore correctly ordered that defendants be

> restrained and enjoined from the placement of any signs in excess of 300 square feet upon the property . . . until November 1, 1994, the day of the termination of the restrictive covenants on such property, and . . . that the defendants, and each of them, within thirty (30) days from signing this judgment remove any signs in excess of 300 square feet presently in place on such property so as to come within compliance of this decree. . . .

We conclude under the facts of this case the subsequent enactment of a less restrictive zoning ordinance by a city governing body does not invalidate a more restrictive covenant imposed by a servient governmental agency by deed given and recorded

prior to passage of the less restrictive zoning ordinance, nothing else appearing. The decision of the trial court in granting summary judgment in plaintiff's favor is

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

EVELYN S. HOUGHTON, BRYANT P. JOHNSON AND WIFE, JEAN P. JOHNSON v. ROBERT L. WOODLEY AND WIFE, BARBARA K. WOODLEY

No. 8311DC494

(Filed 3 April 1984)

Dedication § 2.2— dedication of street to purchaser of lot—sufficiency of evidence

A trial court properly entered a declaratory judgment in the plaintiffs' favor as to their right to use a 20-foot strip of land as a drive and in permanently enjoining defendants from interfering with plaintiffs' use of such drive where the evidence conclusively supported the intent of the plaintiff grantor to effectuate a dedication of the drive, where defendants had direct knowledge of the existence of the dedicated road through a map which was of record when defendants received their deed, and where the property description in defendants' deed made it clear that they never acquired any legal rights in the land comprising the drive.

APPEAL by defendants from *Lyon, Judge.* Judgment entered 21 December 1982 in District Court, LEE County. Heard in the Court of Appeals 14 March 1984.

This is an action instituted by plaintiffs to secure a declaratory judgment as to their right to use a twenty-foot strip of land as a drive, and for injunctive relief seeking to prohibit defendants from interfering with plaintiffs' right to use the land in this manner.

Plaintiff Bryant Johnson [hereinafter "Johnson"] was the developer of a tract of land known as the Winstead Property. Plaintiff Evelyn Houghton [hereinafter "Houghton"] is the grantee of one lot of the property; defendants are the grantees of two additional lots, both of which border Houghton's lot. The

grantors in both cases are Johnson and his wife, Jean Johnson. The disputed strip of land runs between defendants' two lots.

The deed by which Houghton acquired her land was recorded on 31 May 1978. Her deed makes no direct reference to the twenty-foot strip of roadway. Although the evidence tended to show that there was no recorded map of the Winstead Property at the time Houghton received her deed, Houghton testified that she was shown such a map in Johnson's office. She also testified that it was represented to her that if she were ever barred from using a private drive that ran across a corner of her property, that there was a dedicated right-of-way available for her use. This right-of-way is the twenty-foot drive that is the subject of this controversy.

A survey entitled "Winstead Property, Survey for Bryant Johnson," dated 6 July 1978, was recorded on 21 July 1978. this map depicted the twenty-foot drive as curving. The map was subsequently revised to show a straight road. The revised map was recorded on 22 September 1978. Both maps depict the three lots that are involved in this action, the one owned by Houghton, and the two owned by defendants (now owned solely by defendant Barbara Woodley, as her husband has transferred his interest to her).

The deed by which defendants acquired their tracts from plaintiff Johnson is dated 29 September 1978 and was recorded 4 October 1978, subsequent to the recordation of the revised map. The defendants' deed specifically excepts the strip of land in its description of the property transferred by its reference to the "20-foot drive" in the property description for each lot, and by making reference to the 22 September 1978 revised map for a "more particular description" of the property.

Houghton used the private drive with the permission of its owners to gain access to her property for approximately three years. In 1981, however, the owners of the private drive had it blocked off and subsequently moved so that Houghton could no longer use it to gain access to her property. At this point she contacted Johnson, who arranged to have the twenty-foot drive cleared so that Houghton could use it. Houghton testified that the twenty-foot drive is currently the exclusive means of access to her property.

Plaintiff Houghton alleged that defendants interfered with her use of the drive. She testified that defendant Robert Woodley "disked up" the road and defendants otherwise barred her access; she testified that defendant Barbara Woodley threatened to shoot her if she continued using the drive. Houghton testified that she was forced to park her car and walk two-tenths of a mile across a field to get to her house. Although defendants denied some of Houghton's allegations, both defendants admitted on cross-examination that defendant Robert Woodley had "disked up" or cut up the drive which prevented Houghton from being able to use the drive.

As a result of defendants' actions, Houghton, along with Johnson and his wife, Jean, instituted this action for a declaratory judgment and injunctive relief. At the hearing, plaintiffs obtained a declaratory judgment in their favor and were awarded permanent injunctive relief. From the order awarding plaintiffs the relief they sought, defendants appeal.

Bain and Marshall, by Edgar R. Bain, for defendant appellants.

F. Jefferson Ward, Jr., for plaintiff appellees.

VAUGHN, Chief Judge.

The question on appeal is whether the trial court erred in entering a declaratory judgment in the plaintiffs' favor as to their right to use a twenty-foot strip of land as a drive and in permanently enjoining defendants from interfering with plaintiffs' use of such drive. We find no error and affirm.

In order to determine the respective rights of the parties and resolve this appeal, we must review the law concerning dedication of a street or highway. Dedication is defined as follows:

> [A] [d]edication is the intentional appropriation of land by the owner to some proper public use. More specifically, it has been defined as an appropriation of realty by the owner to the use of the public and the adoption thereof by the public,—having respect to the possession of the land and not the permanent estate.

Spaugh v. Charlotte, 239 N.C. 149, 159, 79 S.E. 2d 748, 756 (1954). It has been specifically held that a street or highway may be established by dedication. *Wright v. Lake Waccamaw*, 200 N.C. 616, 617, 158 S.E. 99, 100 (1931). The law governing the manner by which a dedication is accomplished is well settled:

> [A] dedication may be by express language, reservation, or by conduct showing an intention to dedicate; such conduct may operate as an express dedication, as where a plat is made showing streets, alleys, or parks, and the land is sold, either by express reference to such plat or by showing that the plat was used and referred to in the negotiations.

Green v. Barbee, 238 N.C. 77, 79, 76 S.E. 2d 307, 309 (1953). *See also Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837 (1958) (intention of owner to set aside land is the "foundation and very life of every dedication"). The evidence conclusively supports the intent of the plaintiff grantor, Bryant Johnson, to effectuate a dedication of the drive. Johnson testified at the hearing that it was his intention to dedicate the drive for the use of both Mrs. Houghton and the public. His participation in this suit as party plaintiff is additional evidence of his intent to dedicate, in that the goal of the action is to enable Mrs. Houghton to use the drive to get to her property.

Cases factually similar to ours, wherein a landowner has a plat made and recorded, and the land subdivided and sold, identify three categories of people affected by the dedication of a street or road: purchasers of lots within the subdivision, purchasers of lots outside the subdivision, and the general public. The purchaser of a lot within the subdivision clearly acquires rights to the dedicated road upon conveyance of the land. *See, e.g., Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967) (where owner causes map to be recorded and then sells lots, the deeds to which lots refer to the map, "there is . . . a conveyance to the purchaser of the lot of the right to use such streets and have them kept open for his [or her] use . . ."). by contrast, the general public acquires rights in a dedicated road only upon acceptance of the dedication. The reason that a dedication to the public is not complete until acceptance is that the landowner cannot, by the execution of a deed, "compel the authorities to assume the burden of repairing [the highway] unless the prop-

erly constituted agents of the city or town accept it." *Wright v. Lake Waccamaw, supra,* at 618, 158 S.E. at 100. *See also Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458 (1954) (specifically holding that acceptance by municipal authorities not necessary to achieve a dedication of a road as to purchasers of lots within platted subdivision). Purchasers of lots or parcels of land located outside the boundaries of a subdivision, i.e., outside the land as platted and recorded, acquire the rights of the general public, not the rights of a purchaser within the subdivision. *Owens v. Elliott,* 257 N.C. 250, 254, 125 S.E. 2d 589, 591-2 (1962).

We hold that as a purchaser of a lot within the subdivision, plaintiff Houghton acquired rights in the dedicated roadway when her lot was conveyed to her. It was represented to Houghton at the time of her purchase that she had a right-of-way as to the drive. Johnson, the grantor, specifically testified as to his intent to grant the roadway to Houghton and the public. A map of the Winstead Property was recorded on 21 July 1978, and a revised map was recorded on 22 September 1978. These maps reflect what had already been represented to Houghton. Houghton's lot, defendants' lots, and the dedicated roadway appear on both maps.

The revised map was of record when defendants received their deed and they therefore had direct knowledge of the existence of a dedicated road. Furthermore, the property description in defendants' deed makes it clear they have never acquired any legal rights in the land comprising the drive. The twenty-foot drive was validly dedicated to Houghton's use. Under the circumstances, as Houghton and defendants all had timely knowledge of Johnson's subdivision of the property and dedication of the road, the fact that Houghton's deed was recorded prior to the recordation of a map does not affect the result.

The case cited by defendants in support of their position, *Woody v. Clayton,* 1 N.C. App. 520, 162 S.E. 2d 132 (1968), is distinguishable. That case involved the proposed extension of a street. The plaintiff grantors included in the contract for purchase and sale to defendant grantees language concerning the proposed extension of the street. Plaintiffs had a survey and plat prepared showing the extended street, but this was never recorded and the street was never extended. When defendants subsequently acquired a deed to their property, they informed

plaintiffs that they, defendants, had an easement and could compel plaintiffs to extend the street as shown on the unrecorded map. This Court rejected defendants' argument: "Even though plaintiffs may have told defendants of their future plans at the time of entering into the contract for purchase, defendants cannot compel plaintiffs to go through with a plan that was later abandoned by plaintiffs as undesirable." *Id.* at 523, 162 S.E. 2d at 134. The issue now before this Court is entirely different. Plaintiff Houghton does not seek to compel a grantor to accomplish a promised dedication; Mrs. Houghton seeks only to enforce her right to use a roadway that plaintiff grantor has already dedicated to her use.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

JIMMIE FRANKLIN LEE v. CHARLES PAYTON AND JOE CULLIPHER CHRYSLER-PLYMOUTH, INC.

No. 833DC439

(Filed 3 April 1984)

1. **Unfair Competition § 1— misrepresentation that car was "demonstrator"—unfair trade practice**

An automobile dealer's misrepresentation that a car sold to plaintiff was a "demonstrator" when it was in fact a used car constituted an unfair trade practice within the purview of G.S. 75-1.1 which entitled plaintiff to treble damages.

2. **Evidence § 45— value of car as used car or demonstrator—testimony by plaintiff**

The trial court did not err in admitting plaintiff's own testimony as to the value of an automobile as a used car and as a demonstrator where plaintiff based his opinion on his own experience with buying cars and on advice he had received from another person.

APPEAL by defendants from *Ragan, Judge.* Judgment entered 24 November 1982 in District Court, PITT County. Heard in the Court of Appeals 8 March 1984.

On 1 February 1982 plaintiff bought a 1981 Plymouth Champ automobile from defendant Joe Cullipher Chrysler-Plymouth, Inc. Defendant Charles Payton was an authorized agent and salesman for the auto dealership and negotiated the sale of the car.

Plaintiff introduced evidence at trial showing that the car was represented by defendant Payton as being a "demonstrator" vehicle, capable of achieving gas mileage measured at 50 miles per gallon. This allegation was denied by defendants.

A few days after the sale, plaintiff discovered a slip of paper in the glove compartment of the car which indicated that there had been a previous owner of the vehicle. Plaintiff then called defendant Payton and complained about the car's gas mileage and about the fact that it was a used car rather than a demonstrator. Later that day, plaintiff met with defendants and tried to rescind the sale, but defendants refused.

On 25 March 1982, plaintiff filed this action seeking alternative theories of relief against defendants for rescission, fraud, and unfair or deceptive trade practice. On 1 June 1982, defendants' motion for summary judgment as to plaintiff's action for rescission was granted, but the court denied the motion as to plaintiff's second and third causes of action.

A jury trial was held on 18 October 1982, with the jury returning a verdict in favor of defendants as to the allegation of fraud, but finding that defendants did misrepresent the car as a "demonstrator," thereby proximately causing plaintiff damages in the amount of $1,150. Upon this verdict, the trial court concluded as a matter of law that the misrepresentation constituted a violation of G.S. 75-1.1 and awarded plaintiff treble damages. From these proceedings, defendants appeal.

Everett and Cheatham, by Ryal W. Tayloe, for defendant appellants.

Jeffrey L. Miller for plaintiff appellee.

ARNOLD, Judge.

[1] Defendants contend that the trial court erred in entering judgment against defendants in that the evidence did not support

the court's finding of a violation of G.S. 75-1.1. We disagree with this contention and find no error.

G.S. 75-1.1(a) provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Because of the broad language of this statute, what constitutes unfair or deceptive trade practices "is not limited to precise acts and practices which can readily be catalogued," but generally depends on the facts of each particular case. *Johnson v. Insurance Co.*, 300 N.C. 247, 262, 266 S.E. 2d 610, 621 (1980).

In order for an act or practice to be held to violate the statute, it must be either unfair or deceptive. *Id.* A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Spiegel, Inc. v. Federal Trade Commission*, 540 F. 2d 287, 293 (7th Cir. 1976). On the other hand, an act is deceptive if it has the capacity or tendency to deceive. In determining whether a representation is deceptive, its effect on the average consumer is considered, but proof of actual deception is not required. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

Applying these principles of law to the facts found by the jury, we find that the court properly found that the acts of defendants in misrepresenting the nature and quality of the automobile bought by plaintiff were unfair or deceptive to the average consumer and, therefore, violative of G.S. 75-1.1. All of the evidence introduced on the subject at trial established that a "demonstrator" is generally a more valuable automobile than is a used car of the same type. A demonstrator according to the evidence is used by the dealership, serviced frequently, kept in good condition, and, as a rule, is less susceptible to abuse. A representation that a car is a demonstrator when it is, in fact, a used car may be inherently unfair to the average consumer, and moreover, such a representation may tend to deceive the consumer. We find that the trial court did not err in finding that the misrepresentation by defendants constituted a violation of G.S. 75-1.1.

[2] Defendants next contend that the court erred in admitting plaintiff's own testimony as to the value of the 1981 Plymouth Champ automobile as a used car and as a demonstrator. They contend that this testimony was incompetent because no proper foundation was laid. We find, however, that the evidence was properly admitted.

The North Carolina Supreme Court has stated:

> Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not justify him as a witness were he not the owner. . . . The weight of his testimony is for the jury, and it is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure of his contention. *Highway Commission v. Helderman*, 285 N.C. 645, 652, 207 S.E. 2d 720, 725 (1974).

Furthermore, it is permissible for a plaintiff's bare statement concerning the value of an item to be used as the measure of damages as long as there is competent evidence to support the assertion by the plaintiff. *See Hubbard v. Casualty Co.*, 24 N.C. App. 493, 211 S.E. 2d 544 (1975).

In the case at hand, plaintiff testified that the automobile was worth the purchase price of $6,495 as a demonstrator, but as a used car it was worth only $5,200 to $5,500. He stated that he based his opinion on his own experience with buying cars and on advice he had received from another person. We find that the court properly allowed plaintiff to state his opinion as to value.

No error.

Judges WELLS and BRASWELL concur.

CAROLYN DENISE PIPPINS AND SHIRLEY PIPPINS v. WILLIAM CHARLES GARNER

No. 833SC421

(Filed 3 April 1984)

Automobiles and Other Vehicles § 89.2— failure to submit doctrine of last clear chance to jury—proper

The trial court properly failed to submit the doctrine of last clear chance to the jury in an action arising from an automobile accident where the collision occurred within the intersection of a three lane road, each party contended the traffic light gave the right-of-way to him or her, and the matter occurred within a very few seconds perhaps giving defendant the last *possible* chance to avoid the injury but not providing the means to have the last *clear* chance to avoid the injury.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Tillery, Judge.* Judgment entered 30 August 1982 in Superior Court of PITT County. Heard in the Court of Appeals 7 March 1984.

Plaintiffs instituted this negligence action against defendant seeking to recover damages. Shirley Pippins was the owner of a 1972 Chevrolet car. Carolyn Denise Pippins, the daughter of Shirley Pippins, was the lawful operator of the vehicle. As plaintiffs they alleged that on 3 April 1982 Carolyn Denise Pippins was traveling south on Dickinson Avenue in the City of Greenville behind a Volkswagen car; that as she proceeded through the intersection of Reade Street and Dickinson Avenue a car driven by defendant William Garner struck the left front door of the vehicle driven by plaintiff with the left front headlight of his vehicle. Plaintiffs alleged that defendant was negligent in failing to see that his movement could be made in safety before turning from a direct line of traffic, failing to keep a reasonable lookout, failing to yield the right of way, failing to keep his automobile under control so as to avoid an accident, and failing to stop for a red light.

Defendant's answer denied negligence. It pled contributory negligence, alleging that plaintiff failed to keep a proper lookout, failed to keep her vehicle under proper control, failed to stop in obedience to the traffic signal, failed to yield the right of way, and failed to abide by the speed limit or a reasonable safe speed.

Plaintiff replied that defendant had the last clear chance to avoid the collision.

The trial court declined to submit the issue of last clear chance. The jury returned a verdict finding defendant negligent and plaintiffs contributorily negligent. Plaintiffs appeal.

Jeffrey L. Miller for plaintiff appellant.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr. for defendant appellee.

HILL, Judge.

The sole issue is whether the trial court erred in refusing to submit the issue of last clear chance to the jury. We find that the court properly declined to submit the issue of last clear chance.

In order to submit the issue of last clear chance to the jury, the evidence must tend to establish the following:

> (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.

Wray v. Hughes, 44 N.C. App. 678, 681-82, 262 S.E. 2d 307, 309-10, *disc. rev. denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980). Last clear chance "contemplates that if liability is to be imposed the defendant must have a last 'clear' chance, not a last 'possible' chance to avoid injury." *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E. 2d 770, 772 (1971). *Accord Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E. 2d 387, 390 (1966). The burden is on the plaintiff to establish that the doctrine applies. *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E. 2d 591, 596 (1977).

In the case under review plaintiffs have failed to carry their burden of establishing the doctrine's applicability. The evidence

shows that the collision occurred within the intersection of a three lane road. Some question exists as to the right of way at the time of the collision, each party contending the traffic light gave such right to her or him. Carolyn Denise Pippins testified she first saw the defendant's car stopped across Dickinson Street a little way behind the pedestrian walkway. She noticed his left turn signal was activated. She was turning her vehicle toward the lane nearest the curb and did not know of defendant's attempt to turn left until defendant's car struck the car she was driving. The evidence further shows that plaintiff's car was moving 30 to 35 miles per hour or 44 to 51.33 feet per second. There is evidence that defendant's car was moving at a speed of 20 miles per hour or 27.33 feet per second. Such evidence indicates that the matter occurred within a very few seconds and is a case of negligence and contributory negligence rather than last clear chance. While the defendant may have had the last *possible* chance to avoid the injury, defendant had not the time nor the means to have the last *clear* chance to entitle the submission of the question to the jury.

Affirmed.

Chief Judge VAUGHN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Even though the time that defendant had within which to avoid the accident was very brief, indeed, and the distance between the two vehicles was rather short, the evidence nevertheless raised the issue of last clear chance, in my opinion, and the jury should have been so instructed.

The evidence as to virtually every circumstance leading to the accident was in conflict, and how these conflicts were resolved by the jury, we do not know. They could have found, however, as one evidentiary combination indicates, that instead of traveling 20 miles per hour, the defendant was just getting his car in motion, after stopping for the red light, when he could have seen that plaintiff, traveling 30 to 35 miles per hour, was not going to stop for the changing traffic light. Whether the defendant

could and should have stopped his car, rather than increase his speed and travel on, was a question that the jury should have decided, rather than the court. That a car just leaving a stationary position requires very little time and space within which to stop is certain, and in determining that under the circumstances described that defendant had no reasonable opportunity to stop his car and that the chance that defendant undoubtedly had to avoid the accident was only a "last possible chance," rather than a last clear chance, the majority decided a factual, rather than a legal, question in my judgment. While this is a weak last clear chance case, to be sure, based on circumstances drastically different from those involved in most of the reported cases that have dealt with this doctrine, it is still a case for the jury, in my view. Too, despite the refinements that judges have engrafted upon this simple, humane, common sense doctrine, it should be remembered that it is but an extension of the rule of proximate cause, which jurors, rather than judges, usually apply; and, if defendant could and should have avoided the accident in the brief time available after plaintiff's peril was or should have been noted, his failure to do so was the proximate cause of plaintiff's damage. If the jury had been so instructed, the verdict might have been different.

FEDERATED MUTUAL INSURANCE COMPANY v. JERRY HARDIN AND SAM EDWARDS

No. 8316SC394

(Filed 3 April 1984)

Negligence § 29.3— failure to show failure to get building permit proximate cause of fire

In an action in which plaintiff alleged the negligent construction of a room addition and fireplace, although the failure of plaintiff insureds to obtain a building permit constituted negligence *per se*, there was no evidence that this violation was a proximate cause of the fire damage to their house.

APPEAL by defendant from *Martin, Judge.* Judgment entered 7 September 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 6 March 1984.

Enoch and Christine Royal, plaintiff's insureds, decided in 1978 to enlarge their house by enclosing a carport. They contacted defendant Edwards, who agreed to do the carpentry work. After construction of the room addition was begun, the Royals contacted defendant Hardin and asked him to build a fireplace. No building permit was requested or issued. The room and fireplace, which contained a "More Heat" heating system, were completed during the summer of 1978.

In October of 1978 the Royals used the fireplace for the first time without incident. Between that time and January of 1979 they used the fireplace three or four times. On 9 January 1979, a fire started in the Royals' house which damaged the new addition and the rest of the house. Total damages to both real and personal property were claimed at $34,793.40.

Plaintiff paid the Royals pursuant to an insurance policy and then filed this action against defendants in which plaintiff alleged that defendants were negligent in the construction of the room addition and fireplace. At trial, the jury returned a verdict for plaintiff in the amount of $15,615.69. From these proceedings defendant Hardin appeals.

Rose, Rand, Ray, Winfrey and Gregory, by Joel S. Jenkins, Jr., for defendant appellant.

Russ, Worth, Cheatwood and McFadyen, by Donald J. McFadyen, for plaintiff appellee.

ARNOLD, Judge.

Defendant contends for the first time on appeal that the trial court erred in denying his motions for directed verdict made at the close of plaintiff's evidence and again at the close of all the evidence in that plaintiff's insureds' failure to obtain a building permit constituted negligence per se. We consider this contention since it was litigated by consent at trial as contemplated by Rule 15(b) of the North Carolina Rules of Civil Procedure. Rule 15(b) provides that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Turning to the merits of this case, the statute relied on by defendant which requires a permit for the type of construction at issue here is G.S. 153A-357, which states:

> No person may commence or proceed with:
>
> (1) The construction, reconstruction, alteration, repair, removal, or demolition of any building; (or)
>
> . . . .
>
> (4) The installation, extension, alteration, or general repair of any electrical wiring, devices, appliances, or equipment
>
> without first securing from the inspection department with jurisdiction over the site of the work each permit required by the State Building Code and any other State or local law or local ordinance or regulation applicable to the work.

A Robeson County ordinance, which adopts the State Building Code, also requires a permit to be obtained where construction involves the addition of a room to a house, and the installation of a fireplace containing a heating system.

It is well settled that a violation of the provisions of the North Carolina State Building Code is negligence per se. *Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E. 2d 870 (1982). However, to impose liability for such a violation it must be established that the violation was a proximate cause of the alleged injury. *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). Proximate cause has been defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the injury and *without which the injury would not have occurred*, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result was probable under the facts as they existed." *McNair v. Boyette*, 15 N.C. App. 69, 72, 189 S.E. 2d 590, 592, *aff'd*, 282 N.C. 230, 192 S.E. 2d 457 (1972). (Emphasis added.)

Although we agree with defendant's contention that the failure of the Royals to obtain a building permit constituted negligence per se, we find no evidence that this violation was a proximate cause of the fire damage to their house. Defendant argues that had a permit been issued the Robeson County build-

ing inspector would have been able to monitor the construction from beginning to end, thereby safeguarding the premises from the very sort of mishap that in fact occurred. There is nothing in the record, however, to indicate whether the work would have been monitored, how the work would have been monitored or, more important, whether the building inspector would have required modifications to the fireplace as built by defendant. In sum, there is nothing in this record to suggest that the failure to obtain a permit is a cause without which the damage would not have occurred. There being no showing of proximate causation, we find that the defendant's motions for directed verdict were properly denied.

Defendant next contends that the court erred in denying his request for jury instructions on the issue of contributory negligence. The aforementioned lack of evidence as to proximate cause, however, defeats this contention as well. We recognize that G.S. 1A-1, Rule 51 imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. *Warren v. Parks*, 31 N.C. App. 609, 230 S.E. 2d 684 (1976), *cert. denied*, 292 N.C. 269, 233 S.E. 2d 396 (1977). This principle, however, does not negate the import of proximate cause as an essential element of negligence.

No error.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM EUGENE BENFIELD

No. 8321SC805

(Filed 3 April 1984)

1. Criminal Law § 138— consolidating misdemeanor and felony charges—use of misdemeanor to increase sentence for felony

The trial court erred in consolidating misdemeanor and felony charges against defendant for judgment and then using the misdemeanor to increase the presumptive sentence of the felony.

2. Criminal Law § 138— sentence for felonious assault—excessive bodily injury as aggravating factor

In imposing a sentence upon defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as an aggravating factor that defendant inflicted serious bodily injury on the victim substantially in excess of the minimum amount to prove the offense since the same evidence necessary to prove the serious injury element of the offense was used to prove the factor in aggravation. G.S. 15A-1340.4(a)(1).

3. Criminal Law § 138— sentence for discharging firearm into occupied dwelling—creating risk to more than one person as aggravating factor

The trial court erred in finding as an aggravating factor for the offense of discharging a firearm into an occupied dwelling that defendant knowingly created a great risk of death to more than one person since the creation of great risk of death was considered by the legislature in establishing the presumptive sentence for such offense.

APPEAL by defendant from *Albright, Judge.* Judgment entered 1 April 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 February 1984.

Defendant was tried on bills of indictment charging him with assault with a deadly weapon with intent to kill resulting in serious bodily injury, first degree burglary, and discharging a firearm into occupied property. On the night of 3 November 1982, defendant saw his estranged wife's truck in the driveway of a resident on Old Hollow Road in Forsyth County. The couple had recently filed for divorce. Defendant stopped his vehicle and walked up to the house. Through a bedroom window he saw his estranged wife, Paulette, in bed with Denny Shaffer, whom defendant did not know.

Defendant testified at trial that he had initially intended only to take a snapshot of his wife's truck, but that after seeing her with another man he decided to knock on the front door. Defendant testified that he was shot through the door with a shotgun and that he then ran back to his vehicle and drove away.

Paulette Benfield and Denny Shaffer, however, gave a different version of the events at trial. They testified that, while they were in bed, Paulette heard a gun cock and fire and saw defendant at the window. Shaffer was shot in the back, but was able to push Paulette onto the floor. He then tried to grab defendant's arm, which was extended through the window. Shaffer testified that he ran to the front of the house where Jackie Setzer, a

friend who was visiting at the time, threw him his loaded .410 shotgun. As the front door was being kicked, Shaffer pointed the shotgun at the door and pulled the trigger. Defendant then fired two more shots, one of which struck Beverly Lineberry, Jackie Setzer's girl friend who was also present, behind the left ear.

Defendant was subsequently convicted on two counts of assault with a deadly weapon with intent to inflict serious injury, one count of felonious breaking or entering, one count of discharging a firearm into an occupied dwelling, and one count of assault with a deadly weapon. The trial court found twelve factors in aggravation and no mitigating factors and sentenced defendant to a total of 30 years in prison. From these proceedings defendant appeals.

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

Davis and Harwell, by Fred R. Harwell, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant's foremost contention is that the trial court erred in its finding of 12 factors in aggravation at the sentencing hearing. We agree and are compelled to remand this case to superior court for resentencing.

[1] One finding made by the court was that "a charge for which separate punishment would have been imposed has been consolidated for judgment in this case." This finding was based on the fact that the shots fired into the bedroom window of the Shaffer residence resulted in both a misdemeanor charge of assault with a deadly weapon, for the offense against defendant's wife, and a felony charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury, for the offense against Denny Shaffer. The trial court consolidated the felony and misdemeanor for purposes of sentencing. As a result of the court's finding in aggravation, defendant was sentenced to seven years in prison, in excess of the six-year presumptive term for a Class F felony.

The Supreme Court of North Carolina has ruled 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.

State v. Ahearn, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983). *See State v. Mitchell*, 62 N.C. App. 21, 302 S.E. 2d 265 (1983). We find that it was error to consolidate the misdemeanor and felony charges and then to use the misdemeanor to increase the presumptive sentence of the felony.

[2] Another finding in aggravation made by the trial court involved the charge of assault with a deadly weapon with intent to kill inflicting serious injury as committed against Beverly Lineberry. As an aggravating factor, the court found that "the defendant inflicted serious bodily injury on the victim substantially in excess of the minimum amount to prove the offense. . . ." For this offense defendant was sentenced to 15 years in prison, in excess of the six-year presumptive term. We find that the court improperly found this aggravating factor, since the same evidence necessary to prove the serious injury element of the offense was used to prove the factor in aggravation. G.S. 15A-1340.4(a)(1).

[3] Moreover, with regard to defendant's conviction for discharging a firearm into an occupied dwelling, the court found as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person." For this offense defendant was sentenced to four years in prison, in excess of the three-year presumptive term for a Class H felony. We find that this finding in aggravation was made in error because the creation of great risk of death was no doubt considered by the legislature in establishing the presumptive sentence for the offense of discharging a firearm into an occupied dwelling. *See State v. Huntley*, --- N.C. App. ---, 303 S.E. 2d 330 (1983).

The Supreme Court of North Carolina has held that "in 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 sentence hearing." *State v. Ahearn*, 307 N.C. at 602, 300 S.E. 2d at 701.

Although only one error in sentencing requires us to remand a case for a new sentencing hearing we have pointed out more than one improper finding in aggravation in the case before us merely to emphasize the increasing likelihood of error where additional non-statutory aggravating factors are unnecessarily found. As this Court stated recently:

> In light of the increasing number of cases that have been remanded because of erroneous findings of non-statutory factors in aggravation, this Court deems it appropriate to remind trial judges that only one factor in aggravation is necessary to support a sentence greater than the presumptive term. . . . [T]he trial judge may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing.

State v. Baucom (No. 8326SC618, filed 7 February 1984).

We have examined defendant's remaining assignments of error and find in them no merit. Because of the improper finding of non-statutory aggravating factors, however, we remand this case for resentencing.

Remanded for resentencing.

Judges WHICHARD and BECTON concur.

JAMES W. LATTA v. FARMERS COUNTY MUTUAL FIRE INSURANCE COMPANY

No. 8311DC446

(Filed 3 April 1984)

Insurance § 140.2— crop insurance—other insurance clause—summary judgment for defendant insurance company improper

In an action in which plaintiff sought to recover premiums paid to defendant in which plaintiff alleged that defendant had been unjustly enriched by retaining premiums paid to provide insurance for plaintiff's tobacco crop when no risk attached under the policy, the trial court erred in granting summary

judgment for defendant and should have granted summary judgment for plaintiff. Defendant's evidence did not contest plaintiff's assertions that risk never attached under defendant's policy because plaintiff already had Federal Crop Insurance and because plaintiff never notified defendant of his Federal Crop Insurance, and no material issue of fact remained for trial.

APPEAL by plaintiff from *Lyon, Judge.* Judgment entered 29 November 1982 in HARNETT County District Court. Heard in the Court of Appeals 8 March 1984.

Plaintiff seeks to recover premiums paid to defendant, alleging that defendant has been unjustly enriched by retaining $1,584.00 in premiums paid to provide insurance for plaintiff's 1979 tobacco crop when no risk attached under the policy. In his complaint and affidavits, plaintiff asserts that he applied and paid for a policy of hail insurance with defendant. The application contained a statement to the effect that plaintiff had no other insurance on the crops covered in the application and that the application contained the following provision:

> It is hereby agreed that if other insurance is written on the insured interest in the above described crops this Company will be notified in writing of the amounts of such other insurance, including Federal Crop Insurance Corporation Coverage.
>
> It is further agreed that unless or until so notified of such other insurance the coverage under this policy shall be suspended.

Plaintiff was unaware of the "other insurance" clause in his contract suspending coverage of insureds who have or obtain Federal Crop Insurance coverage until notice of such other coverage is given to the insurer. Plaintiff further asserts that defendant knew plaintiff had Federal Crop Insurance, but failed to notify plaintiff of the effect of the "other insurance" clause.

Defendant, in its answer and supporting affidavits, asserts that plaintiff entered into the insurance contract voluntarily and was free to reject its terms if he wished. Defendant never cancelled the contract and was at all times "ready, able and willing" to perform, provided plaintiff complied with the terms of the agreement.

From the trial court's ruling, granting defendant's and denying plaintiff's motion for summary judgment, plaintiff appeals.

Bain & Marshall, by Edgar R. Bain, for plaintiff.

Stewart and Hayes, P.A., by Gerald W. Hayes, Jr. and Joseph L. Tart, for defendant.

WELLS, Judge.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure, ". . . 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.' " *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982) (citations omitted). The burden is upon the moving party to demonstrate that either (1) an essential element of the opposing party's claim is nonexistent, or (2) the opposing party will be unable to produce sufficient evidence to support an essential element of its claim. *Id.* "If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." (Citations omitted.) *Id.*

We first consider the trial court's ruling granting summary judgment in favor of defendant. It is an established principle of insurance law that an insurer must return premiums where, without fault or fraud by the insured, no risk to the insurer ever attaches under the policy. In such a case, the premiums have been paid upon a consideration which has failed. 15 Appleman, *Ins. L. & P.* § 8358 (1944 & 1982 Supp.), 43 Am. Jur. 2d *Insurance* § 918 (1982 & 1983 Supp.). If risk attaches at any time but the policy is later cancelled or suspended, courts disagree whether a pro-rata refund of premiums is required. *Compare* 6 *Couch on Insurance* 2d, § 34:9 (1961 & 1983 Supp.), 43 Am. Jur. 2d *Insurance* §§ 386, 399 (1982 & 1983 Supp.).

In this case, plaintiff asserts that risk never attached under defendant's policy because plaintiff already had Federal Crop Insurance and because plaintiff never notified defendant of his Federal Crop Insurance. Defendant's burden in its motion for summary judgment was to demonstrate that no material issue of

fact remained concerning whether risk attached. This defendant failed to do. Defendant concedes in its brief that the effect of its "other insurance" clause is to suspend coverage until the insured notifies it of the existence of other insurance. *See also N.C. Grange Ins. Co. v. Johnson*, 51 N.C. App. 447, 276 S.E. 2d 469, *disc. rev. granted*, 303 N.C. 315, 281 S.E. 2d 652 (1981), *disc. rev. dismissed*, 304 N.C. 721, 285 S.E. 2d 812 (1982), holding that the presence of an "other insurance" clause renders that policy void ab initio where the insured has other insurance. Defendant has failed to produce a forecast of evidence tending to show that plaintiff did not possess Federal Crop Insurance when he applied for a policy with defendant, or that defendant was ever notified of plaintiff's Federal Crop Insurance, thereby enabling risk to attach under the contract. Defendant states only that the contract was never cancelled and that it was "ready, able and willing" to perform provided that plaintiff complied with the contract provisions. This argument is inapposite, since plaintiff seeks reimbursement on the grounds that risk never attached under the policy.

Defendant contends that plaintiff is trying unfairly to "have it both ways" by retaining the ability to choose either to (a) pay a premium, incur a loss, give notice of other insurance and collect under the policy or (b) pay a premium, incur no loss, give no notice and obtain a refund. This argument ignores the fact that under defendant's own interpretation of its "other insurance" clause defendant's liability does not attach until *after* it receives notice of an insured's other insurance. Because plaintiff failed to give defendant notice of his existing Federal Crop Insurance coverage, defendant was never at risk under its policy with plaintiff. For the reasons stated, we hold that the trial judge erred in granting summary judgment in favor of defendant.

We turn now to plaintiff's argument that the trial judge erred in denying plaintiff's motion for summary judgment. Once again, we agree with plaintiff. Plaintiff's forecast of evidence showed that risk never attached under the policy, and defendant failed to rebut this evidence. Therefore, no material issue of fact remained for trial. Because we hold that summary judgment should have been granted in favor of plaintiff, we need not reach plaintiff's other assignment of error.

The judgments of the trial court are reversed and this cause is remanded to the trial court with instructions for entry of summary judgment for plaintiff.

Reversed and remanded.

Judges ARNOLD and BRASWELL concur.

PATRICIA R. BERRIER v. DONALD H. BERRIER

No. 8322DC383

(Filed 3 April 1984)

Divorce and Alimony § 24.10— child support—agreement requiring payment until youngest child reaches age 18

A separation agreement and consent judgment obligating defendant to pay "for the support of the two minor children" the sum of $45.00 per week per child "until the younger child reaches the age of eighteen (18) years" requires defendant to pay support for the older child until the younger child reaches the age of 18 even though the older child has reached his eighteenth birthday.

APPEAL by defendant from *Fuller, Judge.* Order entered 13 January 1983 in District Court, DAVIDSON County. Heard in the Court of Appeals 6 March 1984.

This is a civil action wherein the plaintiff filed a motion in the cause seeking modification of a consent judgment in regard to child support and a court order requiring defendant to show cause why he should not be held in contempt for failure to comply with the provisions of the consent judgment. The matter came on for hearing in January 1983, and the court, after making findings of fact and conclusions of law, ordered defendant to pay child support in the amount of ninety dollars a week. From this order defendant appealed.

Smith, Michael & Penry, by Phyllis S. Penry, for plaintiff, appellee.

Stoner, Bowers and Gray, P.A., by Bob W. Bowers, for defendant, appellant.

HEDRICK, Judge.

The record discloses the following: plaintiff and defendant were married in 1963 and separated in November 1979. In April 1980, the couple entered into a written separation agreement which formed the basis of a consent judgment entered 18 April 1980. The separation agreement addressed, among other things, defendant's obligation to pay child support for the two children born of the marriage, David and Christopher. At the time of the agreement, David was fifteen and Christopher was ten years of age. The agreement contained the following language:

> 10. *Support of Children.* The Husband agrees to pay to the Wife the sum of One Hundred and no/100 ($100.00) Dollars per month for the support of the two minor children beginning on Friday, April 11, 1980, and on the 11th day of each month thereafter until the house is sold at which time the Husband agrees to pay Forty-five and no/100 ($45.00) Dollars per week per child beginning on the Friday immediately after the sale of the house and to continue on each Friday thereafter until the younger child reaches the age of eighteen (18) years, marries, or otherwise becomes emancipated.

The consent judgment contained the following order:

> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff and defendant fully perform and comply with all the terms and provisions of the Separation Agreement attached hereto as Exhibit A, including but not limited to the following:
>
> . . .
>
> (b) The defendant shall pay into the office of the Clerk of Superior Court for the use and benefit of his minor children the sum of $100.00 per month pending the sale of the homeplace and the sum of $45.00 per week per child beginning on the Friday immediately after the sale of the homeplace and to continue until such time as the youngest child reaches the age of eighteen (18) years, marries, or otherwise becomes emancipated.

On 28 September 1982 David, the older child, reached his eighteenth birthday. On 9 November 1982 plaintiff filed the motion which is the subject of this lawsuit. Defendant's reply and "counter-motion," filed 13 December 1982, asked the court to resolve "[a] dispute . . . between the parties as to the amount which defendant is obligated to pay plaintiff as child support." Following a hearing on the matter, the court made the following finding and conclusion:

> That the language of paragraph ten (10) of the Separation Agreement herein referred to and executed by the parties is plain and unambiguous and its effect is a question of law for the Court, and the Court further finds that the language in the Separation Agreement clearly states that the payments shall continue until the younger child reaches eighteen (18) years of age and that the Agreement does not contain any provisions to reduce the support payments when the oldest child reaches eighteen (18) years of age, and further that the language of the Separation Agreement as incorporated in the consent judgment constitutes an absolute obligation requiring the defendant to pay Forty-Five ($45.00) Dollars per week, per child, as support for the two children and such payments are to continue until the younger child reaches eighteen (18) years of age.

The sole question brought forward and argued on appeal is whether the court erred "in ruling as a matter of law" that, under the terms of the separation agreement and consent judgment, defendant is obligated to pay support for the older child until the younger child reaches the age of eighteen years. Defendant contends that the separation agreement and consent judgment "considered as a whole" establish that he "intended to legally obligate himself for the support of his children only during their minority." In support of this contention, defendant points out the frequent use of the term "minor children" in the provisions of the separation agreement regarding child support.

We agree with plaintiff-appellee that the case of *Rhoades v. Rhoades*, 44 N.C. App. 43, 260 S.E. 2d 151 (1979) contained facts similar to those of the instant case. In *Rhoades*, this Court was called upon to interpret a clause in a separation agreement providing child support "for the two minor children of the marriage

. . . to continue until the two minor children reach the age of eighteen (18) years." *Id.* at 43, 260 S.E. 2d at 152. In holding that the defendant was obliged to provide child support until his younger child reached eighteen, this Court characterized the language of the contested provision as plain and unambiguous and noted the well-established rule that "It is not the understanding, but the agreement, of the parties that controls, unless that understanding is in some way expressed in the agreement." *Id.* at 45, 260 S.E. 2d at 153 (quoting *Lumber Co. v. Lumber Co.*, 137 N.C. 431, 436, 49 S.E. 946, 948 (1905)).

In the instant case, the provision requiring defendant to pay $45.00 per week for each child "until the younger child reaches the age of eighteen" is clear and unambiguous. As in *Rhoades*, the agreement contains no provision for reduction of support payments when the older child becomes eighteen. We hold the trial court acted properly in entering an order consistent with the clear language of the separation agreement and consent judgment.

Affirmed.

Judges HILL and JOHNSON concur.

IN THE MATTER OF SONYA RENEE GREEN DOB 9-23-67

No. 8221DC1287

(Filed 3 April 1984)

Parent and Child §§ 2.2, 2.3— petition alleging abused and neglected child—failure to sign petition—inoperative to invoke jurisdiction of court

The failure of the petitioner to sign and verify a petition, alleging that a minor child was an abused child as defined by G.S. 7A-517(1) and a neglected child as defined by G.S. 7A-517(21), before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter.

APPEAL by movants Mildred Joe and Malachi Joe from an order of *Alexander, Judge.* Order entered 7 July 1982 in District

Court, FORSYTH County. Heard in the Court of Appeals 26 October 1983.

This proceeding was commenced with the filing of a petition by Charles Martin, a Protective Service Worker with the Forsyth County Department of Social Services. It was alleged in the petition that Sonya Renee Green was an abused child as defined by G.S. 7A-517(1) and a neglected child as defined by G.S. 7A-517(21). The petition set forth facts in support of each allegation; however, the petition was neither signed nor verified.

At the time of the filing of the petition, the minor child was living with the movants. Mildred Joe is the biological mother of the minor child and Malachi Joe is her stepfather.

At the call of the case for hearing and prior to the introduction of any evidence, the Joes moved to have the petition dismissed on the grounds the petition, issued pursuant to G.S. 7A-544 and G.S. 7A-561(b), was not signed as required by those statutory provisions. The motion was denied.

Following a hearing on the petition pursuant to G.S. 7A-516, *et seq.*, the court made findings of fact and concluded as a matter of law that Sonya Renee Green is an abused juvenile as defined by G.S. 7A-517(1)(c) and a neglected juvenile as defined by G.S. 7A-517(21). The court then entered an order which directed that:

1. Legal custody of Sonya Renee Green is hereby placed with the Forsyth County Department of Social Services.

2. Physical custody of Sonya Renee Green is hereby placed with her mother, Mildred Joe, who is responsible for protecting the minor from any further acts of abuse or neglect.

3. The Forsyth County Department of Social Services is to make regular home visits to insure the safety and wellbeing of the minor child.

4. Malachi Joe and Mildred Joe are to actively participate in family counseling with Sonya Renee Green and they are to fully cooperate with the Forsyth County Department of Social Services and any other agency employed to help Sonya Renee Green.

From the order and rulings of the court, Mildred and Malachi Joe appealed.

Kennedy, Kennedy, Kennedy and Kennedy, by Annie Brown Kennedy, Willie M. Kennedy and Harvey L. Kennedy, for appellants.

Bruce E. Colvin, for petitioner appellee.

JOHNSON, Judge.

By their first assignment of error, appellants contend the trial court erred in the denial of their motion to dismiss on the ground that the petition was not signed. Appellants also contend that the trial court was without jurisdiction in that the petition was neither signed nor verified.

The appellee admits that the petition is neither signed nor verified, but insists that appellants suffered no harm by lack of the petitioner's signature on the petition and that the lack of a verification is immaterial. Further, that the issue of verification was waived by appellants by their failure to raise it before the trial judge. We disagree.

In the absence of a statutory requirement or rule of court to the contrary, it is ordinarily not necessary to the validity of a petition that it be signed or verified. *See State v. Higgins*, 266 N.C. 589, 146 S.E. 2d 681 (1966) (affidavit referred to in warrant charging defendant upon information and belief with assault is not defective because affiant did not subscribe the affidavit); *Alford v. McCormac*, 90 N.C. 151 (1884) (affidavit is valid despite lack of affiant's subscription if the oath was administered by one authorized to administer oaths).

On the other hand, where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes. *See Alford v. McCormac, supra.* Without compliance, the petition is rendered incomplete and nonoperative. *See In re Colson*, 14 N.C. App. 643, 188 S.E. 2d 682 (1972) (juvenile delinquency petition must be signed and verified as "required by law").

The petition in this case was instituted under Juvenile Code provisions which state in clear and concise terms that the petition

shall be signed and verified before an official authorized to administer oaths. G.S. 7A-544 provides in pertinent part that when a report of abuse or neglect is received, the Director of the Department of Social Services *shall* sign a complaint seeking to invoke the jurisdiction of the court. G.S. 7A-561(b) also provides in pertinent part that the complaint should be filed as a petition and the petition *shall be* verified before an official authorized to administer oaths.

The Juvenile Code requisites that the petition be signed and verified are therefore essential to both the validity of the petition and to establishing the jurisdiction of the court. The primary purpose to be served by signature and verification on the part of the petitioner is to obtain the written and sworn statement of the facts alleged in such official and authoritative form as that it may be used for any lawful purpose, either in or out of a court of law. *See Alford v. McCormac, supra* at 153. Under the Juvenile Code, these requirements also serve to invoke the jurisdiction of the court.

In the case *sub judice*, the failure of the petitioner to sign and verify the petition before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter. It is elementary that the jurisdiction of the court over the subject matter of the action is the most critical aspect of the court's authority to act. *See* Shuford, N.C. Civ. Prac. & Proc. (2nd Ed.), § 12-6. Without it the court lacks any power to proceed; therefore, a defense based upon this lack cannot be waived and may be asserted at any time. *Id.* Accordingly, the appellants may raise the issue of jurisdiction over the matter for the first time on appeal although they initially failed to raise the issue before the trial court. *See Real Estate Trust v. Debnam*, 299 N.C. 510, 263 S.E. 2d 595 (1980); *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E. 2d 567 (1978) (an appellate court may raise the question on its own motion).

We conclude that the trial court lacked jurisdiction over the subject matter because the petition was not duly signed and verified as required by law. G.S. 7A-544; G.S. 7A-561(b). Therefore, the order of the trial court must be vacated and the case dismissed.

We deem it unnecessary to discuss appellants' other assignments of error in view of our decision on the question of jurisdiction.[1]

Vacate and dismiss.

Chief Judge VAUGHN and Judge WELLS concur.

RICHARD ELDON KRAEMER v. ROBIN R. MOORE, D/B/A MOORE MOTOR COMPANY

No. 833SC435

(Filed 3 April 1984)

Insurance § 79— use of dealer tag by salesman—dealer not insurer of salesman

Defendant automobile dealer did not become an insurer of a salesman to whom he loaned a dealer tag so as to be liable for injuries to plaintiff where the dealer permitted the salesman to use the dealer tag to bring unsold vehicles from the salesman's closing dealership to defendant's car lot to be sold; the salesman placed the dealer tag on his personally-owned truck; plaintiff was injured when a ladder fell from the truck; the salesman did not get permission from defendant to use the tag on his truck; there was no showing that defendant caused or permitted the salesman to use the dealer tag in violation of G.S. 20-79(d); and there was no evidence that use of the dealer tag was a proximate cause of plaintiff's injuries.

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1. Although we vacate and dismiss the order entered on other grounds, one particularly troubling feature of the order warrants mention. Eleven out of the twelve "Findings of Fact" begin by stating that the witness "testified under oath . . .", and continue to merely restate the content of that testimony. Such verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented. Where, as here, the trial judge sits without a jury, the judge is required to find the facts specially and state separately his conclusions of law thereon and direct entry of the appropriate judgment. G.S. 1A-1, Rule 52(a). "The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The purported "findings" in the order under discussion do not even come close to resolving the disputed factual contentions of the parties, and, under ordinary circumstances would require this Court to remand the matter to the District Court for the entry of appropriately considered and detailed factual findings.

Kraemer v. Moore

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 14 December 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 March 1984.

Barker, Kafer & Mills by James C. Mills for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Paul L. Cranfill; and James, Hite, Cavendish & Blount by M. E. Cavendish for defendant appellee.

BRASWELL, Judge.

The present appeal raises the novel question of whether a licensed automobile dealer becomes the insurer of an individual to whom he loans a dealer tag. The trial court, by granting the defendant's motion for a directed verdict, ruled that use of the dealer tag did not make the defendant an automobile liability insurance carrier. We must agree.

On Sunday, 6 May 1979, the plaintiff was walking across the Pamlico River Bridge near Washington, North Carolina, on Highway 17 in a southerly direction. Charles Toler, in a 1965 Chevrolet pickup truck, drove across the bridge in a northerly direction. A ladder which Toler had attached to the truck with an elastic cord became unfastened, flew off the truck and struck the plaintiff in the head.

Toler, who worked for the defendant, had obtained the ladder from the defendant's business in order to do some work around his house, but testified at trial that the defendant did not know that he was using the ladder nor did he instruct him on how to load the ladder on the truck.

The title to the pickup truck was in Toler's wife's name, and on the day of the accident he was using a dealer tag on the truck which the defendant had given him. The truck, as Toler's personal vehicle, was not covered under any automobile liability insurance and Toler had not yet purchased 1979 registration plates for the truck.

At trial, Toler testified that he had previously been a car dealer before he had gone to work for the defendant. When Toler closed his dealership, the defendant allowed Toler to bring any

unsold vehicles to his dealership where they were later sold. Toler stated that the defendant had given him several dealer tags to use "on my vehicles when I came to work for him . . . and I used them on one pickup truck." He further testified that the defendant had stated that "his liability insurance would cover the transporting of the vehicle," meaning each vehicle Toler had left to sell from his own automobile business. Toler related that although he had a dealer tag on the truck the whole time that he owned it, he did not know whether the defendant knew that he had a dealer tag on the truck or not.

The plaintiff in the present case has previously been awarded a $45,000.00 judgment against Toler for the injuries he sustained due to Toler's negligence on the Pamlico River Bridge. As of the time the plaintiff brought this action against the defendant, this judgment against Toler remained unsatisfied.

The ultimate issue to be determined in this case is whether the defendant's motion for a directed verdict was properly granted. The scope of our review, derived from G.S. 1A-1, Rule 50(a), is "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). In the present case, the motion was properly granted if the defendant failed to produce some evidence to support a *prima facie* case in all its constituent elements of the defendant's liability for the plaintiff's injuries. *Jones v. Allred*, 64 N.C. App. 462, 307 S.E. 2d 578 (1983).

The novelty in this case stems from the fact that the plaintiff's suit is not based on an agency theory, but on the premise that the defendant by lending Toler a dealer tag has become an insurance carrier. We realize that under the particular facts of this case an attempt to establish liability on agency principles would have been futile. Toler testified at trial that (1) the truck was his personal vehicle, (2) he picked up the ladder to do some work for his "own personal benefit," (3) the defendant did not help him load the ladder or select the binding, and (4) the defendant did not know that Toler was operating the truck that Sunday nor had knowledge that Toler had a dealer tag on his truck. Therefore, even though Toler was the defendant's employee, the defendant would not be liable for Toler's tort under any theory of

respondeat superior because Toler was acting on an errand of his own and not on behalf of the defendant as his employer. *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804 (1967).

The plaintiff, rather than assert a futile agency argument, contends that the defendant is liable under an insurance theory. He argues that the defendant by stating his insurance would cover some of Toler's activities has assumed the role of Toler's insurer. G.S. 58-3 defines an insurance contract as "an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to be insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest." An insurance contract, like other contracts, is based upon an offer and acceptance supported by sufficient consideration. *Belk's Department Store v. Insurance Co.*, 208 N.C. 267, 180 S.E. 63 (1935). From Toler's testimony, there is no evidence that the defendant, based on valuable consideration, agreed to insure Toler. His testimony instead indicates that as a salesman for the defendant he was given dealer tags so he could demonstrate and allow customers to drive the cars for sale, that the defendant let Toler use the tags to bring the unsold vehicles from his closing dealership to the defendant's car lot to be sold, and that Toler did not get permission from the defendant to use a dealer tag on his personally-owned truck. Because there is no evidence of a bargained-for exchange wherein both parties intended that the defendant would insure the use of Toler's personal vehicle, we hold that the defendant cannot be held liable as Toler's insurance carrier.

In the past, under what is termed the "Massachusetts doctrine," automobile dealers who unlawfully loaned a dealer tag to another for use on an unregistered automobile was deemed an aider and abetter in the creation of a highway nuisance and held liable for any injuries sustained in a collision with the vehicle. 14 Blashfield Automobile Law and Practice § 469.8 (3d ed. 1969). Today, the "Massachusetts doctrine" does not prevail as the general rule. *Id.* at §§ 469.2, 469.8 (Supp. 1983). *See generally, Comeau v. Harrington*, 333 Mass. 768, 130 N.E. 2d 554 (1955). Many jurisdictions, including North Carolina and now Massachusetts, have safety statutes which make it unlawful for a dealer to permit any person or employee to operate a vehicle for personal use with a "dealer" plate attached. *See* G.S. 20-79(d); *Blashfield, supra*, at

§ 469.2 (Supp. 1983). Nevertheless, because of the lack of causal connection between the statutory violation of lending the plates and the accident, dealers are not liable for the plaintiff's injuries. *Blashfield, supra,* at § 469.8 (3d ed. 1969). Even though the violation of this motor vehicle traffic regulation may constitute negligence *per se* under G.S. 20-176(a), the violation is not actionable unless it is the proximate cause of the injury. *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966). The plaintiff's evidence through Toler's testimony fails to show that the defendant caused or permitted Toler to unlawfully use the dealer tag in violation of G.S. 20-79(d). His evidence also fails to show that the use of the dealer tag was a proximate cause of his injuries. Because the plaintiff has made no *prima facie* showing on which to base the defendant's liability, we hold the defendant's motion for a directed verdict was properly granted.

Affirmed.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF THE TAXES OF BOB DANCE CHEVROLET, 1978 SOUTH NEW HOPE ROAD, GASTONIA, NORTH CAROLINA

No. 8327SC390

(Filed 3 April 1984)

Setoffs § 1; Taxation § 33— priority of bank's right of setoff over tax liens by city and county

Under G.S. 105-368(b), a bank had ten days after service of attachment notices from the city and county on one of its accounts to respond and assert its claim of setoff, and once the bank complied with the statute, its right became superior to the claims of the tax collectors.

APPEAL by Gaston County and Branch Banking and Trust Company from *Saunders, Judge.* Judgment entered 15 November 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 6 March 1984.

On 3 September 1981, Bob Dance Chevrolet executed a promissory note and security agreement to Branch Banking and Trust

Company (BB&T) in the amount of $138,747.21. Dance Chevrolet closed its doors and ceased doing business on 19 March 1982.

On 22 March 1982, the Gaston County tax collector served on BB&T an "order and levy" seeking to attach the bank account of Bob Dance Chevrolet at BB&T in the amount of $11,050 for the purpose of collecting taxes due for the year 1982.

On 24 March 1982, the City of Gastonia tax collector likewise served on BB&T a "Notice of Attachment and Garnishment" seeking to attach the same account in the amount of $7,488.60 in order to collect 1982 taxes due the city. On that date, the checking account of Bob Dance Chevrolet at BB&T contained funds in the amount of $17,271.85.

On 26 March 1982, BB&T replied to Gaston County and the City of Gastonia, claiming a right of setoff against the account sought to be attached. The basis for the assertion of setoff was the debt of Bob Dance Chevrolet as evidenced by the note and security agreement of 3 September 1981. This matter came to trial without a jury on 4 October 1982, and judgment was entered in favor of the City of Gastonia in the amount of $7,488.60. From these proceedings BB&T and Gaston County appeal.

Mullen, Holland & Cooper, by Eugene A. Reese, Jr., for appellant Branch Banking and Trust Company.

Stott, Hollowell, Palmer and Windham, by Jeffrey M. Trepel, for appellant Gaston County.

Whitesides, Robinson and Blue, by Arthur C. Blue, III, for appellee City of Gastonia.

ARNOLD, Judge.

Branch Banking and Trust Company contends that the trial court erred in failing to find that it had a right of setoff in the account of Bob Dance Chevrolet which had priority over the "order and levy" by the Gaston County tax collector and the "notice of attachment and garnishment" by the City of Gastonia tax collector. We agree and order this case reversed.

The right of setoff has been defined as the right of a bank "to apply the debt due by it for deposits to any indebtedness by the

depositor, in the same right, to the bank, provided such indebtedness to the bank has matured." *Hodgin v. Bank*, 124 N.C. 540, 541, 32 S.E. 887 (1889). In the case at bar, BB&T elected to setoff any obligation it had as garnishee to the city and county tax collectors by the debt of Dance Chevrolet on the 1981 note and security agreement which, under the terms of the agreement, matured when Dance Chevrolet ceased doing business on 19 March 1982. The crux of this matter, then, is whether the tax lien took priority over the bank's right of setoff.

Under G.S. 105-355(b) taxes on personal property "shall be a lien on personal property from and after levy or attachment and garnishment of the personal property levied upon or attached." The Gaston County and Gastonia tax liens attached upon the service of notice and attachment on March 22 and 24 respectively.

The lien created by the attachment of the Dance Chevrolet account with BB&T is further governed by the priority rule of G.S. 105-356(b)(2) which states:

> The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon property other than that to which the lien attaches, *be inferior to prior valid liens and perfected security interests* and superior to all subsequent liens and security interests. (Emphasis added.)

The tax collectors urge a finding that BB&T must have actually exercised its right to setoff in order to have established its priority by virtue of a "valid lien" as contemplated by the statute. Although this may be the rule in some jurisdictions, we are compelled to follow the North Carolina law which exists on the subject of setoff and find that BB&T complied with all applicable statutory requirements. G.S. 105-368(d) states:

> If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered or certified mail. . . .

In the case at bar, BB&T received notice of attachment on March 22 and 24. The bank then promptly asserted its right of setoff by mail on March 26, clearly within the prescribed 10-day

period. Although we do not disagree with the trial court's finding that "[a]s of the 24th day of March, 1982 the Bank has taken no affirmative step to set off the bank accounts of Bob Dance Chevrolet against any outstanding indebtedness," we are unable to see how that finding controls the disposition of this case. Under G.S. 105-368(b), BB&T clearly had 10 days after service of the attachment notice on March 22 and 24 to respond and assert its claim of setoff. Once the bank complied with the statute, its right became superior to the claims of the tax collectors. To require the bank to establish priority by "exercising" the right to setoff *before* receiving notice of attachment would necessitate the senseless practice of requiring a garnishee bank to anticipate which accounts might potentially be attached in order to avoid losing its right to the property upon receipt of notice of attachment.

We find that the trial court erred in failing to find that BB&T had a setoff in the account of Bob Dance Chevrolet giving the bank superior rights to those claimed by the Gaston County and City of Gastonia tax collectors. This decision makes it unnecessary for this Court to consider the validity of the county's lien on the account. The order of the trial court is

Reversed.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. CARLTON KENT BOWEN

No. 8321SC249

(Filed 3 April 1984)

Automobiles and Other Vehicles § 122— driving under the influence—public vehicular area—jury question

In a prosecution for driving under the influence, the trial court erred in ruling as a matter of law that the driveway of a condominium complex was a "public vehicular area" within the meaning of G.S. 20-4.01(32) where there was evidence tending to show that there was a "condominiums for sale" sign at the entrance to the complex apparently inviting in the public, there was no obstruction to public access, and officers were unaware they were in a condominium complex at the time of defendant's arrest, and where there was also evidence tending to show that there was a "no trespassing" sign at the en-

trance to the complex, members of the public were not authorized to enter except by permission or invitation, all parking spaces belonged to the owners of the condominiums, and the common roads had not been dedicated for public use. However, such evidence presented a jury question as to whether the driveway constituted a public vehicular area.

Chief Judge VAUGHN dissents.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 13 October 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 November 1983.

Defendant was charged with operating a motor vehicle while under the influence of alcohol.

The State's evidence tended to show that police responded to a call that a truck was blocking a driveway. They found defendant, apparently asleep, at the wheel of his truck, which was sitting with the engine running in the only driveway into a condominium complex. The front of the truck pointed out toward the public highway. The investigating officer noticed a stong smell of alcohol and a bottle of tequila with a broken seal on the front seat. He woke defendant and talked to him; then defendant backed the truck back into the parking lot.

The officer followed and issued defendant a citation for carrying the opened bottle. After some discussion, the officer started to leave; defendant fell and began yelling that he had been run over. The officer stopped and investigated and found defendant unharmed. He then arrested defendant for driving under the influence. A breathalyzer test administered approximately one hour later showed a blood alcohol content of .19%.

The State also presented evidence that there was a "Condominiums For Sale" sign at the entrance to the complex, but that the officers were unaware that they were in a condominium complex at the time of the arrest.

Defendant's evidence did not materially contradict the State's regarding the events that transpired. However, defendant did show that he never left the complex and never got out on the highway. Defendant's evidence also showed that there was a "No Trespassing" sign at the entrance, and that members of the public were not authorized to enter except by permission or invitation. All parking spaces belonged to the owners, who also held an

undivided interest in common areas. Furthermore, the common roads had not been dedicated for public use.

Defendant requested intructions to assist the jury in determining whether the driveway was a "public vehicular area." The court refused them, and instead instructed the jury that the driveway was such an area as a matter of law. The jury found defendant guilty of operating a vehicle with a blood alcohol content of .10% or more.

Attorney General Edmisten, by Associate Attorney General William H. Borden, for the State.

Alexander and Hinshaw, by Robert D. Hinshaw, for the defendant appellant.

JOHNSON, Judge.

Defendant's principal contention is that the court erred in deciding as a matter of law that the condominium driveway was a "public vehicular area," thus taking the issue from the jury. The definition of "public vehicular area" applicable to this case is found in G.S. 20-4.01(32) (Cum. Supp. 1981):

> Public Vehicular Area.—Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public . . .*

The trial court had sharply conflicting evidence before it. The evidence that this was a public vehicular area indicated that there was a "For Sale" sign apparently inviting in the public, and

* In the Safe Roads Act of 1983 the General Assembly has since significantly expanded this definition. *See* 1983 N.C. Session Laws, c. 435, s. 8 (listing areas by way of illustration rather than limitation and including nondedicated subdivision roads). The new definition became effective 1 October 1983. 1983 N.C. Session Laws, c. 435, s. 46.

that there appeared to be no obstruction to public access; the officers were unaware that it was a condominium complex. Evidence to the contrary indicated that "No Trespassing" signs were posted, that there was no parking set aside for the public, and that the driveway had not been dedicated for public use. We conclude that the evidence did not suffice to support the trial court's conclusion *as a matter of law* that the driveway was a "public vehicular area" within the meaning of the statute. In so holding we follow precisely our decision in *State v. Lesley*, 29 N.C. App. 169, 223 S.E. 2d 532 (1976).

Thus, the court erroneously removed from the jury's consideration one of the essential elements of the *offense*, *see State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972), and the only truly disputed issue. Such peremptory instructions are permissible only in rare instances in this State, where uncontradicted evidence establishes the element(s) beyond a reasonable doubt. *See State v. Allred*, 21 N.C. App. 229, 204 S.E. 2d 214, *cert. denied and appeal dismissed*, 285 N.C. 591, 205 S.E. 2d 724 (1974), *cert. denied*, 419 U.S. 1127, 42 L.Ed. 2d 828, 95 S.Ct. 814 (1975). Such was certainly not the case here; therefore, prejudicial error occurred.

Our resolution of the remaining assignment of error determines our disposition of the case. Defendant contends that the evidence was insufficient to convict, and that we should as a matter of law declare the driveway outside the statutory definition and thus dismiss the charge. In reviewing the sufficiency of the evidence, we must take all the evidence in the light most favorable to the State, and give the State the benefit of every reasonable inference therefrom; we may not consider defendant's evidence unless it is favorable to the State or does not conflict with the State's evidence. *State v. Dancy*, 43 N.C. App. 208, 258 S.E. 2d 494, *disc. review denied*, 298 N.C. 807, 262 S.E. 2d 2 (1979). Here, there was evidence that the driveway was open to the public highway and appeared to serve a normal apartment complex. In addition, the jury could infer from the "For Sale" sign that the public was permitted on the premises to view the condominiums, and the parking spaces available were provided at least in part for such customers by the owners. Taking this evidence in the light most favorable to the State, we conclude that it was sufficient to take the case to the jury under proper instructions.

Defendant argues that the statute must nonetheless be strictly construed in his favor and the charge be dismissed. In considering a criminal statute, however, we must also construe it with regard to the evil which it is intended to suppress. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). We believe a reasonable construction of the statute in question, in light of the legislative intent to protect life and property from drivers under the influence, may include the situation before us. Therefore, defendant is not entitled to dismissal of the charge.

We conclude that although there was prejudicial error at the first trial, sufficient evidence came before the jury to support its verdict. Therefore, a new trial before a new jury is proper.

New trial.

Judge WELLS concurs.

Chief Judge VAUGHN dissents.

IN THE MATTER OF THE ADOPTION OF ANTIONETTE DIANE CLARK BY NEIL SIDNEY CLARK AND MARIE ANN PARSON CLARK v. LYNN LUSK JONES

No. 8328SC427

(Filed 3 April 1984)

Parent and Child § 1.6— proceeding to terminate parental rights—insufficient evidence of abandonment

In a proceeding to adopt a child, the trial court erred in finding that respondent "willfully abandoned" her child pursuant to G.S. 48-2(1)a where the court made no findings in support of its conclusion that respondent's failure to communicate with her child was willful, and where the record revealed that respondent introduced substantial evidence that her actions in not communicating with her daughter were coerced and not willful.

APPEAL by respondent from *Allen (C. Walter), Judge.* Order entered 17 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 March 1984.

This is an appeal by respondent from an order declaring her not to be a necessary party to proceedings instituted by petitioners Neil and Marie Clark to adopt Antionette Clark. The record discloses the following:

Respondent and Neil Clark are Antionette's biological parents. Following his divorce in 1977 from Ms. Jones, the respondent, Mr. Clark, obtained custody of Antionette, the only child of the marriage, now eleven years old. He later married petitioner Marie Clark. On 13 September 1982 petitioners instituted a special proceeding before the Clerk of Superior Court of Buncombe County, in which they sought to adopt Antionette. The following day Mr. and Mrs. Clark filed a petition in Superior Court, pursuant to N.C. Gen. Stat. Sec. 48-5, in which they sought an order declaring that respondent is not a necessary party to the adoption proceeding. Following an evidentiary hearing, the court made findings of fact that, except where quoted, are summarized as follows:

Following her divorce from Neil Clark in 1977, Ms. Jones frequently visited her child, with the exception of a lengthy period in 1978 during which respondent did not communicate with Antionette. In November 1979, Ms. Jones called petitioners and informed them that she was in Atlanta, Georgia. In January 1980, respondent again telephoned petitioners and spoke with her child. On 24 August 1982 respondent called petitioners and informed them of her plans to return to the area. With the exceptions of these telephone calls, respondent "made no other efforts to communicate with said child, nor visit with said child, nor in any manner attempted to communicate or visit." During the period of November 1979 to August 1982 petitioners had no knowledge of Ms. Jones' whereabouts. Petitioners' address did not change during this period, and their unlisted phone number was furnished to respondent's mother, with whom respondent had been in contact.

Based on these findings of fact the court concluded that respondent "has willfully abandoned the child," and entered an order declaring respondent "not a necessary party to this adoption proceeding." Respondent appealed.

Riddle, Shackelford & Hyler, P.A., by John E. Shackelford, for petitioners, appellees.

Anderson & McDowall, P.A., by William D. McDowall, Jr., for respondent, appellant.

HEDRICK, Judge.

Respondent assigns error to the court's conclusion of law that she "willfully abandoned" her child.

N.C. Gen. Stat. Sec. 48-2(1)a in pertinent part provides: "For the purpose of this Chapter, an 'abandoned child' shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child." "A child has been 'willfully abandoned' within the meaning of the statute when the conduct of the abandoning parent over the six months period reveals a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child." *In re Stroud*, 38 N.C. App. 373, 374, 247 S.E. 2d 792, 793 (1978) (citing *Pratt v. Bishop*, 257 N.C. 486, 503, 126 S.E. 2d 597, 609 (1962)). "The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*." *In re Maynor*, 38 N.C. App. 724, 726, 248 S.E. 2d 875, 877 (1978) (emphasis original).

Our examination of the findings of fact made by the trial judge in the instant case reveals that the court made no findings in support of its conclusion that Ms. Jones' failure to communicate with Antionette was willful, as that term has been defined by our courts. While the court found as a fact that respondent made no attempt to communicate with her child during the critical six month period, this finding alone is insufficient support for the conclusion that her actions reflect "a settled purpose and willful intent . . . to relinquish all parental claims to the child." Because the court's findings of fact do not support its conclusion of law, the order declaring Ms. Jones to be not a necessary party to the adoption proceedings instituted by petitioners must be vacated.

Our conclusion in this matter is buttressed by an examination of the record, which reveals that Ms. Jones introduced substantial evidence that her actions in not communicating with her daughter

were coerced and not willful. Ms. Jones testified that she was married to a man who beat her and who threatened her child and other members of her family. She further testified that her repeated efforts to separate from her husband were unsuccessful, and that she was able to return safely to the area only after her husband was taken into custody by federal authorities in August 1982. Her testimony was corroborated by other witnesses. The court made no finding of fact regarding this largely uncontradicted evidence which was critical to the issue whether Ms. Jones *willfully* abandoned Antionette. Nor did the trial judge make any finding regarding the evidence that the respondent and Mr. Clark were negotiating an arrangement for the respondent to resume visitation at the time the petition was filed.

Our disposition of this case makes it unnecessary for us to discuss respondent's remaining assignments of error.

The order of the Superior Court entered on 17 January 1983 is

Vacated.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. JAMES LEE WILLIAMS

No. 8326SC839

(Filed 3 April 1984)

1. Searches and Seizures § 13— time limit of consent to search

The temporal scope of a consent to search is a question of fact to be determined in light of all the circumstances.

2. Searches and Seizures § 13— delay in conducting search by consent

Where there is a delay in conducting a search by consent, seized evidence should be excluded only if the delay resulted in legal prejudice to the complaining party.

3. Searches and Seizures § 13— search not exceeding duration of consent

A search twenty-three hours after defendant executed a consent to search did not exceed the duration of the consent where the written consent contained no limitations on the time for search; there was no evidence that de-

fendant attempted to withdraw his consent prior to the search or that he attempted to limit its duration; during much of the time lapse, the officers who conducted the search were engaged in other investigation regarding the crime; and there was no evidence indicating that the result of the search would have differed if it had been conducted at an earlier time.

4. Searches and Seizures § 13— search not exceeding physical scope of consent

Where defendant executed a consent to search authorizing search of his vehicle "located at . . . the Mecklenburg County Police Department," a search of defendant's automobile after an officer moved the vehicle from the premises of the police department to the department's impound area did not exceed the physical scope of defendant's consent since the statement in the consent form regarding the vehicle's location was descriptive of the subject of search rather than proscriptive as to place; there was no evidence that defendant attempted, verbally or in writing, to restrict the search as to location; and there was no evidence indicating that the result of the search would have differed if it had been conducted at the department rather than the impound area. G.S. 15A-223(a).

5. Criminal Law § 163— failure to object to charge—waiver of objection

Defendant cannot assign error to the trial court's failure to charge on voluntary manslaughter where defense counsel on three occasions stated that defendant was satisfied with the charge and had no requests for further instructions. App. Rule 10(b)(2).

APPEAL by defendant from *Gaines, Judge.* Judgment entered 10 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 March 1984.

Defendant appeals from a judgment of imprisonment entered upon his conviction of second degree murder.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Larry Thomas Black for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in denying his motion to suppress evidence seized during a search of his automobile. He concedes that he voluntarily executed a consent to search, and that "a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given." G.S. 15A-221(a); *see Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 36 L.Ed. 2d 854, 858, 93 S.Ct. 2041, 2043-44 (1973); *State v. Long,* 293 N.C. 286, 293, 237 S.E. 2d 728,

732 (1977). He relies, however, on G.S. 15A-223(a), which provides that a search by consent "may not exceed, in duration or physical scope, the limits of the consent given."

Defendant executed the consent to search at 8:47 p.m. on 12 July 1982. The search was conducted at 7:30 p.m. on 13 July 1982. Defendant argues that the twenty-three hour interval between the consent and the search exceeded the duration of the consent.

[1] The temporal scope of a consent to search is a question of fact to be determined in light of all the circumstances. *People v. Trujillo*, 40 Colo. App. 186, 189, 576 P. 2d 179, 181 (1977) (consent executed on 9 August, not limited to a particular time, sufficient to support search on 11 August). "A brief 'lapse of time between the consent and the search does not require a reaffirmation of the consent as a condition precedent to a lawful search.'" *Gray v. State*, 441 A. 2d 209, 221 (Del. 1981) (twenty hour delay while officers conducted other investigation permissible). "The length of time a consent lasts depends upon the reasonableness of the lapse of time between the consent and the search in relation to the scope and breadth of the consent given." *Gray, supra*, 441 A. 2d at 221; *see also United States v. White*, 617 F. 2d 1131, 1134 (5th Cir. 1980) (two day delay not ground for suppression of evidence where no indication defendant attempted to withdraw his consent prior to search or that he was in any way prejudiced by the delay).

[2] Where there is delay in executing a *warrant* for search, "evidence should be excluded only if the delay resulted in legal prejudice to the complaining party." *United States v. Bradley*, 428 F. 2d 1013, 1016 (5th Cir. 1970). The same should apply where there is delay in conducting a search by consent.

[3] The written consent to search here contained no limitations on the time for search. There is no evidence that defendant attempted to withdraw his consent prior to the search or that he attempted, verbally or in writing, to limit its duration. During much of the time lapse, the officers who conducted the search were engaged in other investigation regarding the crime. This consisted of a consensual search of defendant's apartment and the surrounding area, and interviews with defendant. No evidence tends to indicate in any way that the result of the search would have differed if it had been conducted at an earlier time.

Under these circumstances we hold that the search was conducted with reasonable expedition, and defendant has shown no prejudice from the brief delay between the consent and the search. We thus reject the contention that the motion to suppress should have been granted because the search exceeded the duration of defendant's consent.

[4] The consent to search authorized "a complete search of [defendant's] . . . vehicles . . . located at . . . the Mecklenburg County Police Department, Charlotte, N.C." After defendant executed the consent, and before officers conducted the search, an officer moved the vehicle searched from the premises of the police department to the department's impound area. Defendant argues that this placed the vehicle outside the physical scope of his consent.

The written consent to search contained no limitation on the place. There is no evidence that defendant attempted, verbally or in writing, to restrict the search as to location. The statement in the consent form regarding the vehicle's location was descriptive of the subject of search rather than proscriptive as to place.

Further, the officer who moved the vehicle testified that the reason was to "[p]ut it in a sealed area where [he] could process it later." He left the vehicle "sealed," and it remained so when he opened it to conduct the search. None of the seals had been "tampered with." Thus, no evidence tends to indicate in any way that the result of the search would have differed if it had been conducted at the department rather than the impound area.

Under these circumstances we hold that removal of the vehicle was reasonable, and defendant has shown no prejudice therefrom. We thus reject the contention that the motion to suppress should have been granted because the search exceeded the physical scope of defendant's consent.

[5] Defendant contends the court erred in denying his request that it charge the jury on voluntary manslaughter. When making the request, defense counsel expressed doubt as to "whether voluntary manslaughter is an appropriate charge," but made the request for the record. In response to the court's request for the State's position, the District Attorney stated: "My feeling is, Judge, that you have to strengthen the testimony in order for it

to justify [a] voluntary manslaughter charge." The court then suggested reopening the evidence because of the possibility that doing so "might give rise to a manslaughter charge." After further discussion defense counsel requested, and the court in its discretion granted, permission to reopen the evidence.

Following additional testimony, defendant did not renew the request; and the court did not charge on voluntary manslaughter. When it completed the charge, the court inquired whether the attorneys desired "any changes, alterations or additions." Defense counsel replied: "The defendant is satisfied with the charge, your Honor."

During deliberations the jury returned to the courtroom to request additional instructions. Upon completing the further instructions, the court again asked, in the jury's presence, if either the State or defendant had "anything further they would like the Court to instruct on." Defense counsel replied in the negative.

Following the jury's departure, the court again called for "any additions, deletions or anything with regard to the additional instructions," and "[a]ny objections to any portion of it." Defense counsel responded: "No requests from the defendant."

Under these circumstances defendant cannot assign error to the omission complained of. N.C. R. App. P. 10(b)(2). Upon the record as a whole, the omission was not "plain error." *State v. Odom*, 307 N.C. 655, 659-62, 300 S.E. 2d 375, 378-79 (1983). This assignment of error is therefore overruled.

Finally, the court did not err in denying defendant's motion for a new trial.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. TEDDY RUDOLPH KING

No. 8313SC1041

(Filed 3 April 1984)

1. **Criminal Law § 167.1— question naming defendant as robber before identification of robber made—harmless error**

In a prosecution for armed robbery, although the district attorney erred in naming the defendant as the robber in a question before any identification of the defendant as the robber had been made, the error was harmless where the evidence of defendant's guilt from other sources was so strong as to preclude the likelihood that a different outcome could have resulted had the error not been committed. G.S. 15A-1061.

2. **Criminal Law § 76.7— confession—evidence supporting finding of fact that defendant signed confession after reading it**

In a prosecution for armed robbery, the evidence, although conflicting, was sufficient to support a trial judge's findings of fact that defendant signed his confession after reading it and that defendant did not think he "was signing for a lawyer."

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 3 May 1983 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 15 March 1984.

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

Frink, Foy and Gainey, by Michael R. Ramos, for the defendant appellant.

BRASWELL, Judge.

Defendant was indicted and convicted of armed robbery and sentenced to an active prison term of twenty years. On appeal, defendant challenges the trial court's denial of his motions to strike and for a mistrial following a question by the prosecutor which identified defendant as the robber before any evidentiary identification of the defendant as the robber had been made. He also challenges the denial of his motion to suppress his in-custody statement because, as he testified, when he signed the statement, "I thought I was signing for a lawyer."

On the evening of 3 January 1983, a black man wearing a ski mask over his face, a toboggan, khaki jeans, a denim jacket and

black shoe polish over his nose, entered the Ocean Isle Party Mart, pointed a gun at the cashier, and ordered the cashier to open the cash register. When the cashier opened the register, the man grabbed the money from it and ran. Later that evening, defendant, wearing a pair of brown khaki pants and a blue jacket, with shoe polish smeared on his face, came to the home of William Bland, and requested a change of clothes and a ride home. While being carried home by William Bland and his brother, defendant told William Bland that he had "hit" a store that evening. The next day, Bland's wife found a rifle in their yard. She asked defendant about it and he told her he used it in robbing a store on Ocean Isle the night before. Defendant gave an in-custody statement, which was read to the jury, in which he admitted robbing the Ocean Isle Mini Mart, going to the Blands' and changing clothes, catching a ride, and leaving the rifle at the Blands' house.

The evidence favorable to the defendant tended to show that the cashier was unable to identify the robber.

[1] During the examination of the store cashier, the district attorney in a question named the defendant as the robber before any identification of the defendant as the robber had been made. The trial court sustained defendant's counsel's prompt objection, but denied his simultaneous motions to strike and for a mistrial. No curative instructions were given and none were requested. The incident as shown in the record, follows:

> Q. O.K. Ms. Lee when at the time you handed over this money to Teddy King?
>
> MR. RAMOS: Objection.
>
> COURT: Sustained.
>
> MR. RAMOS: Motion to strike, Motion for mistrial.
>
> COURT: Denied.
>
> EXCEPTION NO. 1

To the denial of these motions, defendant assigns error.

A trial judge must declare a mistrial, upon motion, "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substan-

tial and irreparable prejudice to the defendant's case." G.S. 15A-1061. The decision as to whether such prejudice has occurred is within the trial judge's discretion, which will not be disturbed on appeal absent a showing of a gross abuse of discretion. *State v. Rogers*, 52 N.C. App. 676, 279 S.E. 2d 881 (1981); *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978).

Neither prejudicial error nor an abuse of discretion has been shown in the present case. The cashier subsequently candidly testified that she was unable "to this day" to identify the robber. The evidence of defendant's guilt from other sources, however, was so strong as to preclude the likelihood that a different outcome could have resulted had the error not been committed. Further, the defendant's own confession showed his guilt.

[2] Defendant next contends that the trial court erred in refusing to suppress his in-custody statement because he thought that the statement which he signed was a request for an attorney. In this court he also seeks to challenge the admissibility of the statement as not being in his handwriting nor read by him. These contentions have no merit. The facts found and conclusions drawn by the trial judge at the *voir dire* hearing fail to support defendant's position.

"When a statement purporting to be a confession bears the signature of the accused, it is presumed, nothing else appearing, that the accused has read it or has knowledge of its contents." *State v. Walker*, 269 N.C. 135, 139, 152 S.E. 2d 133, 137 (1967). The rule in civil cases, also applicable to the defendant's argument in this criminal case, is that a person who signs a paper writing has a duty to ascertain the contents of the writing, and he will be held to have signed with full knowledge and assent as to its contents unless it is shown that he was wilfully misled or misinformed by the opposing party, or if the contents were fraudulently withheld from him. *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942).

When the admissibility of an in-custody confession is challenged, the trial judge must hold a *voir dire* hearing to determine whether a confession was voluntary and admissible. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976), *motion to reconsider denied*, 293 N.C. 261, 247 S.E. 2d 234 (1977). If there is a material conflict in the evidence, that is, one which affects the admissibili-

ty of the confession, the trial judge must make findings of fact resolving the conflict. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934, 91 S.Ct. 2266, 29 L.Ed. 2d 715 (1971); *State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569 (1966).

The officer who recorded defendant's statement in the present case testified on *voir dire* that defendant signed the confession after reading it. Defendant, however, testified on *voir dire* that he did not read the statement as he thought he "was signing for a lawyer." A conflict thus arose in the evidence on *voir dire* on this issue.

The trial court did resolve the conflict, however. Defendant testified that before he signed the statement, he expressed a desire for an attorney, and thought he was signing for an attorney when he signed the statement. The officer, however, testified that the defendant never requested an attorney. This conflict was resolved by the trial court's findings of fact that defendant expressly stated that he did not desire an attorney after being asked if he wanted a lawyer present. The defendant also signed a waiver of rights. Indeed, these findings of fact show that there was no fraud, misleading, or withholding of information from defendant. Defendant stated that he could read.

The cases cited by defendant are distinguishable. In *State v. Walker, supra*, the State's own evidence clearly established that the defendant had not read or been read his confession. In *State v. Conyers, supra*, although there was a conflict in the evidence as to whether the defendant had read or been read the confession, the trial court's failure to resolve any of the conflicts after the contested hearing rendered the trial court's findings of fact woefully inadequate.

Assuming *arguendo* that the trial court erred in failing to make a finding of fact whether defendant had read the statement, the error was not prejudicial in this case. Even without the confession, there was plenary evidence of defendant's guilt. The Blands' description of defendant as he appeared at their house later that evening matched the description given of the robber by the store cashier. Moreover, defendant told the Blands that he had robbed a store that evening. The confession merely tended to corroborate their testimony.

Defendant had an opportunity to cross-examine the officer at trial about the authenticity and accuracy of the statement. Defendant did not bring the lack of a finding about whether defendant had read the statement to the trial court's attention, and no exception to the trial court's failure to make such finding appears in the record.

We hold that defendant received a fair trial, free from prejudicial error.

Judges ARNOLD and WELLS concur.

ELOISE B. QUICK (GRIFFITH) v. CLYDE C. QUICK

No. 8326DC443

(Filed 3 April 1984)

1. **Divorce and Alimony § 24.7— increase in child support—sufficiency of evidence and findings**

The evidence and findings supported the trial court's order requiring defendant father to increase his child support payments from $130 per month to $320 per month.

2. **Divorce and Alimony § 27— increased child support—erroneous order of attorney fees**

The trial court erred in ordering defendant to pay a portion of plaintiff's attorney fees in a proceeding to increase child support where the court made no findings of fact that plaintiff had insufficient means to defray the costs of the proceeding, and where the court's other findings indicated that plaintiff had sufficient means to defray the costs of the suit and to employ adequate counsel.

APPEAL by defendant from *Todd, Judge.* Order entered 23 November 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 8 March 1984.

Perry, Patrick, Farmer & Michaux by Roy H. Michaux, Jr., for plaintiff appellee.

Reginald L. Yates for defendant appellant.

BRASWELL, Judge.

[1] The question presented by this appeal is whether the trial court's order requiring defendant to pay increased child support and a portion of plaintiff's attorney's fees is supported by the findings of fact. We find no error in the award of increased child support, but we do find error in the award of attorney's fees.

The parties were divorced in September 1972, one month before their only child's fifth birthday. When the child was two and one-half years old the parties separated and executed a separation agreement in which defendant agreed to pay $130 per month child support. On 6 October 1982, plaintiff filed a motion in the cause seeking an increase in child support and attorney's fees. A hearing on the motion was held on 16 November 1982, and an order requiring defendant to pay $320 per month child support and a portion of plaintiff's attorney's fees in the amount of $350 was entered on 23 November 1982. In support of its order, the trial court made the following unchallenged pertinent findings of fact:

> 1. The plaintiff and the defendant were formerly husband and wife and are the parents of a minor child, Tammie Lee Quick, who was born on October 21, 1967.
>
> 2. The plaintiff and the defendant separated in March of 1970. In June of 1970, they entered into a written "Deed of Separation" and the minor child of the parties has been in the custody of the plaintiff since the parties separated.
>
> 3. Paragraph 3 of the aforementioned Deed of Separation provided for the defendant to pay to the plaintiff the sum of $130.00 per month commencing on the 1st day of July, 1970 and on the 1st day of each month thereafter for the use, benefit and support of the minor child.
>
> 4. Although the defendant has on occasion been in arrears in the payment of child support, the support called for under the agreement is current through the month of October of 1982. No payment has been made for the month of November and this amount was due on November 1, 1982.
>
> 5. At the time of the Deed of Separation in June of 1970, the minor child born of the parties was approximately two

and one-half years old and the sum of $130.00 per month was an amount which was reasonable to cover her needs as they existed at that time.

6. The minor child born of the parties was 15 years old on October 27, 1982 and the support called for in the Deed of Separation is not adequate to meet the reasonable needs of such child which now average $853.62 per month.

7. For the year ending December 31, 1981, the defendant had a gross income of $23,839.00 and after the payment of state income tax and approximately one-half of the federal income tax paid by him and his present wife, the defendant had an after tax income of $19,378.50 or $1,614.88 per month.

8. Through October 13, 1982, the defendant has been paid a gross salary of $21,338.10. He is paid $969.24 twice each month and will receive five additional salary checks in 1982 for $969.24 each or $4,846.20 which will increase his 1982 gross earnings to $26,184.30.

9. Since the divorce of the parties, the defendant has remarried. His wife had a gross income in 1981 of $21,270.00 and both of them remain employed at the same places. The defendant has reasonable living expenses of $1,576.27 per month, the greatest portion of which includes expenses for housing and utilities for him and his wife.

10. The plaintiff is employed and had a gross income in 1981 of $16,995.73 from which she pays for medical and dental insurance on her minor child.

11. The plaintiff's gross income for the year 1982 will be just under $21,000.00. The plaintiff has remarried and her husband's income for 1982 will be approximately in the same amount although he pays child support for one child by a prior marriage in the amount of $345.00 per month.

12. Although the defendant has been requested on several occasions since 1974 to increase the amount being paid to the plaintiff for child support, he has refused to do so. After several discussions during the year 1982 with plaintiff's counsel, the defendant, in late August and early September of 1982 authorized that an agreement be drawn for an in-

crease in child support which was prepared and sent to him. The defendant never responded to the agreement and never made any offer for any increase in the amount being paid for the support of his child.

Defendant's contention that the court erred in ordering defendant to pay $320.00 per month child support because there were no findings of fact as to plaintiff's ability to provide for the support of the child, as to plaintiff's reasonable living expenses, and as to defendant's ability to pay child support has no merit. Defendant is apparently concerned that plaintiff is not providing her share of the child's support. The order, however, indicates that defendant was ordered to pay $320.00 per month which is less than one-half of the child's unchallenged reasonable average monthly needs of $853.62. Plaintiff, therefore, is providing more than one-half of the child's average monthly needs. The court did make findings as to plaintiff's ability to pay, as evidenced by findings of fact numbers ten and eleven. The court also made findings as to defendant's ability to pay, as evidenced by findings of fact numbers seven through nine, and as to his monthly expenses, which can be met with the $21,270.00 annual income of his new wife, with whom most of the expenses are jointly incurred.

[2] The trial court did err, however, in ordering defendant to pay a portion of plaintiff's attorney's fees without making findings of fact that plaintiff has insufficient means to defray the costs of the proceedings. Before a court can award attorney's fees to an interested party under G.S. 50-13.6 in a motion in the cause proceeding for a modification of child support, the court must make the following three findings of fact: (1) the party is acting in good faith [here, there is such a conclusion of law in the order, but no such finding of fact]; (2) the party has insufficient means to defray the expenses of the suit; and (3) the party ordered to pay support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). For an interested party to have insufficient funds to defray the expense of suit, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant. *Id.* at 474, 263 S.E. 2d at 725.

In *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972), the Supreme Court vacated an award of counsel fees to the dependent spouse where the dependent spouse had $141,362.50 in stocks and bonds and an annual income of $2,253.00 therefrom, and the supporting spouse had stocks and bonds worth $677,637.27 and a net annual income of $17,657.84. The Court stated that an award of counsel fees was clearly not necessary to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially equal terms, by making it possible for her to employ adequate counsel. The Court reached the same conclusion and result in *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980) and *Hudson, supra*. In *Williams*, the dependent spouse had a net worth of $761,975.00 and an annual gross income of $22,000.00, while the supporting spouse had a net worth of $870,165.00 and an annual gross income of $116,660.00. And in *Hudson*, the dependent spouse had a net worth of $665,652.00, an income free and clear of all expenses of $9,192.00, and an annual rental income of $48,000.00, while the supporting spouse had a net worth of $492,941.00.

In the present case the award of attorney's fees is not supported by any specific finding of fact. Actually, there is no recitation of any nature on the subject of attorney fees within the findings of fact. Further, the trial court's other findings of fact indicate that plaintiff has sufficient means to defray the costs of suit and is able to employ adequate counsel to proceed as litigant. These findings show that plaintiff had a gross income of $16,995.73 in 1981 and of just below $21,000.00 in 1982. Plaintiff's second husband's gross income for 1982 was approximately $21,000.00. On the other hand, defendant's gross income for 1981 was $23,839.00 and for 1982 was expected to be $26,184.30. Defendant's second wife's gross income in 1981 was $21,270.00. The parties, therefore, stood on relatively equal footing and plaintiff was able to employ adequate counsel to meet defendant on substantially even terms.

The portion of the order requiring defendant to pay a portion of plaintiff's attorney's fees is therefore vacated. The portion of the order requiring defendant to pay increased child support is affirmed.

Affirmed in part; reversed in part.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF: THE WILL OF WALTER D. DANIELS, DECEASED

No. 828SC1129

(Filed 3 April 1984)

1. Wills § 22— caveat proceeding—exclusion of evidence concerning mental capacity error

In a caveat proceeding, the trial court erred in excluding evidence which indicated that the propounder and some of his witnesses, who testified that the testator was of sound mind when the will was executed, had expressed a contrary opinion or taken a contrary position four years earlier. Further, the court erroneously refused to permit the caveators to introduce into evidence duly authenticated records of the testator's hospitalization on some 14 different occasions between 1971 and 1977.

2. Wills § 21.4— undue influence—sufficiency of evidence

In a caveat proceeding, the trial court erred in directing a verdict against the caveators on the undue influence issue where, in addition to the testator's advanced age and feeble health, the caveators' evidence tended to establish that when the will was written the testator was living in the propounder's home; he was estranged from his other children, the caveators, and they had little access to him; he was taken to the lawyer's office by the propounder and executed the will in his presence; and the will in effect disinherited five of his six children for no known reason.

APPEAL by caveators from *Llewellyn, Judge.* Judgment entered 2 July 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 19 September 1983.

Walter D. Daniels died on 22 August 1980 at the age of ninety and a paperwriting, dated 6 August 1980, was tendered for probate as his last will. It left the bulk of the decedent's estate to his son, Earl Daniels, the propounder, and made only nominal bequests to decedent's other five children, who filed a caveat alleging lack of mental capacity by the testator and the undue influence of the propounder and others.

Upon the trial of the case the court directed a verdict against the caveators on the undue influence issue and on the other

issues the jury rendered verdict in favor of the propounder and the will. From judgment entered on the verdicts directed and rendered, the caveators appealed.

Hulse & Hulse, by Herbert B. Hulse, and Duke & Brown, by John E. Duke, for caveators appellants.

Taylor, Warren, Kerr & Walker, by David E. Hollowell, for propounder appellee.

PHILLIPS, Judge.

[1] During the trial the court erroneously kept from the jury much of the evidence that the caveators had a right to use in one way or another, and a new trial is required. The court's most serious and pervasive error, accomplished by a series of rulings, was in keeping from the jury evidence or information in any form which indicated that the propounder and some of his witnesses, who testified that the testator was of sound mind when the will was executed, had expressed a contrary opinion or taken a contrary position four years earlier. The contrary opinion or position was expressed or taken in connection with a special proceeding filed in court 1 December 1976 for the purpose of having the testator declared mentally incompetent to manage his affairs. The petition in that proceeding, signed by the propounder and caveators alike, was drafted by Attorney Thomas E. Strickland, who also prepared the will, testified as a witness for the propounder, and wrote some group letters to the caveators and propounder about the proceeding in which the testator's inability to understand certain important business problems that he then had was mentioned. Before the trial began, pursuant to an oral motion *in limine* made by the propounder, the court entered an order prohibiting the caveators from alluding to the proceeding in their opening statement or during the cross-examination of the propounder. The order was later expanded to prevent the caveators from questioning propounder as to his opinion of the deceased's mental capacity in 1976 and from cross-examining Attorney Strickland about either the special proceeding or the letters that he wrote in connection with it. The court's only basis for all these orders was that the events involved took place four years before the will was made and were therefore too remote to bear upon the testator's mental capacity when he executed the will.

Though the ability of a person to make a will is determined as of the date of the will's execution, evidence concerning his mental condition at other times is admissible if it tends to show the testator's mental capacity at the time the document was executed. "Evidence of mental condition before and after the critical time is admissible, provided it is not too remote to justify an inference that the same condition existed at the latter time." 1 Brandis, N.C. Evidence § 127 (1982). Whether evidence of a testator's mental condition at another time is too remote depends upon the circumstances involved. As Justice Brogden, writing for our Supreme Court, said: "No precise or mathematical definition can be fashioned. . . . The best that appellate courts can do in dealing with the subtle processes of the mind is to interpret facts in such cases by the rule of reason and common sense." *In re Will of Hargrove*, 206 N.C. 307, 311-12, 173 S.E. 577, 579-80 (1934).

The excluded evidence tended to show that in 1976 when he was 86 years old the testator's mental faculties had deteriorated to the point of deficiency because of the aging process and chronic ill health; and because of the circumstances involved it clearly justifies an inference, we think, that the testator's mental condition had not changed for the better four years later. Thus, the evidence was not too remote to bear upon the issues being tried and all of the exclusionary orders entered on that basis were erroneous. But even if the excluded evidence had been too remote to be received for substantive purposes, it was not thereby automatically rendered *unusable* for all purposes, as the trial court apparently assumed. No citation of authority is needed for the elemental proposition that under our system of jurisprudence, depending upon the circumstances of the case, evidence that is inadmissible as substantive evidence is often admissible or usable for other purposes. One proper purpose otherwise inadmissible evidence is frequently used for is to undermine the credibility of opposing witnesses; and remote or not, caveators had a right to cross-examine the propounder and his witnesses about the contrary positions they had taken and the contrary statements they had made concerning the testator's incompetency at an earlier time. 1 Brandis, N.C. Evidence §§ 42, 46 (1982).

Also, apparently, on the grounds of remoteness, the court erroneously refused to permit the caveators to introduce into evidence duly authenticated records of the testator's hospitaliza-

tion on some fourteen different occasions between September, 1971 and January, 1977. Those records tend to show that throughout that period the testator was suffering from "generalized" or "cerebral" arteriosclerosis. This condition, as is commonly known, is associated with the aging process, is not reversible, tends to progress once it starts, and can impair one's mental and physical faculties. The records also tend to show that at different times during the several year period covered by them that the testator suffered from several other serious and debilitating illnesses, some of considerable duration, including hepatitis, diverticulosis of the colon, osteoarthritis, carcinoma of the pancreas, pyelonephritis, prostatitis and urinary bladder retention. That testator's circulatory system had been impaired and probably getting worse for several years has some tendency to show that by the time the will was written he was incapable of executing it. And that his health generally had been breaking down for the same period complements and strengthens the evidence of impaired circulation, and also tends to show that he was capable of being imposed upon and unduly influenced by others.

Though the court permitted the caveators to introduce part of the record of testator's last hospitalization, covering the period August 15, 1980 to August 22, 1980, the nurses' notes were erroneously excluded therefrom. The basis for this exclusion is not recorded and we know of no sound basis that could have been stated. The evidence certainly is not too remote—the period covered began but nine days after the will was executed—and had the tendency to show that the confused, disoriented condition recorded therein also existed nine days or so earlier when the will was signed. The court also erroneously excluded certain other evidence offered by the caveators, which tended to show that the testator had treated his feeble spouse and her property irrationally in 1976. Under the circumstances, such evidence was relevant to the testator's mental capacity when the will was executed. *In re Will of Hinton*, 180 N.C. 206, 104 S.E. 341 (1920).

[2] Finally, the order directing a verdict against the caveators on the undue influence issue was erroneously entered. In addition to the testator's advanced age and feeble health, the caveators' evidence tended to establish that: When the will was written the testator was living in the propounder's home; he was estranged from his other children, the caveators, and they had little access

to him; he was taken to the lawyer's office by the propounder and executed the will in his presence; the will in effect disinherited five of his six children for no known reason. This evidence was sufficient in our opinion to establish a *prima facie* case on this issue. *See In re Will of Mueller,* 170 N.C. 28, 86 S.E. 719 (1915).

This matter is remanded to the Superior Court for a new trial consistent with this opinion.

New trial.

Chief Judge VAUGHN and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. HOWARD GOFORTH

No. 8328SC1053

(Filed 3 April 1984)

Criminal Law § 138— attempted rape of stepdaughter—position of trust aggravating factor

In imposing a sentence upon defendant for attempted first degree rape, the trial court properly found as an aggravating factor that defendant took advantage of a position of trust to commit the offense by attempting to rape a young victim who was for all practical purposes his stepdaughter. G.S. 15A-1340.4(a)(1)(n).

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 20 May 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 March 1984.

Defendant was convicted of attempted first degree rape and sentenced to a term of imprisonment in excess of the presumptive sentence. Defendant appealed. This Court, in an opinion at 59 N.C. App. 504, 297 S.E. 2d 128 (1982), found no error in the trial but found an error in sentencing in that two factors in aggravation were based on the same item of evidence in violation of G.S. 15A-1340.4(a)(1). However, Judge Hill, speaking for the panel, found that the error in sentencing was not prejudicial. *Id.* Defendant filed a petition for discretionary review in the North Carolina Supreme Court which was allowed for the purpose of remanding the case to the superior court for resentencing in accordance with

the Court's decision in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). *See State v. Goforth*, 307 N.C. 699, 307 S.E. 2d 162 (1983).

At the resentencing hearing, the court found as the only aggravating factor that the defendant took advantage of a position of trust to commit the offense by attempting to rape his wife's daughter to whom he was, for all practical purposes, a stepfather. The court found three mitigating factors but found that defendant's abuse of trust outweighed the evidence in mitigation and again imposed a sentence in excess of the presumptive term. From the judgment entered and the sentence imposed at the resentencing hearing, defendant appealed.

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

Assistant Public Defender Lawrence C. Stoker for defendant appellant.

WEBB, Judge.

Defendant contends the court committed reversible error by finding as a factor in aggravation that defendant took advantage of a position of trust. He submits that the aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense, found at G.S. 15A-1340.4(a)(1)(n), relates only to misconduct in public or private office, or to a fiduciary relationship existing between individuals, or between an agency or company and an individual, and not to the familial relationship in the present case. We do not believe this statutory factor should be interpreted so narrowly, and our case law does not support such an interpretation as is demonstrated by this Court's ruling in *State v. Potts*, --- N.C. App. ---, 308 S.E. 2d 754 (1983), where the Court upheld a finding of this aggravating factor based upon evidence showing that the defendant and his victim were close friends.

In *State v. Melton*, 307 N.C. 370, 378, 298 S.E. 2d 673, 679 (1983), our Supreme Court stated: "As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances . . . which are reasonably related to the purposes of sentencing must be considered during

sentencing. (Citations omitted.)" In the present case, the essentially familial relationship between the defendant and his young victim was not an element of the offense. The evidence tends to show that the defendant lived with the victim's mother, brothers and sisters for approximately eight years, and was considered by the victim, her family, and even the defendant himself, to be the children's stepfather. Defendant was not, in fact, the victim's stepfather because he was not legally married to her mother. Nevertheless, the evidence shows defendant was for all practical purposes the victim's stepfather and that he took advantage of such position of trust to commit the offense. We believe defendant's abuse of his parental role relates to his character or conduct, and was reasonably related to the purposes of sentencing. We hold the trial court properly found as an aggravating factor that defendant took advantage of a position of trust to commit the offense, and did not abuse its discretion in finding that the aggravating factor outweighed the mitigating factors, and in imposing a sentence in excess of the presumptive term.

In so holding, we also reject defendant's argument that the trial court improperly used an element of the lesser crime of incest to find the aggravating factor for the greater crime of rape. Incest is not a lesser included offense of attempted rape because it requires proof of the additional element that the defendant had assumed the position of a parent in the home of the minor victim. *See* G.S. 14-27.7; G.S. 14-27.2. Because defendant's parental position is not an essential element of the offense of attempted rape, the court did not err in considering it as a factor in sentencing.

No error.

Judges BECTON and EAGLES concur.

STARKINGS COURT REPORTING SERVICES, INC. v. RUTH E. COLLINS

No. 8312SC397

(Filed 3 April 1984)

Contracts § 7— contract between business and independent contractor—covenant not to compete unenforceable

A contract between plaintiff court reporting service and defendant, independent contractor, which forbade defendant from engaging in the court reporting business in Cumberland County or within a 50 mile radius of Cumberland County for two years from the termination of the business relationship between plaintiff and defendant was unenforceable for two reasons: (1) it was against public policy in that its practical effect was merely to stifle normal competition and (2) it provided for greater restraint on defendant than was reasonably required for the protection of plaintiff.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 16 February 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 March 1984.

On 24 August 1981, plaintiff and defendant signed an "Independent Contractor Agreement," whereby defendant agreed to take court reporting assignments from plaintiff "as an Independent Contractor, not as an agent or employee." Defendant agreed to pay her own taxes, liability insurance, and operating expenses. Fees generated pursuant to this agreement would belong to plaintiff, and plaintiff agreed to pay 70% of the fee to defendant. The agreement purported to bind defendant to a covenant not to compete with plaintiff, which forbade defendant from engaging in the court reporting business in Cumberland County or within a 50 mile radius of Cumberland County for two years from the termination of the business relationship between plaintiff and defendant. The agreement recited $100.00 as consideration for the covenant not to compete clause.

On or about 21 October 1982, defendant terminated the business relationship with plaintiff. Soon thereafter, defendant established her own court reporting service in Cumberland County. On 27 January 1983, plaintiff filed the complaint in this action, seeking permanent injunctive relief for plaintiff and against defendant for violations by defendant of the covenant not to compete contained in the Independent Contractor Agreement. The case was heard in Superior Court without a jury, and the trial

judge denied plaintiff's prayer for a permanent injunction against defendant and declared the covenant not to compete clause of the Independent Contractor Agreement to be invalid, void and unenforceable. Plaintiff appealed.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for plaintiff-appellant.

Russ, Worth, Cheatwood & McFadyen, by Philip H. Cheatwood, for defendant-appellee.

EAGLES, Judge.

Plaintiff assigns as error the trial court's conclusion of law that the covenant not to compete clause of the Independent Contractor Agreement between plaintiff and defendant was in restraint of trade, unreasonable and unfair to plaintiff, against public policy, illegal, unenforceable and void. Plaintiff contends that the restrictions on this independent contractor are no broader than is necessary to protect the legitimate interests of the plaintiff. We do not agree.

G.S. 75-1 declares contracts in restraint of trade to be illegal in North Carolina. However, our courts have recognized the rule that a covenant not to compete is enforceable in equity if it is: (1) in writing; (2) entered into at the time and as part of the contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory embraced in the restrictions; (5) fair to the parties; and (6) not against public policy. *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E. 2d 139 (1962); *Schultz and Associates v. Ingram*, 38 N.C. App. 422, 248 S.E. 2d 345 (1978). This court has noted that even where there is an otherwise permissible covenant not to compete:

> [T]he restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Owing to the possibility that a person may be deprived of his livelihood, the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale. (Citations omitted.)

Wilmar, Inc. v. Liles, 13 N.C. App. 71, 75, 185 S.E. 2d 278, 281 (1971). See also, Restatement (Second) of Contracts Section 188 (1979).

The covenant not to compete here is an unreasonable restraint of trade and thus unenforceable for two reasons: (1) it is against public policy in that its practical effect is merely to stifle normal competition and (2) it provides for greater restraint on defendant than is reasonably required for the protection of plaintiff. Defendant here was truly an *independent* contractor and not an employee of plaintiff: defendant used her own equipment, paid her own operating expenses, and was not subject to any regulation, direction or control by plaintiff as to format, timeliness or method in performing her court reporting assignments. Defendant had no access to trade secrets or unique information as a result of her business association with plaintiff. There was no need to protect plaintiff's customer lists, since anyone could go to a telephone book or lawyers' directory to find a list of attorneys who would be potential customers. It is clear, then, that this covenant not to compete was designed for one purpose: to restrain and inhibit normal competition. Our Supreme Court has said that when the effect of a contract "is merely to stifle normal competition, it is . . . offensive to public policy . . . in promoting monopoly at the public expense and is bad." *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E. 2d 543, 546 (1944). In such a case, the public has a greater interest in preserving an individual's ability to earn a living than in protecting an employer from competition. *Id.* at 160, 29 S.E. 2d at 546.

Because the covenant not to compete in this Independent Contractor Agreement is against public policy and provides for greater restraint on defendant than is required to protect plaintiff, the trial judge was correct in declaring this covenant not to compete to be invalid, void and unenforceable.

Affirmed.

Judges WEBB and BECTON concur.

BOBBY LEE MEDFORD, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARY SPAN M. CLEMENS v. MARK G. LYNCH, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 8328SC488

(Filed 3 April 1984)

Taxation § 27— inheritance tax—computed according to provisions of will rather than consent judgment error

A trial judge erred in concluding that inheritance taxes must be computed according to the provisions of a testator's will rather than according to the actual distribution of the estate pursuant to a consent judgment in a caveat proceeding since G.S. 105-2(1) clearly provides that inheritance tax shall be imposed upon the transfer of property pursuant to a final judgment in a caveat proceeding.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 20 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 March 1984.

Plaintiff, executor of the estate of Mary Clemens, was the sole beneficiary under a will executed by Mary Clemens on 26 May 1978. After plaintiff probated that will in common form, Robert McLendon, a devisee under a will purportedly executed by Mary Clemens on 19 January 1977, instituted a caveat proceeding to probate the 1977 will. Patrick Span and Claudia Span Johns, all of the heirs at law of Mary Clemens, thereafter intervened in the proceedings as caveators.

The trial began on 21 April 1980 before a judge and a jury. During the trial, the parties agreed on a settlement whereby the 26 May 1978 will in favor of plaintiff would be probated in solemn form, but the distributable estate would be apportioned as follows: 50% to plaintiff, 28% to McLendon, 11% to Spans, and 11% to Johns. This agreement was reduced to writing and executed by the parties and their attorneys on 24 April 1980. Evidence of the execution of the will had already been presented, and the terms of the settlement were disclosed to the court prior to the close of the evidence. The jury found that the 26 May 1978 will was the last will and testament of Mary Clemens. Thereafter, the trial court, on 24 April 1980, entered a consent judgment which found that the 26 May 1978 will was the last will and testament of Mary Clemens but ordered that the "distributable estate"

be apportioned according to the terms of the settlement reached by the parties. This judgment has not been appealed.

Thereafter, plaintiff, as executor, filed a North Carolina Inheritance Tax Return, computing the inheritance tax due based on the transfers of property made pursuant to the consent judgment, and paid the inheritance tax as a debt of the estate. Defendant Department of Revenue determined plaintiff's inheritance tax liability according to the terms and provisions of the 26 May 1978 will (without regard for the provisions of the consent order) and assessed additional inheritance taxes, penalty and interest of $4,845.92 against plaintiff. Plaintiff paid the assessed tax, requested a refund pursuant to G.S. 105-267, and, upon denial of his request for refund, instituted this action to recover $4,845.92 together with interest.

The trial judge, sitting without a jury, heard the matter and entered judgment in favor of the Department of Revenue. The trial judge concluded, as a matter of law, that G.S. 105-2(1) required plaintiff to compute the inheritance tax solely in accordance with the provisions of the will as probated in solemn form. Plaintiff appeals.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the defendant-appellee.

Long, Parker, Payne & Matney, by Robert B. Long, Jr., for plaintiff-appellant.

EAGLES, Judge.

Plaintiff assigns as error the trial judge's conclusion of law that inheritance taxes must be computed according to the provisions of the 26 May 1978 will instead of the actual distribution of the estate pursuant to the consent judgment. Plaintiff contends that G.S. 105-2(1) requires that inheritance taxes be computed based on the transfers of property made pursuant to the consent judgment in the caveat proceedings. We agree.

Prior to 1 July 1974, G.S. 105-2(1) provided:

> A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or cor-

> porations . . . [w]hen the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

Our Supreme Court ruled in 1957 that, according to the language in that statute, "the succession tax is computable in accordance with the will, unaffected by the compromise agreement" that had been incorporated in a consent judgment. *Pulliam v. Thrash*, 245 N.C. 636, 639, 97 S.E. 2d 253, 256 (1957).

In 1974, the legislature amended G.S. 105-2(1) by adding language concerning a final judgment in a caveat proceeding:

> A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations . . . [w]hen the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State, *or when the transfer is made pursuant to a final judgment entered in a proceeding to caveat a will executed by any person dying seized of the property while a resident of this State.* (Emphasis added.)

We find that the legislature thereby provided for a different result than that in *Pulliam.* The amended version of G.S. 105-2(1), which controls this case, clearly provides that inheritance tax shall be imposed upon the transfer of property pursuant to a final judgment in a caveat proceeding.

Defendant contends that the consent judgment here was not a "final judgment" in the caveat proceeding, but merely a contract between the parties. We find this argument to be without merit, noting that our Supreme Court has recently held:

> Once the court adopts the agreement of the parties and sets it forth as a judgment of the court with appropriate ordering language and the signature of the court, the contractual character of the agreement is subsumed into the court ordered judgment. At that point the court and the parties are no longer dealing with a mere contract between the parties.

> The power of the court to enforce its judgment is no less and no greater for a court-adopted consent judgment than for a judgment resulting from a jury verdict in a hotly contested adversary proceeding. (Citations omitted.)

Henderson v. Henderson, 307 N.C. 401, 407-408, 298 S.E. 2d 345, 350 (1983).

We hold that a consent judgment entered in a caveat proceeding is, absent any evidence of collusion, a final judgment for purposes of G.S. 105-2(1). There being no evidence of collusion here, we find that the trial judge erred in holding that the inheritance taxes here must be computed according to the provisions of the will instead of the actual distribution of the estate pursuant to the consent judgment.

Reversed.

Judges WEBB and BECTON concur.

GATE CITY PRINTING, INC. v. GLACE-HOLDEN, INC., PHOENIX PRODUCTIONS, INC., ROBERT W. HOLDEN AND THOMAS E. GLACE

No. 8318DC389

(Filed 3 April 1984)

Rules of Civil Procedure § 55— action against multiple defendants—postponement of summary judgment against defaulting defendants

Where plaintiff sought to recover from all defendants jointly and severally for sales to the corporate defendants, entry of summary judgment against the defaulting corporate defendants should have been postponed until the conclusion of the action on the merits.

APPEAL by defendants Glace-Holden, Inc., and Phoenix Productions, Inc., from *Lowe, Judge.* Order entered 7 January 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 6 March 1984.

Benjamin D. Haines for plaintiff appellee.

Pearman, Pearman & Shumate by Richard M. Pearman, Jr., for defendant appellants.

BRASWELL, Judge.

The corporate defendants appeal from the denial of their motion in the District Court to set aside a default judgment entered against them by the Clerk of Superior Court. There is a general exception only to the entry of the District Court judgment. Consequently, our review is limited to a determination of "whether the facts found and conclusions drawn support the judgment. Rule 10(a), Rules of Appellate Procedure." *In re Rumley v. Inman*, 62 N.C. App. 324, 324, 302 S.E. 2d 657, 657 (1983); *In re Taylor*, 293 N.C. 511, 519, 238 S.E. 2d 774, 778 (1977).

On 10 November 1982, plaintiff filed a complaint in which it alleged that there was a balance due it of $4,789.68 on a contract of sale to defendant Glace-Holden, Inc., and a balance due it of $9,944.51 on a contract of sale to defendant Phoenix Productions, Inc. The complaint further alleged that the individual defendants were the sole officers, directors, and shareholders of the two corporate defendants, which engaged in business operations in the same location, and were not separate entities. Plaintiff further alleged in its complaint that the corporate charter of defendant Glace-Holden had been suspended, that the two corporations were created for the purpose of defrauding creditors, and that the corporate defendants were the alter ego of the individual defendants. Plaintiff sought to recover from all defendants, jointly and severally, the sum of $14,734.19, with interest at the rate of 1½% per month on $9,944.51 from 1 August 1982 until paid, and interest at the rate of 1½% on $4,789.68 from 1 November 1982 until paid.

Summons and a copy of the complaint were personally served upon defendants Glace-Holden, Inc., Phoenix Productions, Inc., and Thomas E. Glace on 12 November 1982. Summons and a copy of the complaint were served upon defendant Robert W. Holden on 15 November 1982.

On 17 November 1982, defendant Robert W. Holden delivered the suit papers which had been served upon him to his attorney, who had been retained for all defendants. Holden, however, neglected to inform his attorney that the other defendants had been served earlier or to produce the suit papers served upon the other defendants.

On 14 December 1982, the clerk made an entry of default and entered a default judgment against defendants Glace-Holden, Phoenix Productions, and Thomas E. Glace for the sum of $14,734.19 with interest as prayed in the complaint. Defendant Robert Holden, however, upon motion, was allowed an extension of time in which to file answer.

The next day, defendants Glace-Holden, Phoenix Productions, and Thomas Glace filed a motion pursuant to Rule 60(b)(1), (4) and (6) for relief from the default judgment. After hearing the motion, the District Court made findings of fact and conclusions of law that the corporate defendants had failed to show a meritorious defense. It accordingly refused to set aside the entry of default and the default judgment entered against the corporate defendants. The court, however, found that the individual defendant, Thomas Glace, had shown excusable neglect and a meritorious defense, and ordered the entry of default and default judgment against him to be set aside.

This case is controlled by our decision in *Rawleigh, Moses & Co. v. Furniture, Inc.*, 9 N.C. App. 640, 177 S.E. 2d 332 (1970). In that case, suit was brought against a corporate debtor and five individual guarantors alleging that the defendants were " 'both collectively, individually, jointly and severally' " liable to the plaintiff for sums due under a factoring agreement. *Id.* at 641, 177 S.E. 2d at 332. An entry of default and a default judgment were entered by the clerk against one of the individual defendants for the full amount of the prayer for relief. Upon motion of the defaulting defendant, the default judgment was set aside based upon a showing of excusable neglect and a meritorious defense. Treating the appeal as a writ of certiorari, this Court held that although the trial court erred in setting aside the default judgment on the ground of excusable neglect, the trial court's setting aside of the default judgment was justified on other grounds. Following the federal practice, we held that when there are multiple defendants, and joint, or joint and several liability is alleged, the correct procedure is to postpone the entry of judgment against the defaulting defendant until the conclusion of the action on the merits.

Accordingly, we hold that the judgment of the District Court upholding the entry of default against the two corporate defend-

ants was proper and continues to stand. The corporate defendants are not entitled to answer or appear in the lawsuit. However, it was error for the District Court to refuse to set aside the default judgment against the two corporate defendants. Although the suit was for a sum certain, and ordinarily the granting by the Clerk of the default judgment after entry of default would have been the next step, here the final judgment of default must await the termination of the lawsuit against the two individual defendants because in this case the whole of the pleadings and theory of relief is joint and several liability. The burden of proof will still be upon the plaintiff at trial to establish the liability of all defendants, including the defaulting defendants, because the plaintiff has asserted as its theory of recovery the underlying concept of joint and several liability. *See Harris v. Carter*, 33 N.C. App. 179, 234 S.E. 2d 472 (1977); W. Shuford, N.C. Civil Practice and Procedure § 55-4 (2d ed. 1981). Following the conclusion of the trial against the two individual defendants the trial court shall also enter an appropriate default judgment against the two corporate defendants, the only appellants.

The default judgment only against the two corporate defendants is vacated, and this cause is remanded for further proceedings consistent with this opinion. The order of the District Court is

Vacated and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JOHN RICHARD MITCHELL

No. 8321SC975

(Filed 3 April 1984)

Criminal Law § 138— new sentencing hearing—fewer aggravating factors—same sentence as first hearing—no error

There was no merit to defendant's contention that it was error for a trial judge to impose the identical length of sentence on resentencing where at the first sentencing hearing the trial court found six aggravating factors and two mitigating factors while at the second hearing two aggravating factors and

two mitigating factors were found since it is the proper function of the trial judge to determine how to weigh and balance any finding of aggravating and mitigating circumstances in a sentencing hearing, and the evidence supported the findings in this case.

APPEAL by defendant from *Albright, Judge.* Judgment entered 9 June 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 March 1984.

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

Gordon H. Brown for defendant appellant.

BRASWELL, Judge.

This is the second appeal of the same case. *See State v. Mitchell,* 62 N.C. App. 21, 302 S.E. 2d 265 (1983). In the first appeal we found no error in defendant's trial but remanded for a new sentencing hearing because of errors in the finding of certain aggravating factors. The new hearing on sentencing took place on 9 June 1983 before the same Superior Court Judge.

Mitchell was convicted and sentenced for the felony of involuntary manslaughter, which carries a statutory maximum term of 10 years and a presumptive term of 3 years. G.S. 14-18, Class H felony. The active time portion of the new sentence was 7 years, which was the identical length of sentence imposed at the first hearing on 23 April 1982.

At the first hearing six aggravating factors and two mitigating factors were found. At the second hearing two aggravating and two mitigating factors were found. On each occasion the trial judge found that the factors in aggravation outweighed factors in mitigation and that all factors found were proven by a preponderance of the evidence.

This appeal challenges the balancing process of factors found in aggravation and mitigation. In essence, the defendant argues that it is error for a trial judge to impose the identical length of sentence on resentencing. In principle, the defendant argues that with the evidence being basically the same for both hearings, and with a reduction in the number of aggravating factors from six to two, he should automatically be entitled to some unspecified

reduction from the original 7-year sentence. We reject this line of argument.

For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence. *See State v. Watson*, 65 N.C. App. 411, 413, 309 S.E. 2d 3, 4 (1983); *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978). On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing. However, in the process of weighing and balancing the factors found on rehearing the judge cannot impose a sentence greater than the original sentence. G.S. 15A-1335. This statute (passed in 1977) overrides the ability to enhance a sentence on rehearing that *Lewis, supra*, suggests could be done. As the official commentary to this statute indicates, North Carolina has changed that part of the case of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), which would have allowed a more severe sentence for intervening factors. In simple words, on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence, regardless of whether the new aggravating factors occurred before or after the date of the original sentence. It is possible for a judge to find six aggravating factors proven by the evidence and yet in the balancing process attach great weight to only one out of the six factors and insignificant weight to the remaining five factors. The law does not require the judge to specify in his sentence which certain factor he considers to be the most significant or to list the factors in order of importance. The judge is only required to find that the specific factors he lists are proven by a preponderance of the evidence. G.S. 15A-1340.4(a) and (b). As has been stated before, one aggravating factor may outweigh two or more mitigating factors (and vice versa) in the process of balancing the weight to be given any factor, and in determining the sentence to be imposed. *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E. 2d 689, 697 (1983); *State v. Baucom*, --- N.C. App. ---, 311 S.E. 2d 73 (1984). As made plain in *Baucom, Id.* at ---, 311 S.E. 2d at 75, " 'The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. [Citations omitted.]' "

In the appeal before us the judge found these factors in aggravation:

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. The court considered no prior conviction wherein the defendant was not represented by counsel. In all prior convictions considered the defendant was in fact represented by counsel.

[16] a. The defendant has a long history of habitual and presistent [*sic*] disregard of the motor vehicle laws and rules of the road resulting in at least 10 previous license suspensions or revocations.

The mitigating factors found are:

13. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

[15] a. The defendant has a good employment record.

These two aggravating factors were among those found at the first hearing. In the first appeal these same factors were analyzed and found to be without error. Thus, under the doctrine of the law of the case the earlier ruling of approval is binding upon us. However, defendant asserts that there is no evidence to support finding 16.a. that he habitually and persistently disregarded the motor vehicle laws and rules of the road. To this argument we point out that the record on appeal contains the defendant's Drivers License Record Check of the North Carolina Division of Motor Vehicles, which shows a specific conviction date for 33 motor vehicle violations, including two license revocations and eight license suspensions. All of these 33 matters are prior to the occurrence of the offenses now in question. This was more than ample evidence upon which the court could find the existence of the non-statutory aggravating factor by a preponderance of the evidence. As we look further into the record we note these remarks by defense counsel:

> He's got a big failing. That was regarding alcohol. No question about it. If you'll look at his record, he's got a traffic record, a lot of which was around the use of alcohol. No ex-

cuse for anything, no mitigation for anything; but he's not what you might call a hardened criminal.

We hold that it is a proper function of the trial judge to determine how to weigh and balance any finding of aggravating and mitigating circumstances in a sentencing hearing, during the original and on any resentencing. The evidence supports the findings in this case. The trial judge did not abuse his discretion, but exercised it and recorded for appellate review the factors so found. For an acknowledgment by our Supreme Court that all discretion in sentencing has not been removed by the Fair Sentencing Act from the trial judge, *see State v. Ahearn, supra,* at 596-97, 300 S.E. 2d at 697.

Affirmed.

Judges ARNOLD and WELLS concur.

FRANK ALLEN MYERS v. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 8310IC455

(Filed 3 April 1984)

Interest § 1; State § 9— award under Tort Claims Act—no entitlement to interest

A claimant was not entitled to interest on an award under the State Tort Claims Act.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 11 February 1983. Heard in the Court of Appeals 9 March 1984.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the Department of Crime Control and Public Safety.

Harris & Pressly, by Edwin A. Pressly, for plaintiff appellant.

BECTON, Judge.

On 30 November 1981, a Deputy Commissioner of the North Carolina Industrial Commission (Commission) awarded the claimant, Frank Allen Myers, $60,000 in his action against the Department of Crime Control and Public Safety (Department) under the State Tort Claims Act, N.C. Gen. Stat. § 143-291 (1983). The Department appealed to the Commission, which, on 1 October 1982, affirmed the award. On 3 November 1982, the Department paid Myers $60,000, an amount representing principal only. Myers then filed a motion for post-judgment interest on the award pending appeal. The Commission, in its order of 11 February 1983, denied Myers interest on his judgment for both the approximate one year's time that passed from the date of the Deputy Commissioner's award to the date the Commission affirmed the award, and for the approximate one month's time that passed thereafter before the Department paid the award. From that Order, Myers appeals.

The sole issue on appeal is whether Myers is entitled to interest on an award of damages under the State Tort Claims Act. Having considered the relevant statutes, case law, and policy arguments, we hold that Myers is not entitled to interest on his award.

In 1951, North Carolina, acting through its General Assembly, waived its sovereign immunity in cases in which injury and damage resulted from the negligence of its employees by enacting 1951 N.C. Sess. Laws ch. 1059, sec. 1 (codified as amended at N.C. Gen. Stat. § 143-291 (1983)). As a consequence, Myers contends that state tort claims actions should be treated no differently than other suits up to the $100,000 ceiling imposed by the statute.

Myers' argument has tremendous appeal, especially since (a) the amendments of N.C. Gen. Stat. § 24-5 (Supp. 1983)[1], N.C. Gen.

1. N.C. Gen. Stat. § 24-5 (Supp. 1983) reads:

The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion

Stat. § 24-7 (Supp. 1983)[2], and the enactment of N.C. Gen. Stat. § 97-86.2 (Supp. 1983)[3] show a definite legislative intent to broaden a claimant's right to recover post-judgment interest, and (b) the party having to pay the award may abuse the process by making frivolous appeals when the investment return on the award exceeds the cost of litigating appeals. Indeed, the legislature may be persuaded, by such an argument, to authorize the accrual of interest on damage awards under the State Tort Claims Act. The legislature has not done so, however, and we can provide Myers no relief. We follow the reasoning of *Yancey v. Highway & Public Works Comm'n*, 222 N.C. 106, 22 S.E. 2d 256 (1942), a condemnation case, in which our Supreme Court held that post-judgment interest was not collectible against the State and "may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Id.* at 109, 22 S.E. 2d at 259.

Because the State Tort Claims Act is in derogation of sovereign immunity, and should, therefore, be strictly construed as written, there must be a specific statutory provision authorizing the accrual of interest on damage awards under the Act. And

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of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

2. N.C. Gen. Stat. § 24-7 (Supp. 1983) reads:

Except with respect to compensatory damages in actions other than contract as provided in G.S. 24-5, when the judgment is for the recovery of money, interest from the time of the verdict or report until the judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

3. N.C. Gen. Stat. § 97-86.2 (Supp. 1983) reads:

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.

although G.S. § 24-5 and G.S. § 24-7 refer to post-judgment interest, the General Assembly nevertheless recently enacted G.S. § 97-86.2 allowing interest on workers' compensation claims to be assessed on awards at the legal rate. Thus, in our view, the same type of statutory enactment would be necessary before any interest could accrue to a tort claims award.

For the above reasons, the Order of the Commission is

Affirmed.

Judges WEBB and EAGLES concur.

ZIMMERMAN'S DEPARTMENT STORE, INC. v. SHIPPER'S FREIGHT LINES, INC. AND BOB BARE, INDIVIDUALLY

No. 8319DC369

(Filed 3 April 1984)

Rules of Civil Procedure § 56.1— summary judgment motion—untimely—ruling improper

Where the recitals of the trial court in its order granting summary judgment to defendant indicated that the motion for summary judgment was made orally, "in open court," immediately following the final pre-trial conference, and where the record clearly indicated that plaintiff had identified eight persons as potential witnesses to be offered at trial, and that plaintiff contended there were six contested issues which should be submitted to the jury, the trial judge erred in entering summary judgment for the defendant without affording plaintiff the opportunity of the mandatory ten day notice requirement in G.S. 1A-1, Rule 56(c).

APPEAL by plaintiff from *Montgomery, Judge.* Judgment entered 2 November 1982 in District Court, ROWAN County. Heard in the Court of Appeals 6 March 1984.

This is a civil action wherein plaintiff seeks to recover actual and punitive damages arising out of defendant Shipper's Freight Lines' alleged failure to ship certain merchandise delivered to it by plaintiff and for defendant Bob Bare's alleged wrongful conversion of a portion of the same merchandise. The record before us contains the following:

1. Complaint

2. Answer

3. Interrogatories from Defendants to Plaintiff, and Plaintiff's Answers

4. Interrogatories from Plaintiff to Defendants, and Defendants' Answers

5. Order on Final Pre-Trial Conference

6. Summary Judgment

7. Attachments to Record on Appeal, consisting of Eight Documents.

From summary judgment for defendants, plaintiff appealed.

Ketner & Rankin, by David B. Post, for plaintiff, appellant.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by Richard R. Reamer, for defendants, appellees.

HEDRICK, Judge.

We first note plaintiff's failure to comply with Rule 28, North Carolina Rules of Appellate Procedure, with respect to preparation of its brief. We also note that the trial judge made detailed findings of fact, which are unnecessary and often inappropriate in ruling on a motion for summary judgment. The recitals of the trial court in its order indicate that the motion for summary judgment was made orally, "in open court," immediately following the final pre-trial conference. Indeed, the "Order on Final Pre-Trial Conference" states:

> 10. There are no pending motions, and neither party desires further amendments to the pleadings except amendment alleging set-off for amount paid; defendants' Motion to Dismiss punitive damages or force election; defendants' Motion to Strike; defendants' Motions about insurance evidence.

N.C. Gen. Stat. Sec. 1A-1, Rule 56(c) in pertinent part provides: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Failure to comply with

this mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule. *See, e.g., Ketner v. Rouzer,* 11 N.C. App. 483, 488-89, 182 S.E. 2d 21, 25 (1971), where this Court said: "It is possible . . . that if plaintiff is given the opportunity, which proper notice of the motion for summary judgment would provide, he might by affidavit develop more fully the facts as to what actually occurred. . . ."

While the notice provision contained in Rule 56 may be waived by plaintiff, *Raintree Corp. v. Rowe,* 38 N.C. App. 664, 248 S.E. 2d 904 (1978), we do not believe such waiver may be found on the facts of this case. The record clearly indicates that plaintiff had identified eight persons as potential witnesses to be offered at trial, and that plaintiff contended there were six contested issues which should be submitted to the jury. While plaintiff on 1 November 1982 had announced its readiness to proceed to trial, such readiness is in no way equivalent to readiness to respond to a motion for summary judgment. Thus the trial judge erred in entering summary judgment for the defendants.

For the reason stated, summary judgment for defendants i 'acated and the cause remanded to District Court for further pr eedings.

Vacated and remanded.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. RANDY BRYAN

No. 833SC752

(Filed 3 April 1984)

1. Criminal Law § 138— pecuniary gain aggravating factor

The trial court erred in finding as an aggravating factor that an offense of breaking or entering was committed for hire or pecuniary gain where there was no evidence that defendant was hired or paid to commit the crime.

2. Criminal Law § 142.3— work release—restitution as condition—supporting evidence

The evidence supported the trial court's recommendation that, as a condition of obtaining work release, defendant be required to make restitution of $400 to one of his victims.

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgment entered 23 February 1983 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 January 1984.

Attorney General Edmisten, by Associate Attorney General Daniel C. Higgins, for the State.

William Farrior Ward, III for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal calls into question only the correctness of the sentence imposed and the amount of restitution ordered by the court below.

[1] Defendant pleaded guilty to two counts of felonious breaking or entering and two counts of felonious larceny. This was done pursuant to a plea arrangement, in exchange for which the State dismissed other charges against him and consolidated the four remaining charges for judgment. Under the law as it was before G.S. 15A-1340.4(a) was amended effective October 1, 1983, the four consolidated charges, all Class H felonies with a presumptive term of three years and a maximum term of ten years, had to be treated as one offense for sentencing purposes. *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858 (1967). Before sentencing the defendant to a term of eight years, the court found two factors in aggravation, one in mitigation, and that the aggravating factors outweighed the mitigating factor. One of the factors in aggravation was that the offense of breaking or entering was committed for hire or pecuniary gain. Our Supreme Court has held that this factor can be properly found only when the evidence shows "that defendant was hired or paid to commit the crime." *State v. Abdullah,* 309 N.C. 63, 77, 306 S.E. 2d 100, 108 (1983). Since there was no such evidence in the present case, the finding was erroneous and defendant must be re-sentenced.

[2] But the defendant's other contention that the court erred in requiring restitution for one of the victims of his lawless acts in

the amount of $400 is without merit. The victim's coin-operated machines were out of operation for four months and the court found that that was the net amount lost as a consequence. This finding was based on the victim's estimate that the net business loss for the period involved was "four or five hundred dollars." Though the basis for the estimate was not fully stated, the defendant neither objected to this evidence nor attempted to diminish its effect by cross-examination. Under the circumstances, therefore, its weight was for the court, and it is sufficient to support the order entered.

Remanded for re-sentencing.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. ELLIOTT HARRISON, JR.

No. 8310SC977

(Filed 3 April 1984)

Criminal Law § 18.4— trial de novo in superior court—publishing arrest warrant to jury indicating defendant found guilty for same offense in district court—error

On trial *de novo* in superior court for assault on a law enforcement officer, the trial court erred in allowing the State to admit into evidence and to publish to the jury the police officer's copy of the arrest warrant which charged defendant with assault on a law enforcement officer since this copy of the arrest warrant carried the officer's handwritten notation that in District Court the defendant had been found guilty of the same offense for which he was being tried.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 9 June 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 14 March 1984.

Defendant was found guilty in District Court of assault on a law enforcement officer. He appealed to Superior Court where on trial *de novo* he was found guilty and sentenced to six months in prison. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Sueanna P. Peeler, for the State.

Currie, Simmons, Pugh & Joyner, by Irving Joyner, for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the fact that the State was allowed to admit into evidence and to publish to the jury the police officer's copy of the arrest warrant which charged defendant with assault on a law enforcement officer. Defendant contends that he was prejudiced because this copy of the arrest warrant carried the officer's handwritten notation that in District Court the defendant had been found guilty of the same offense for which he was being tried. We agree.

When a defendant takes an appeal of right to Superior Court, "it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose." *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E. 2d 897, --- (1970). Here, the officer's copy of the arrest warrant that was admitted into evidence and published to the jury carried the clear notation: "Plead Not Guilty 11/5/82 Found Guilty—Notice of Appeal." This notation placed before the jury the information that this case had been previously adjudicated and that defendant had entered a not guilty plea and had been found guilty of the offense for which he was being tried. To inform the jury that another court has already tried the case and found defendant guilty is clearly prejudicial error. We hold that the State may not make this information available to the jury. We therefore remand for a new trial.

Because we remand for a new trial, it is unnecessary to discuss defendant's other assignments of error.

New trial.

Judges WEBB and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 APRIL 1984

ACKERMAN v. ACKERMAN No. 8326DC156	Mecklenburg (81CVD7274)	No Error
FERGUSON v. LOCKLEAR No. 8318SC167	Guilford (80CVS3286)	Affirmed
HUDNELL v. GWYN No. 8321SC458	Forsyth (81CVS6630)	Affirmed
IN RE BUFFALOE No. 8322DC366	Davidson (80J162)	Affirmed
KENT v. WASHINGTON CO. HOSPITAL No. 832SC403	Martin (82CVS310)	Reversed
MILLS v. BARBER-SCOTIA COLLEGE No. 8319SC374	Cabarrus (80CVS1148)	Affirmed
STATE v. MOSS No. 834SC927	Duplin (83CRS1762) (83CRS1875)	No Error in Trial Remanded for Resentencing
STATE v. OXENDINE No. 8316SC902	Robeson (80CRS14691) (80CRS16143) (80CRS16836) (80CRS19834) (80CRS21136) (80CRS23419) (80CRS24202) (81CRS5) (81CRS141)	Affirmed
STATE v. PAISLEY No. 8316SC742	Robeson (82CRS15127)	No Error in Trial Remanded for Resentencing
STATE v. RANSOM No. 8316SC400	Robeson (82CRS1966) (82CRS1967)	No Error
STATE v. USHER No. 834SC1020	Duplin (83CRS2367)	Appeal Dismissed
STATE v. WILSON No. 8310SC1005	Wake (82CRS45870)	No Error

Glenn v. Wagner

RICHARD H. GLENN, EARL C. HOOD, HELEN HOOD, CYNTHIA HOOD, TEAKA HOOD, ROBERT HOOD, ERICA HOOD, CHAUNCEY HOOD BY HIS G/A/L AND LEKEITHIA HOOD BY HER G/A/L v. SMILIE WAGNER D/B/A SALEM MANOR MOTEL, B-BOM, INC., AND D & S ENTERPRISES, INC.

No. 8221DC1206

(Filed 3 April 1984)

1. **Corporations § 1.1— instructions on noncompliance with corporate formalities and the "instrumentality" doctrine improper**

In an action in which plaintiffs sought recovery against defendant B-Bom, Inc. on the theory that D & S Enterprises, Inc. was operated as a mere instrumentality of B-Bom, Inc. to shield it from liability, and that the corporate entity of D & S Enterprises, Inc. should be disregarded to allow plaintiffs to recover directly from B-Bom, Inc. for damages when defendants trespassed upon their premises by padlocking them out of their apartments, because of the plaintiffs' failure to join David Wagner, the dominant shareholder and president of both corporations, and because of B-Bom's lack of direct ownership in D & S, it was error to include the alternative theory of domination over the corporation by an individual shareholder in the midst of an instruction on the "instrumentality" rule as it applies to parent-subsidiaries or affiliated corporations. Furthermore, the trial judge failed to adequately delineate the relationship holding between B-Bom and D & S so that the jury could correctly apply the instructions given to the evidence.

2. **Corporations § 1.1— "mere instrumentality" corporate law rule improperly instructed upon**

In an action in which plaintiffs sought to recover against defendant B-Bom, Inc. on the theory that D & S Enterprises, Inc. was operated as a mere instrumentality of B-Bom, Inc. to shield it from liability, and that the corporate entity of D & S Enterprises, Inc. should be disregarded to allow plaintiffs to recover directly from B-Bom, Inc. for their damages when defendant Smilie Wagner padlocked them out of their apartments, although the evidence presented was sufficient to support B-Bom's liability because there was evidence of a "complete identity of interest between the two corporations," it was not sufficient to support that conclusion under the instrumentality rule, and the trial judge erred in so instructing. Despite the underlying affiliation between B-Bom and D & S by virtue of common ownership and management, the ability to control D & S arising therefrom was not used by B-Bom to perpetrate the act causing plaintiffs' injuries. The evidence showed that David Wagner, the dominant shareholder and president of both corporations, left general policy and control of D & S to Smilie Wagner. Moreover, the specific policies and practices of padlocking the plaintiffs out of their apartment, storing their furniture and turning back their mail were set and effectuated by Smilie Wagner and his employees and not by either David Wagner or B-Bom itself.

3. Corporations § 1.1— failure to instruct on excessive fragmentation of a single enterprise into separate corporations and inadequate capitalization—error

In an action in which plaintiffs sought recovery against B-Bom, Inc. on the theory that D & S Enterprises, Inc. was operated as a mere instrumentality of B-Bom, Inc. to shield it from liability and that the corporate entity of D & S Enterprises, Inc. should be disregarded to allow plaintiffs to recover directly from B-Bom, Inc. for their damages when defendant Smilie Wagner padlocked them out of their apartments, the trial court erroneously failed to instruct the jury on both the doctrines of "excessive fragmentation of a single enterprise into separate corporations" and inadequate capitalization. Plaintiff's evidence was sufficient to establish the four factors which courts have recognized as justifying recovery from an affiliated corporation: (1) David Wagner was a common officer, director and shareholder with ownership of sufficient stock to give him actual working control over both B-Bom and D & S; (2) unified administrative control was thereby maintained by David Wagner over two corporations which essentially shared one asset and his business functions were supplementary; (3) the plaintiffs are involuntary tort creditors; and (4) the debtor corporation, D & S, against which the claim primarily lies, is insolvent. Under the single enterprise theory, the fact that B-Bom through its agent David Wagner *failed to exercise control* over Smilie Wagner's tortious practices would properly be considered a "liability imposing factor," rather than a legal escape route by which B-Bom could evade the responsibilities of rental property ownership. Once the corporate shell of D & S is disregarded, Smilie Wagner would properly be considered to be an agent or employee of B-Bom itself and B-Bom's liability for Smilie's acts would flow from traditional principles of agency or respondeat superior. Furthermore, although the evidence as to D & S's financial structure was scanty, it would appear that D & S had been inadequately capitalized from the time of its inception until its demise. The evidence presented tended to show that a single business entity had been subdivided into an ownership corporation and an operating corporation, with the latter having as its primary asset the lease of a property which was meant to produce income almost exclusively for the owner corporation, and very little else. This structure appeared to leave the creditors of the operating company without proper safeguards for the obligations arising out of the operation of the rental property, and therefore would justify disregarding the separate entity of the debtor corporation.

APPEAL by defendant from *Tash, Judge.* Judgment entered 2 September 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 17 October 1983.

The several plaintiffs initiated this action against the defendants, Smilie T. Wagner and B-Bom, Inc., alleging that while they were tenants upon the premises of the Salem Manor Motel, the defendants had trespassed upon the plaintiff-tenants' premises by padlocking them out of their apartments; had breached the tenants' implied covenants of quiet enjoyment; and had wrongfully

converted their personal property by removing and/or disposing of it. The plaintiffs initially named the apartment manager, Smilie Wagner and the property owner, B-Bom, Inc., as the party defendants. Plaintiffs later amended their complaint to allege that Smilie Wagner was an agent of B-Bom, Inc., and that through him, B-Bom acted to injure the plaintiffs.

Defendants filed an answer and counterclaims in May, 1980. In their answer, defendants denied, *inter alia*, that Smilie Wagner is an agent for B-Bom, Inc. Plaintiffs filed a reply to the counterclaims on 29 May 1980. Apparently an order was entered on 16 September 1980 joining D & S Enterprises, Inc. as a party defendant. It was later stipulated by the parties that Smilie Wagner did act as an employee and agent of D & S Enterprises, Inc. in managing and renting apartments at the location known as Salem Manor Motel.

A trial was held and both parties presented evidence. Plaintiffs sought recovery against defendant B-Bom, Inc. on the theory that D & S Enterprises, Inc. was operated as a mere instrumentality of B-Bom, Inc. to shield it from liability, and that the corporate entity of D & S Enterprises, Inc. should be disregarded to allow plaintiffs to recover directly from B-Bom, Inc. for their damages. Defendant B-Bom, Inc.'s motions for a directed verdict in its favor on this issue were denied. Plaintiffs' motion for a directed verdict against defendants on the issue of conversion was allowed.

The jury returned a verdict for plaintiffs on all of the issues submitted. Judgment was entered thereon 2 September 1981, awarding plaintiffs compensatory damages of $9,007.00. Plaintiffs were also awarded punitive damages. Damages of $15.60 were awarded to defendants by way of counterclaim. Defendant B-Bom, Inc.'s motion for judgment n.o.v. was denied on 17 September 1981. On that same date, the court entered a supplemental judgment, concluding that the defendants' actions constituted unfair trade practices in violation of G.S. 75-1.1 and ordering that the award of compensatory damages be trebled. Defendant B-Bom, Inc. appeals.

Brenda Wagner-Sumner, for defendant appellant, B-Bom, Inc.

Legal Aid Society of Northwest North Carolina, Inc., by Ellen W. Gerber and Gwyneth B. Davis, for plaintiff appellees.

JOHNSON, Judge.

This appeal primarily involves the question of whether the trial court properly denied defendant B-Bom, Inc.'s (hereafter "B-Bom") motion for a directed verdict on the issue of whether the corporate entity of D & S Enterprises, Inc. (hereafter "D & S"), should be disregarded. Defendant's other arguments relate primarily to the form of the trial court's instructions to the jury on the eleven issues presented. No appeal was taken with regard to the verdict of the jury that trespass, breach of quiet enjoyment and conversion were committed against the plaintiffs as tenants at Salem Manor Motel when they were padlocked out of their apartments and their personal property was disposed of. Nor have defendants appealed from the award of compensatory and punitive damages, or from the conclusion that unfair trade practices had been committed.

I

The events forming the factual background of this action occurred between August, 1979 and January, 1980. They may be briefly summarized as follows: The owner of the Salem Manor Motel at all relevant times was the defendant corporation B-Bom. Salem Manor is located at 2500 Old Greensboro Road in Winston-Salem, North Carolina. Defendant corporation D & S had leased the subject property from B-Bom and operated the motel as an apartment/room rental business and ran the small general store located on the premises. Under the terms of the lease, the bulk of the Salem Manor rents and profits went to B-Bom in the form of rental payments. Defendant Smilie Wagner managed the business on a day-to-day basis, with the advice and consultation of his cousin David Wagner, a 50% stockholder and president of both defendant corporations.

Plaintiff Richard Glenn rented an apartment at Salem Manor Motel from D & S during the fall of 1979. When Glenn fell behind in his rent, his apartment was padlocked by a personal employee of Smilie Wagner's, Mr. Walter Robinson. Sometime after the padlocking of the apartment, Smilie Wagner directed that the personal property found in Glenn's room be moved to a storage room and the room formerly occupied by Glenn cleaned for new occupancy. Some items belonging to Glenn were discarded. Glenn's attempts to arrange for the return of his apartment and

possessions were refused. Ultimately, with the aid of his attorney, he was permitted to search through the storeroom, and he recovered some portion of his property in damaged condition.

The plaintiff Hood family also rented an apartment at Salem Manor Motel during the fall of 1979. They were asked to vacate the premises, although they were not behind in their rent. When they did not do so voluntarily, their apartment was padlocked. Four members of the plaintiff family, including two infants, were inside the apartment when one of Smilie Wagner's employees at Salem Manor, Ms. Loretta Mack, demanded that they leave so that she could padlock the door. Later that night, the padlock was broken off by plaintiff Earl Hood and the family returned to the apartment and remained there until they moved. While plaintiffs were still residing at Salem Manor, Smilie Wagner took the family's mail and returned it to the post office, saying that the mail didn't belong there. Despite their demands, Smilie Wagner would not return their mail.

II

On 17 October 1980, David Wagner, an officer in both of the defendant corporations, was deposed by the plaintiffs' attorneys. Selected portions of this deposition were properly introduced into evidence as part of plaintiffs' case in chief pursuant to Rule 32(a)(3) of the Rules of Civil Procedure. Defendants introduced testimony by David Wagner and Smilie Wagner concerning the relationship between B-Bom and D & S.

The evidence presented at trial tended to show that B-Bom, Inc.[1] was incorporated in 1973, with David Wagner as one of the original incorporators and member of the original Board of Directors. B-Bom was formed to acquire, lease and manage property, both real and personal. B-Bom owns several pieces of rental property, including Salem Manor. David Wagner and George Hill each own 50% of the stock of B-Bom; they are the only shareholders and selected themselves to be officers of B-Bom. David Wagner runs the company as its president and also acts as its registered agent, keeping the corporate seal in his law office. His law office also serves as the corporate office of both B-Bom and D & S.

1. In his deposition, David Wagner testified that "B-Bom" stands for "Black Brothers on the Move."

At trial, Wagner testified that B-Bom purchased the Salem Manor property at a foreclosure sale in 1978 and leased it back to its original owners. Under the lease, the former owners operated the apartment rental business and paid B-Bom a monthly rental out of the proceeds. After that lease was terminated, D & S Enterprises, Inc. was organized to be the lessee of Salem Manor, and to operate the rental business and store located there. However, David Wagner also testified that D & S was "set up mainly to benefit Smilie and as well to help him make some additional funds." The Articles of Incorporation state that the objects of D & S are to lease, acquire and manage rental properties.

"D & S" stands for David and Smilie, that is David Wagner and Smilie Wagner. David Wagner was one of the incorporators and handled all the details of the incorporation process. However, less than 18 months later (at the time of his deposition) David Wagner had no recollection of the occurrence of any of the salient events in the corporate life of D & S, such as whether there was an organizational meeting, when the by-laws were adopted, who was present at the time of their adoption, who was on the initial Board of Directors, nor how many board meetings had been held. He could recall no formal shareholder meetings or annual meetings, but stated that, "Smilie and I met regularly dealing with business matters of that company."

The Articles of Incorporation show that David Wagner was the sole subscribing shareholder in D & S; subscribing 10 shares at a par value of $100.00 per share. David Wagner testified that as of 1980, he and Smilie each owned 50% of the company, however, he could not recall how many shares had been issued. There was no evidence showing whether and to what extent the shares had been paid in by either David or Smilie. David Wagner never received any income or profits from D & S. Smilie Wagner testified that his salary from D & S was lower in the beginning so that they could get the Salem Manor operation "off and running."

At the time D & S was incorporated, and during the period in question, Smilie Wagner was also employed as a property manager by Urban Housing, Inc., which is a corporation solely owned by David Wagner and located on the Salem Manor premises. David and Smilie were the officers of D & S; David Wagner "thought" that he was president and treasurer, and therefore,

that Smilie "must be" vice-president and secretary. D & S had only one business and that was the operation of the rental business and store at Salem Manor. D & S derived its only funds from the rents and the store. At the time of this action, its only assets were some items of personal property.

The only formal instrument executed on behalf of D & S was the lease agreement with B-Bom. David Wagner drafted the lease and signed it both as president of B-Bom and as president of D & S on 1 January 1978. However, D & S was not incorporated until 8 May 1978. Pursuant to the lease, D & S was to pay a monthly rent to B-Bom for Salem Manor from the rentals collected there by D & S. B-Bom received the rent checks through David Wagner and, in part, the proceeds were used to meet the costs B-Bom incurred as owner of Salem Manor. As shareholder of B-Bom, David Wagner received the benefit of one-half of the residue. B-Bom's other shareholder, George Hill, was not involved with D & S itself and was concerned only when D & S defaulted on the lease for a time. B-Bom established the amount of rent to be charged for each of the rental units at Salem Manor.

In all other respects, Smilie Wagner controlled the finances of D & S. He acted as bookkeeper, hired employees, set his own salary and gave monthly accounting statements to David Wagner to review. David testified that he did not place any particular restrictions over Smilie's ability to take funds out of D & S and that Smilie "had a lot of latitude in the operation of that company [D & S], and I did not question too much what he did." David Wagner also testified that he never dealt directly with any of the tenants at Salem Manor and had no involvement with collecting their rents. He characterized his involvement in the apartment rental business as "more of an advisory nature because that business was operated exclusively by Smilie . . . as a general rule he operated the business pretty much as he saw fit." David also testified that he and Smilie met often and did discuss D & S activities, as well as other business David and Smilie had in common, but that he "did not direct or attempt to direct or control the activities of D & S that much."

Both David and Smilie testified that Smilie operated the rental business on the day-to-day basis. Smilie testified that David "didn't set policies per se," but rather gave advice about the

business generally. Smilie testified that he "set the policies" of the Salem Manor management. As to the policy of padlocking, Smilie stated that it had been done by the previous managers and "we just carried it over the new corporation—which is D & S."

In his deposition, David Wagner had testified that with regard to the specific padlocking of the Glenn apartment in the late fall of 1979, it was first brought to his attention after the fact by Glenn's attorney and he then discussed it with Smilie and "suggested it probably wasn't the way he ought to do it." When asked about the Hood case, David Wagner stated that Smilie "has told me he did it [padlocking] with some clients."

By October, 1980, D & S was no longer operating the apartment rental business. The following exchange took place at the Wagner deposition regarding the dissolution of the lease between B-Bom and D & S:

Q. And you said the lease was dissolved. Was there any formality taken to dissolve the lease?

A. When you say formality, I don't know what—

Q. Well, was a letter written to B-Bom informing them that the lease would no longer be in effect?

A. There were no letters written.

Q. So, on or about July 1, 1980, the lease was not renewed by simply not paying rent.

A. That wasn't what I said. I said on or about July 1, Smilie went into business for himself and last week [October, 1980] is when D & S went out of the business of operating Salem Manor.

Q. By going out of business, you mean they simply failed to make a payment to B-Bom?

A. No. *They simply informed B-Bom,* I guess you could say would be the way to do it, and that's kind of difficult to do, *but that's like me informing me, but D & S essentially told B-Bom last week that it's no longer in the business of operating Salem Manor, and B-Bom said, fine.*

Q. *You told yourself, fine?*

A. *That's right.*

David Wagner also testified that after Smilie Wagner left Salem Manor, the store that D & S ran closed down, "but the apartment rentals were still there and, you know someone had to collect the rent, so B-Bom ended up collecting rent after that point [July, 1980]. However, by October, 1980, David Wagner had given Frederick Hunt, an employee of Wagner's other corporation located on the Salem Manor premises, verbal authorization to begin collecting rents from Salem Manor tenants; such rents to be deposited in B-Bom's bank account. D & S as a corporation was never formally dissolved. It is essentially without any assets to satisfy the judgment in this action, inasmuch as the lease with B-Bom constituted the prime asset of D & S.

The parties had stipulated that, at all relevant times, Smilie Wagner was acting as an agent of the defendant, D & S Enterprises, and the trial court so instructed the jury in its charge. However, the court then continued, stating that the parties had also stipulated that Smilie Wagner was not, at any relevant time, acting as an agent of the defendant, B-Bom. The record reveals that no such stipulation was in fact agreed to by the plaintiffs. Rather, it was plaintiffs' theory at trial that Smilie Wagner should be considered the agent of B-Bom because his "employer," D & S was the "alter ego" of B-Bom or the "mere instrumentality" through which B-Bom operated the Salem Manor Motel and injured the plaintiffs. No objection, however, was made by the plaintiffs to this misstatement of the stipulations. Over defendant B-Bom's objection, the trial court submitted ten issues to the jury regarding liability and damages as to all defendants,[2] and one issue concerning the relationship between B-Bom and D & S. Previously, the trial court had indicated to the parties that a separate issue as to whether Smilie Wagner acted as agent for B-Bom would not be submitted to the jury because, in the court's

2. Defendant correctly contends that the issue as to B-Bom's relationship to plaintiffs and/or the other defendants should have been submitted to the jury prior to the issues relating to the possibility of wrongdoing or liability by or against all "defendants," so that the jury would not have been asked to decide "whether or not there was a wrong" prior to deciding who had committed those wrongs. However, we find no prejudice to defendant from the form of issues one through ten.

opinion, plaintiffs' issue number eleven "takes care of B-Bom." Issue number eleven, as submitted to the jury over defendant's objection, is as follows:

> *Did B-Bom, Incorporated, so dominate and control D & S Enterprises, Incorporated that the corporate entity should be disregarded?* The burden of proof on this issue is on the plaintiffs. This means that they must satisfy you by the greater weight of the evidence that D & S Enterprises had no separate role of its own. Under North Carolina law, a corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances the separate identities of parent and subsidiary or affiliated corporations may be disregarded.
>
> The corporate entity also may be disregarded if it is totally dominated by an individual shareholder. When a corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominate shareholder and a shield for its activities in violation of the declared public policy or statute of the state, the corporate entity will be disregarded and the corporation and the shareholders treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.
>
> The control must be such complete domination of policy and business practice that as to the transactions in question the subservient corporation had no separate mind, will or existence of its own.

Therefore, the plaintiffs must prove by the greater weight of the evidence that B-Bom, Incorporated, through its dominant shareholder, David Wagner, exercised such control over D & S Enterprises, Incorporated that D & S, in effect, had no separate identity, no separate mind or will of its own, but instead there was a complete identity of interest between the two corporations. The jury returned a verdict in favor of all plaintiffs on every issue.

III

In general, the doctrine that a corporation is a legal entity existing separate and apart from the persons, whether individual

or corporate, composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. Therefore, the concept cannot be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, the concept of corporate separateness and its attendant limited liability may be disregarded by the courts. 18 Am. Jur. 2d, Corporations, § 14 (1965). The general principles guiding application of the "alter ego," "instrumentality" or "identity" doctrines were summed up by this Court in *Insurance Co. v. Bank*, 11 N.C. App. 444, 453-454, 181 S.E. 2d 799, 805 (1971) as follows:

> A court of equity seeking to do justice among all parties looks at the spirit and not the form of transactions . . . It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance . . . Corporate identity offers no bar to equity's pursuit of the "plumb line" of right dealing and fair accounting. (Citations omitted.)

In other words, a court will disregard the corporate form or "pierce the corporate veil" and extend liability for corporate obligations beyond the confines of a corporation's separate entity whenever necessary to prevent fraud or to achieve equity. Each case involving disregard of the corporate entity must rest upon its particular facts. 18 Am. Jur. 2d, *supra*, § 15.

The principle factors that support an attack on the separate corporate entity have been summarized as follows:

1. inadequate capitalization ("thin incorporation");

2. noncompliance with corporate formalities;

3. complete domination and control of the corporation so that it has no independent identity;

4. excessive fragmentation of a single enterprise into separate corporations.

Robinson, North Carolina Corp. Law, § 2-12 (3d ed. 1983). Our courts have recognized, either expressly or implicitly, that the presence of any one of these factors may, in the appropriate case, justify denial of the privilege of limited liability for the

shareholders or corporations affiliated with the corporation primarily liable for the obligation sued upon.

Defendant argues both that the issue of B-Bom's liability for the injury-producing conduct of D & S should never have been submitted to the jury and that the instructions given on the law of intercorporate liability were misleading, confusing and/or erroneous as a matter of law. It is defendant's contention that B-Bom and D & S are separate corporate entities; that B-Bom is not a shareholder of D & S and that there was no evidence presented to show that B-Bom otherwise exerted control over the policies and practices of D & S; that the only formal relation between the two corporations was that of lessor/lessee; and that B-Bom, as lessor of Salem Manor, cannot be held liable for the torts of its lessee, D & S.

Throughout the trial, and on appeal, the plaintiffs have maintained that D & S had no true corporate existence and functioned only as a tool or conduit through which B-Bom operated the rental business at Salem Manor.

A

At the outset, we note that the trial judge correctly denied the defendant's motion for a directed verdict. The evidence presented was clearly sufficient to take the case to the jury on the question of B-Bom's liability for the tortious acts of D & S. The problem presented by this case lies with the legal theory under which it was submitted to the jury in other words, with the sufficiency of the evidence to support the trial judge's instructions to the jury.

Rule 51(a) provides that when charging the jury in a civil action, the trial judge shall declare and explain the law arising on the evidence. G.S. 1A-1, Rule 51(a). He must relate and apply the law to variant factual situations presented by some reasonable view of the evidence. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975). This rule confers a substantial legal right and imposes upon the trial judge a positive duty, and his failure to charge on the substantial features of the case arising on the evidence constitutes prejudicial error. *Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E. 2d 565 (1980). Conversely, an instruction relating to a factual situation not properly supported by the

evidence is also erroneous. *Foods, Inc. v. Super Markets, supra; Dennis v. Voncannon*, 277 N.C. 446, 158 S.E. 2d 489 (1968). In either situation, the error is prejudicial and the aggrieved party is entitled to a new trial. *Board of Transportation v. Rand, supra; Foods, Inc. v. Super Markets, supra.* We find both types of errors present in the case under discussion. For the reasons set forth below, the case must be remanded to the Superior Court for a new trial. We turn first to the instructions which the jury did receive on issue number eleven.

B

[1] The trial judge gave the jury what appears to be a combined instruction on noncompliance with corporate formalities and the "instrumentality" doctrine. The former theory was not directly applicable to the facts of this case, while the latter was simply not supported by any of the evidence presented.

The trial judge correctly stated the rule that the corporate entity may be disregarded if the corporation is totally dominated by an individual shareholder, and operated as his "alter ego," whether the sole or dominant shareholder is an individual or another corporation. In *Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968), the decision from which the instruction was taken, the Supreme Court held that the corporate entity was properly disregarded and the individual shareholder held liable where the evidence showed that the dominant shareholder of a very closely held corporation "made no effort to keep, or pretense of keeping, his interest and activities separate and apart from those of the corporation." 273 N.C. at 260, 160 S.E. 2d at 44. The *Henderson* court evidently concluded that in addition to his control through stock ownership, the dominant shareholder had failed to observe even the minimum formalities of conducting business in a corporate form, and therefore, was not entitled to the privilege of limited liability on his corporation's obligations.

However, unlike the situation in *Henderson*, the dominant shareholder and president of both corporations, David Wagner, was never joined as a party to the action and plaintiffs did not seek to hold him individually liable on the basis of his stock ownership in D & S. B-Bom and D & S did not stand as parent and subsidiary because B-Bom itself did not own any shares in D & S. The relationship between the two was properly character-

ized as that of affiliated corporations.[3] The rule of *Henderson* properly applies where the corporation to be "disregarded" has been properly incorporated but is thereafter ignored as a separate entity by its *owners* to the detriment of the party injured. Because of the plaintiffs' failure to join David Wagner in this action and B-Bom's lack of direct ownership in D & S, it was error to include the alternative theory of domination over the corporation by an individual shareholder in the midst of an instruction on the "instrumentality" rule as it applies to parent-subsidiaries or affiliated corporations. Furthermore, the trial judge failed to adequately delineate the relationship holding between B-Bom and D & S so that the jury could correctly apply the instructions given to the evidence. We agree with defendant that, given the facts of this case, the instructions were confusing, misleading and erroneous.

C

[2] The portions of the jury instruction preceding and following the shareholder "alter ego" section state that a corporation which exercises actual control over another, operating the latter as a "mere instrumentality or tool," is liable for the torts of the corporation thus controlled. *See Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967). The remainder of the charge placed the burden of proof on plaintiffs to prove that B-Bom exercised such control over D & S Enterprises through David Wagner, that D & S had no separate identity of its own, there being a complete identity of interest between the two corporations. Although the evidence presented was sufficient to support B-Bom's liability because there was evidence of a "complete identity of interest between the two corporations," *see infra* Part IV, it was not sufficient to support that conclusion under the instrumentality rule.

That rule apparently arose as a means to distinguish "normal" and "usual" shareholder control by means of voting rights from the direct exertion of working control over corporate ac-

3. An affiliated corporation may be defined as a corporation in which the controlling interest is owned by the same person or persons (including corporate persons) who own the controlling interest in another corporation, the latter being, therefore, also an affiliate. *See generally* Latty, Subsidiaries and Affiliated Corporations (1936).

tivities which would justify disregard of the corporate entity in the appropriate case. *See generally* Latty, Subsidiaries and Affiliated Corporations, Chap. VII (1936). The basic test utilized by our courts is as follows:

> "The control necessary to invoke what is sometimes called the 'instrumentality rule' is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal. It must be kept in mind that *the control must be shown to have been exercised at the time the acts complained of took place in order that the entities be disregarded at the time.*" (Emphasis added.)

Acceptance Corp. v. Spencer, 268 N.C. 1, 9, 149 S.E. 2d 570, 576 (1966), *quoting* 1 Fletcher, Cyclopedia Corporations, *perm. ed.*, p. 204 *et seq.* To clarify the meaning of the "instrumentality rule," the following definition was provided in *Acceptance Corp.*:

> The clearest statement we have found with respect to this area of the law is in *Lowendahl v. Baltimore & O.R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62, 76, *affirmed* 272 N.Y. 360, 6 N.E. 2d 56, where the Court said:
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> "Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> " '(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> " '(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> " '(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.' See Powell, 'Parent and Subsidiary Corporations,' chapters I to VI, passim, and numerous cases cited."

Id.; Huski-Bilt v. Trust Co., supra at 670-671, 157 S.E. 2d at 358; *Insurance Co. v. Bank, supra. See also Ram Textiles, Inc. v. Hillview Mills and Texland Industries v. Hillview Mills,* 47 N.C. App. 593, 267 S.E. 2d 700, *disc. rev. denied,* 301 N.C. 530, 273 S.E. 2d 454 (1980). *See generally* 18 Am. Jur. 2d, Corporations, § 17 (1965).

The evidence presented at trial was simply insufficient to support an instruction of the instrumentality rule as stated in *Acceptance Corp.* and *Huski-Bilt.* Clearly, a substantial identity of ownership and administrative control existed between B-Bom and D & S in the person of David Wagner. In addition, B-Bom set the rental price for the apartment units at Salem Manor. However, B-Bom did not directly own any shares in D & S so as to give it either complete, majority or *any* stock control over the operation of D & S. The uncontroverted evidence also established that the apartment rental business was operated almost exclusively on the day-to-day basis by Smilie Wagner as shareholder, officer and employee of D & S. Also, Smilie had considerable autonomy with regard to D & S finances. As general manager of Salem Manor, Smilie hired employees, directed their activities and compensation and undertook to improve the property. Most importantly, it was Smilie who set the policies of D & S with regard to the rental business and specifically adopted and executed the business practice of padlocking the apartments of renters who were in arrears, storing their property and turning back their mail. In other words, it was Smilie Wagner who controlled D & S policy and practice with "respect to the transaction attacked." David Wagner only learned of these practices *after the fact,* and only after plaintiffs had already been injured thereby. Evidently, as to these practices, D & S had a "mind of its own," and that "mind" was controlled solely by Smilie Wagner.

Accordingly, despite the underlying affiliation between B-Bom and D & S by virtue of common ownership and management, the ability to control D & S arising therefrom was not used by B-Bom to perpetrate the acts causing plaintiffs' injuries. The evidence showed that David Wagner left general policy and control of D & S to Smilie. Moreover, the specific policies and practices of padlocking the plaintiffs out of their apartment, storing their furniture and turning back their mail were set and effectuated by Smilie Wagner and his employees and not by either

David Wagner or B-Bom itself. This factual situation stands in sharp contrast to that presented, for example, in *Insurance Co. v. Bank, supra,* upon which plaintiffs rely to support the verdict.

In that case, the plaintiff corporation instituted an action for declaratory judgment on the issue of whether it was liable to one of the corporate defendants, Northwestern Bank, on a mortgage title insurance policy plaintiff had issued. Subsequent to a certain loan from Northwestern to Hillwest, Inc., secured by the property in question, the title insured by plaintiff's policy was discovered to be defective. Plaintiff refused to pay on the policy. The trial court held for plaintiff, finding and concluding that plaintiff was not liable on the policy by virtue of the fact that Northwestern suffered no actual loss on the loan. This conclusion was, in turn, based upon the finding that Northwestern had relied for its security not on the property insured, but upon the fact that its corporate alter ego, Park Road Professional Center, Inc., had eventually come to acquire the deed of trust securing Hillwest's demand note.

The parties stipulated that the sole shareholder in Park Road held his shares as Trustee for defendant First Atlantic. It was undisputed that First Atlantic was owned and controlled by Northwestern and that the acts of First Atlantic with regard to the disputed transactions were the acts of Northwestern. This Court found abundant evidence of First Atlantic's complete domination and control over Park Road with regard to the transaction attacked, to satisfy the requirements of the instrumentality rule quoted above.

> In the testimony of officers of First Atlantic, we find evidence of this type of control. The testimony of Thomas D. Pearson, a Vice-President of First Atlantic, indicates that he was "named" President of Park Road for the purpose of executing the loan agreement of 17 January 1968. His testimony also establishes beyond question that he personally knew nothing about the affairs of Park Road and little, if anything, about the loan agreement which he signed.
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> * * *
>
> William McClain testified that as President of First Atlantic he negotiated the loan in question with Hillwest on behalf of

> Northwestern. McClain testified that he did not know how Mr. Pearson came to be elected President of Park Road Professional Center but stated: "I presume he was appointed for the protection of First Atlantic Corporation, although I do not know." McClain admitted that the reason the loan instruments were assigned to Park Road rather than Hillwest was that "if they were assigned to Park Road Professional Center which we controlled they would be safe to be used." (Emphasis added.)
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> The above quoted testimony, as well as other evidence appearing in the record, clearly establishes the necessary element of "control." We think it equally clear that this control was used by the dominant corporation, Northwestern, to commit an unjust act in contravention of plaintiff's legal rights. *Lowendahl v. Baltimore & O.R. Co., supra; Acceptance Corp. v. Spencer, supra.*

11 N.C. App. at 450-452, 181 S.E. 2d at 803-805.

Additional evidence of the lack of actual corporate existence was found in the fact that the corporate charter of Park Road was in a state of suspension at all pertinent times, its purported president had never seen any minute books, tax returns or corporate records, and the only indicia of title its purported president had was his recollection that First Atlantic's president, William McClain, told him he was president—an event which McClain apparently did not recall. On these facts, the court had no hesitation in concluding that, "if Park Road exists at all, it exists as a mere puppet and device in the hands of First Atlantic . . . Its policies and practices are dominated to the point that it was 'no separate mind, will or existence of its own and is but a business conduit for its principal.' " (Citations omitted.) 11 N.C. App. at 453, 181 S.E. 2d at 805.

It is evident that the dominant corporation in *Insurance Co.* caused the subordinate corporation to be established solely for the purpose of acquiring the loan instruments in question and exerted its domination and control over that "phantom" corporation with respect to the very transaction plaintiff complained of. As stated above, plaintiffs here have simply not presented any evidence showing B-Bom's direct exercise of control over Smilie Wagner with regard to the acts in question to satisfy the re-

quirements of the instrumentality rule. Therefore, the trial judge erred in giving the jury an instruction on that doctrine because it related to a factual situation not properly supported by the evidence. *Foods, Inc. v. Super Markets, supra; Dennis v. Voncannon, supra.*

The foregoing errors do not mandate the grant of a directed verdict in defendant's favor, however, because the plaintiffs presented sufficient evidence to take the case to the jury upon proper instructions on the related theories of inadequate capitalization and excessive fragmentation of a single enterprise into separate corporations.

IV

[3] The principal feature of the case arising on the evidence presented, upon which the trial judge erroneously failed to instruct the jury, was the "excessive fragmentation of a single enterprise into separate corporations." Robinson, *supra,* § 9-10. The extension of liability for a corporation's obligations beyond the confines of its own separate entity is appropriate in those cases where an essentially single business or economic enterprise is nevertheless conducted through several separate corporations, either in a parent-subsidiary arrangement or under common ownership as in the case of affiliated corporations. *See* Latty, *supra,* Subsidiaries and Affiliated Corporations, Chap. VIII.

Such a division or fragmentation may take the form of a traditional parent-subsidiary relationship or that of a single individual or group of individuals owning directly the stock of the various corporations which go to make up the single business enterprise. Latty, *supra.* Upon disregard of the separate entity of one of the corporate components, the rights of a creditor of that corporation would be as great against an affiliate with substantial identity of stock interest as against a parent which owns substantially all the stock of a subsidiary. The extent of recovery, however, would properly be limited to the pool of assets of the larger business entity. In other words, only the internal subdivision of the single business entity would be disregarded and the parent or affiliate *stockholders* would nonetheless retain *their* privilege of limited liability. *Id.*

Dean Latty has identified four factors common to those cases in which courts have allowed recovery from the parent or affiliated corporation: (1) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control; (2) unified administrative control (which follows almost automatically from such ownership) of corporations whose business functions are similar or supplementary; (3) involuntary as opposed to voluntary creditors; and (4) the insolvency of the corporation against which the claim primarily lies. Latty, *supra*, Ch. VIII, §§ 49-51. *See also* 1 Fletcher Cyc. Corps., *supra*, § 43.20; Note, Liability of a Corporation for Acts of a Subsidiary or Affiliate, 71 Harv. L. Rev. 1122 (1958).

The foregoing "single enterprise" theory of inter-corporate liability was implicitly recognized in *Fountain v. West Lumber Co.*, 161 N.C. 35, 76 S.E. 533 (1912). In *Fountain* the defendant, West Lumber Company, owned the trees and timber rights on a certain tract of land. An individual, C. R. Johnson, was president, secretary and virtually the sole shareholder in West Lumber. He was also president and owned practically all the stock in C. R. Johnson Lumber Company, and was also doing an individual business in his own name. All of these "businesses" dealt in lumber and timber, and all were conducted from the same office. Plaintiff entered into a contract with C. R. Johnson whereby plaintiff agreed to cut and manufacture the timber into building materials. After payments for the work fell into arrears, plaintiff first attempted to maintain an action against both Johnson himself and the Johnson Lumber Co. Upon learning that West Lumber actually owned the subject timber rights, plaintiff brought his claim against West Lumber. C. R. Johnson and the Johnson Lumber Company then went into bankruptcy. West Lumber attempted to defend the action on the grounds that it had previously sold the timber rights to Johnson Lumber and that plaintiff's contract was made with Johnson either individually or acting on behalf of Johnson Lumber.

In accordance with the instructions, the jury found that in making the contract, C. R. Johnson was not bona fide acting on behalf of himself or the C. R. Johnson Lumber Company and that in fact, the device of separate corporations was used in order to evade responsibility on the part of West Lumber, Johnson being president and practically sole owner of the stock in both com-

panies. The Supreme Court first observed that where the president of a corporation deals directly in reference to his corporation's property, he is presumed to act on behalf of the corporation. 161 N.C. at 38, 76 S.E. at 535. After stating that the charge correctly and fairly submitted the issues and evidence to the jury, the court upheld the verdict for the plaintiff on the ground that "the jury [has] found that the contract, *notwithstanding the methods and devices used*, was made by the West Lumber Company." *Id.*

Clearly, the *Fountain* court recognized that the doctrine of limited liability is not itself without limitations and refused to allow the internal insulation of liability attempted by the owner's excessive fragmentation of a single business entity into separate corporations to contravene the rights of the plaintiff-creditor. Thus, the creditor of an insolvent corporation may properly recover from the debtor's corporate affiliate where the various corporations are operated under common ownership and unified management; are essentially engaged in the same or supplementary businesses, sharing a single asset or pool of assets among the subdivisions; and under the circumstances it would be unjust to recognize, as a separate entity, one of the individual corporate compartments.

In the case under discussion, the undisputed evidence shows that plaintiffs are involuntary creditors and that D & S is an insolvent corporation. Plaintiffs have also presented evidence tending to show that B-Bom and D & S were affiliated corporations, with a substantial identity of ownership in the person of David Wagner, who also functioned as president of both corporations. David Wagner testified that as president of B-Bom, it was his duty to "run the company." According to the Articles of Incorporation, when D & S Enterprises was incorporated on 8 May 1978, the new corporation subscribed ten shares of stock, all to David Wagner, at a par value of $100 per share. David Wagner was designated as one of the incorporators and a member of the initial Board of Directors. The corporate by-laws of D & S were also drafted by David Wagner. It is clear that although B-Bom and D & S each had one other shareholder besides David Wagner, David Wagner's stock ownership, coupled with his position as president and director of both corporations, gave him actual

working control over B-Bom and D & S with respect to Salem Manor affairs in general.

There was also ample evidence tending to show the consequent unified administrative control of two corporations whose business functions were supplementary. B-Bom owned the Salem Manor property, and relied upon its rental units to supply the funds to meet its mortgage obligations thereon. Although there was some conflict in the evidence as to why D & S was formed, there was sufficient evidence, if believed, to support the conclusion that D & S was formed solely as a vehicle to pass through the rents and profits from Salem Manor to its owner, B-Bom. Indeed, B-Bom decided how much rent should be charged for each of the units of Salem Manor. As president of B-Bom, David Wagner drew up the lease which provided that D & S pay from those rents, first $1,300 and then $1,700 per month to B-Bom in the form of "rent" for the Salem Manor property. David Wagner then signed the lease agreement in his capacity as president of B-Bom and as president of D & S, despite the fact that D & S was not incorporated until four months after the lease was executed. David Wagner received the monthly rent checks from D & S on behalf of B-Bom and deposited them in B-Bom's account.

In addition, the evidence showed that after Smilie Wagner left D & S and D & S had "informed" B-Bom that it was no longer "in the business of operating Salem Manor," B-Bom began collecting the rent from the Salem Manor tenants itself. Later, David Wagner himself gave Frederick Hunt, an employee of Wagner's other wholly owned rental management corporation, Urban Housing, verbal authorization to collect the rents and turn them over to B-Bom.

The location of the principal office for both B-Bom and D & S was 1225 E. Fifth Street in Winston-Salem, North Carolina, which is also the law office of David Wagner. The agent for service of process for both corporations was David Wagner and the corporate records for both corporations, as well as the by-laws and corporate seal of D & S are located in his office.

In his deposition, David Wagner indicated that he had no recollection of the occurrence of any of the usual indicia of corporate existence in the life of D & S. Although David and Smilie testified that business policy and practice, in particular the acts

complained of, were set and executed by Smilie Wagner, both men also testified to almost continuous contact between the two with regard to the business of D & S and the other corporations they were jointly involved with. According to David Wagner, after D & S went out of the business of operating B-Bom's rental property, no formal notice was sent to the owner, but D & S simply "told B-Bom of that fact." David Wagner characterized this notification as a process of "me informing me" and then telling himself, "fine."

Defendant contends that notwithstanding the foregoing evidence tending to show the unified ownership, operation and administration of the two corporations, there was no evidence that any of the general advice David gave Smilie concerning Salem Manor was given in his capacity as an employee or agent of B-Bom as opposed to his capacity as an officer and stockholder in D & S or as an individual attorney. We do not agree.

First, there was no evidence presented which would indicate that David Wagner was ever compensated for acting as counsel for D & S or ever received any income or profit as a shareholder or officer in D & S. He received the benefits of the income produced at Salem Manor solely in his capacity as shareholder in B-Bom. Secondly, in *Fountain v. West Lumber Co., supra*, the court held that "where the president deals directly in reference to his corporation's property, since he has no lawful right to deal with it individually, there should be a presumption that he acted lawfully, and in behalf of the corporation." 161 N.C. at 38, 76 S.E. at 535.

Clearly, David Wagner acted on behalf of his principal B-Bom when he purported to lease Salem Manor to D & S, a corporation he created to operate those premises as its sole business. We think that, under the facts of this case, there is a rebuttable presumption raised that David Wagner acted on behalf of his principal B-Bom *at all times* with regard to Salem Manor. Therefore, absent evidence to the contrary, David Wagner, in his participation in the affairs of D & S with regard to the operation of the rental business at Salem Manor may be presumed to have acted as agent for B-Bom, and not in his individual capacity as either shareholder, officer or attorney to D & S Enterprises.

D & S was essentially a corporation without assets. The only formal activity that D & S is alleged to have entered into was its lease agreement with B-Bom, and that was executed four months prior to its incorporation. By means of the lease device, D & S obtained an asset belonging to B-Bom to manage, but not to own. There was no evidence presented to show whether the shares issued to David Wagner or allegedly owned by Smilie Wagner were ever actually paid in. The picture thus presented is that of two corporations sharing one income-producing capital asset and simply dividing the supplementary functions of ownership and operation into distinct legal entities—in other words, functioning as a single business enterprise in substance, if not in form. Upon such evidence, a jury could properly find that the device of separate corporations was used to evade responsibility on the part of B-Bom. *Fountain, supra.*

In summary, plaintiff's evidence was sufficient to establish the four factors identified by Dean Latty which courts have recognized as justifying recovery from an affiliated corporation: (1) David Wagner was a common officer, director and shareholder with ownership of sufficient stock to give him actual working control over both B-Bom and D & S; (2) unified administrative control was thereby maintained by David Wagner over two corporations which essentially shared one asset and whose business functions were supplementary; (3) the plaintiffs are involuntary tort creditors; and (4) the debtor corporation, D & S, against which the claim primarily lies, is insolvent. In conjunction with these factual circumstances, "[t]he effect of control as a liability imposing factor . . . is ordinarily limited to a situation where control *in fact*, with or without stock ownership, may involve the parent [or affiliate] corporation in liability for having exercised or failed to exercise control in violation of a duty owed to the plaintiff." Latty, *supra*, at 216. In other words, under the single enterprise theory, the fact that B-Bom through its agent David Wagner *failed to exercise control* over Smilie Wagner's tortious practices would properly be considered a "liability imposing factor," rather than the legal escape route by which B-Bom could evade the responsibilities of rental property ownership. Once the corporate shell of D & S is disregarded, Smilie Wagner would properly be considered to be an agent or employee of B-Bom itself and B-Bom's

liability for Smilie's acts would flow from traditional principles of agency or respondeat superior.

Therefore, in terms of structure, finance and operation, the evidence tended to show that the two corporations functioned as a single economic entity and their interests may accordingly be considered "identical" despite the internal compartmentalization of ownership and operation by means of separate incorporation. In such a case, neither the device of a "lease" nor the doctrine of "separate legal entity" may properly be interposed to conceal the true relation between the rental property owner and the operating company. Accordingly, the trial judge had a duty to instruct the jury on the law arising on these substantial features of the evidence, whether or not requested to do so. His failure to do so requires a new trial.

Furthermore, although the evidence as to D & S's financial structure was scanty, it would appear that D & S had been inadequately capitalized from the time of its inception until its unceremonious demise.

One of the foremost requirements for achieving limited liability through use of the corporate form is adequate capitalization. Robinson, *supra*, § 9-8. In an early case, *Insurance Co. v. Edwards*, 124 N.C. 116, 120-121, 32 S.E. 404, 406 (1899), the Supreme Court, in dictum, expressly recognized limited liability as a special privilege and strongly implied that it could be denied on the basis of inadequate capitalization.

> One of the great dangers [with corporations] is the risk of insolvency arising from the want of any personal liability of their stockholders, and the uncertain and perhaps fictitious nature of their assets. Some are afflicted with what may be called *congenital* insolvency. They are born insolvent, capitalized into insolvency at the moment of their creation, and eke out a precarious existence in an apparent effort to solve the old paradox of living on the interest of their debts. Such corporations are . . . intrinsically dangerous. . . .

See also G.S. 55-53(h) (provision in the Business Corporation Act section on watered stock liability stating that a shareholder may nevertheless incur unlimited liability under general principles of law or equity arising from the creation or maintenance of an in-

adequately capitalized incorporated enterprise or other abuse of the privilege of achieving limited liability by incorporation).

Such "thin incorporation" can take many forms, one of which is the scheme of "leasing" to the corporation all or most of the property which it needs to operate. *Robinson, supra,* § 9-8, n. 4. When an affiliated or subsidiary corporation runs a substantial business with grossly insufficient capital, combined with the lease device, liability is properly extended to its parent (or affiliate). The justification for unlimited liability in this situation has been succinctly characterized as arising out of the parent corporation's *"attempt to do business without proper safeguards for creditors*—where the property with which the business is done is not risked because the owner in his character of owner doesn't operate and in his character of operator owns nothing to be risked." (Emphasis original.) Latty, *supra* at 112.

Here, the evidence presented tended to show that a single business entity had been subdivided into an ownership corporation and an operating corporation, with the latter having as its primary asset the lease of a property which is meant to produce income almost exclusively for the owner-corporation, and very little else. This structure would appear to leave the creditors of the operating company without proper safeguards for the obligations arising out of the operation of the rental property, and therefore justify disregarding the separate entity of the debtor corporation.

Courts in other jurisdictions have long imposed liability on the parent or affiliated corporation where a creditor would be unjustly injured by judicial recognition of the separate existence of the undercapitalized subsidiary or affiliate. In *Oriental Investment Co. v. Barclay,* 25 Tex. Civ. App. 543, 64 S.W. 80 (1901), the evidence presented at trial disclosed a factual situation remarkably similar to the case at bar. There, the defendant was a Missouri corporation organized to purchase, own and rent buildings. The Missouri corporation owned a hotel in Texas and its stockholders organized an operating company, incorporated in Texas, in which each Missouri stockholder owned a share in the Texas corporation proportionate to that owned in the Missouri corporation. The directors and officers of the Texas corporation were elected by the Missouri corporation, and there was evidence that the Texas corporation had very little operating capital ac-

tually paid in for its shares. The valuable hotel property was then leased to the Texas operating company for a rather small monthly rental; the lease provided that the operating company was to keep the premises in repair. The plaintiffs were hotel employees of the operating company who were injured there by a falling freight elevator.

The defendant hotel owner denied liability on the basis of the lease and the lack of a principal-agent relationship between itself and the operating company. The jury returned a verdict in favor of plaintiffs, finding that the lease was intended to conceal the true relation between the owner of the property and the occupant, and that the Texas operating company was acting as agent for the defendant owner. After an extensive review of the evidence presented concerning the relations between the two corporations, the appellate court affirmed the verdict, stating that the evidence presented tended strongly to show that the Texas corporation "was merely the tool of the investment company, and in operating the hotel was acting as the agent of that company." 64 S.W. at 88.

A similar factual pattern was presented in *Luckenbach S.S. Co. v. W. R. Grace & Co.*, 267 Fed. 676 (4th Cir.), *cert. denied*, 254 U.S. 644, 65 L.Ed. 454, 41 S.Ct. 14 (1920). There, the corporate owner of a fleet of steamships was held liable on a contract which the plaintiff had entered into with the steamship operating company. The evidence showed that the two corporations had the same directors and officers, and a common president who owned substantially all of the stock in each corporation. The operating company had a capital of $10,000, while the owner company was capitalized at $800,000. The steamships in question were leased to the operating company at far below their true rental value.

Based upon the evidence presented, the appellate court had no trouble in concluding that:

> [The facts] show such identity of the two corporations, or at least give rise to such a strong presumption of their identity, as warrants the conclusion that the Luckenbach Company is equally responsible with the steamship company for the breach by the latter of its contract with the appellee. For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers,

> worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form.

267 Fed. at 681. *Accord Joseph R. Foard Co. v. Maryland, ex rel. Goralski*, 219 Fed. 827 (4th Cir. 1914); *Schlamowitz v. Pinehurst, Inc.*, 229 F. Supp. 278 (M.D. N.C. 1964). *See also Walkovszky v. Carlton*, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585, 223 N.E. 2d 6 (1966).

The factual similarities between the *Oriental*, *Luckenbach* and *Fountain* cases and the case under discussion are striking. All may be considered examples of the "excessive fragmentation" or "single enterprise" theory discussed above, and the holdings, whether couched in terms of "instrumentality" or "agency," all support the conclusion that the purported separate incorporation of D & S as an operating company, coupled with the lease device, will not necessarily stand as a bar to B-Bom's liability for the acts of D & S which caused the plaintiffs' injuries. Under the evidence presented in this case, it would be unconscionable to allow the owner of a valuable apartment/room rental property to escape liability because it turned the property over to an inadequately capitalized operating company "which is simply itself in another form." *Luckenbach, supra.*

V

In conclusion, the trial judge correctly denied defendant B-Bom's motion to dismiss because the plaintiffs presented sufficient evidence of B-Bom's liability for the torts of D & S to take the case to the jury. However, the trial judge prejudicially erred by (1) giving the jury an instruction relating to a factual situation not properly supported by the evidence (the "instrumentality" doctrine) and (2) by failing to charge on the substantial features of the case arising on the evidence presented (the "single enterprise" or "excessive fragmentation" and "inadequate capitalization" doctrines). Therefore, the case must be remanded for a new trial so that the parties have the opportunity for a jury to consider the issues raised by their evidence on the question of intercorporate liability under the law properly arising therefrom.

We have carefully examined defendants' other assignments of error and find them to be without merit.

New trial.

Chief Judge VAUGHN and Judge WELLS concur.

LINDA BERGER v. MARTIN BERGER

Nos. 831DC212 and 831DC801

(Filed 3 April 1984)

1. **Appeal and Error § 6.6— denial of motion to dismiss—no immediate appeal**

An order denying defendant's G.S. 1A-1, Rule 12(b)(6) motion to dismiss for failure to state a claim was interlocutory and not immediately appealable.

2. **Appeal and Error § 6.3— lack of subject matter jurisdiction—denial of motion to dismiss—no immediate appeal**

An order denying a G.S. 1A-1, Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable.

3. **Appeal and Error § 6.3— lack of personal jurisdiction—denial of motion to dismiss—no immediate appeal**

Defendant's motion to dismiss for lack of personal jurisdiction based on plaintiff's failure to comply strictly with G.S. 1A-1, Rule 3 in commencing an action by issuance of a summons actually raised a question of sufficiency of service of process rather than of due process, and the order denying such motion was thus not immediately appealable under G.S. 1-277(b). G.S. 1A-1, Rule 12(b)(4).

4. **Process § 8— personal jurisdiction—service on defendant in this State**

The trial court had personal jurisdiction over defendant under our "long-arm statute," G.S. 1-75.4(1)(a), in an action for alimony, child support and equitable distribution, where defendant was a natural person present within North Carolina when he was served with process, defendant had lived and worked in this State for five years when this action was instituted, and defendant had caused a similar suit previously filed by plaintiff in Virginia to be dismissed by claiming to be a North Carolina resident.

5. **Appeal and Error § 16— appeal from interlocutory order—trial court not divested of jurisdiction**

Defendant's appeal from an order denying his motions to dismiss for failure to state a claim and for lack of subject matter and personal jurisdiction was interlocutory and a nullity and did not divest the trial court of jurisdiction to enter an award of child support, alimony and counsel fees *pendente lite.*

6. Appeal and Error § 6.2— order of child support and alimony pendente lite—no immediate appeal

An order awarding child support and alimony *pendente lite* does not affect a substantial right and is not immediately appealable.

7. Appeal and Error § 36.1— time of entry of order—timeliness of service of record on appeal

A contempt order was filed on 14 March rather than on 14 February, and the time for serving the record on appeal began to run on 14 March, where the evidence showed that the court found defendant in contempt on 14 February and asked plaintiff's attorney to prepare the formal written order; the clerk's notation in the record reflects a judgment purportedly entered on 14 February; defendant made a motion pursuant to App. Rule 3(c) to alter or amend the judgment; and a hearing on defendant's motion was held on 14 March and a final judgment finding defendant in contempt was entered on that date. G.S. 1A-1, Rule 58.

8. Appeal and Error § 17— stay bond—inapplicability to interlocutory order

While execution of a final judgment may be stayed by posting a bond pursuant to G.S. 1-289, execution of an interlocutory order awarding child support, alimony and counsel fees *pendente lite* is not subject to the stay provisions of G.S. 1-289.

9. Divorce and Alimony § 21.5— failure to comply with pendente lite orders—punishment for contempt

The evidence and findings supported the trial court's order finding defendant in contempt for failure to pay child support, alimony and counsel fees *pendente lite* as ordered by the court. G.S. 5A-21.

APPEALS by defendant from *Parker* and *Chaffin, Judges.* Judgments entered 11 October and 1 December 1982 and 14 March 1983 in District Court, DARE County. Consolidated and heard in the Court of Appeals 6 February 1984.

These consolidated cases stem from an action instituted on 23 August 1982, by plaintiff, wife, for equitable distribution, permanent and temporary alimony, child support, counsel fees, and possession of the parties' marital home. Prior to this action, an action for divorce filed by plaintiff on 12 August 1982 was pending in Virginia.

The facts adduced at trial showed that the parties were married in New York and lived there until January 1977, when they moved to Dare County, North Carolina. They bought a home in Dare County, which they still owned at the time of trial. Defendant owned and operated a real estate company and actively pursued the Dare County real estate market. Some time in 1978 the

parties set up another residence in Virginia. Plaintiff resided in Virginia with the parties' three minor children during the school year. Defendant resided primarily in North Carolina, with plaintiff and the children spending summers and weekends in North Carolina. Some time in July or August, 1982, defendant told plaintiff that he was moving and gave her a post office box number and a telephone number in West Virginia where he could be reached. Plaintiff immediately went to the parties' house in Dare County, and found that the furniture and defendant's personal property were still in the house, it appearing that defendant had not moved.

On 23 August, therefore, plaintiff instituted action in North Carolina by making application for the issuance of a summons pursuant to G.S. 1A-1, Rule 3. Plaintiff alleged in her application that defendant was in the process of removing property and assets from the State of North Carolina in an attempt to evade process and secrete himself in another state or country. Defendant was personally served with said summons in Dare County. Three days later, on 26 August, plaintiff filed the complaint forming the basis of defendant's appeals hereunder. Defendant was served with said complaint by personal service on 3 September 1982, and by registered mail on 13 September 1982. Plaintiff's action and defendant's motions pursuant thereto gave rise to three separate orders forming the basis of defendant's three appeals, which we consider chronologically from the date each order was entered.

DEFENDANT'S FIRST APPEAL

On 10 September 1982, defendant moved to dismiss plaintiff's complaint pursuant to G.S. 1A-1, Rules 12(b)(1) through 12(b)(6), Rule 41(b). The trial court denied defendant's motions, concluding in pertinent part that the court had both subject matter and personal jurisdiction over defendant, process and service having been sufficient, and that the complaint stated facts upon which relief could be granted. The denial of defendant's motions forms the basis of the first appeal.

DEFENDANT'S SECOND APPEAL

On 8 November 1982, pursuant to plaintiff's motion to calendar the action, the trial court concluded, in essence, that its order

denying defendant's motions was interlocutory and nonappealable and that, therefore, it retained jurisdiction over plaintiff's cause of action. Defendant thereafter filed an answer and counterclaim. After a hearing on 29 November, in which both parties personally appeared, the trial court ordered defendant to pay $1,800 per month in alimony *pendente lite*, $4,200 per month in child support and $6,792.26 in counsel fees *pendente lite*. The court noted in its decree that it would retain jurisdiction over the parties for the entry of further orders consistent with its decree and enforcement thereof. This order forms the basis of defendant's second appeal.

DEFENDANT'S THIRD APPEAL

On 9 and on 18 January, plaintiff filed motions to show cause why defendant should not be held in contempt for failure to pay alimony and counsel fees *pendente lite* and child support. Almost simultaneously therewith, on 14 January, defendant filed a bond to stay execution of the trial court order pending appeal.

After a hearing on 14 February, defendant was found in contempt and ordered imprisoned until payment of the total arrearage due plus an additional $2,500 in counsel fees, for a sum total of $19,222.26. The court appointed a receiver to inventory and report to the court the nature and extent of defendant's real and personal property having a situs in Dare County. This order forms the basis of defendant's third and final appeal.

LeRoy, Wells, Shaw, Hornthal & Riley, by Terrence W. Boyle, for plaintiff appellee.

Battle, Winslow, Scott & Wiley, by Jasper L. Cummings, Jr., for defendant appellant.

VAUGHN, Chief Judge.

I.

The first order from which defendant appeals is the 11 October order denying his Rule 12(b) motions to dismiss.

We first consider defendant's contention that the trial court erred in denying both his motion to dismiss for failure to state a claim upon which relief could be granted and his motion to

dismiss for lack of subject matter jurisdiction. G.S. 1A-1, Rules 12(b)(1) and 12(b)(6). Generally, orders denying motions to dismiss are interlocutory and nonappealable, the reason being to prevent delay and expense from fragmentary appeals and to expedite the administration of justice. *Shaver v. Construction Co.*, 54 N.C. App. 486, 283 S.E. 2d 526 (1981), *later appeal*, 63 N.C. App. 605, 306 S.E. 2d 519 (1983). Immediate appeal is generally allowed only from those orders affecting a substantial right and likely to result in injury to the appellant if not corrected before appeal from the final judgment. *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141, *rehearing denied*, 306 N.C. 393 (1982); *see* G.S. 1-277; G.S. 7A-27. Any error in the order not affecting a substantial right is correctable upon appeal from the final judgment. *Id.*

[1, 2] The trial court order denying defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim was clearly interlocutory and not immediately appealable. *O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). The Supreme Court, furthermore, has recently clarified any doubt regarding the appealability of orders denying 12(b)(1) motions to dismiss for lack of subject matter jurisdiction. Pursuant to *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982), the denial of defendant's 12(b)(1) motion was also interlocutory and not immediately appealable. Defendant's appeal on these two grounds is, therefore, dismissed.

[3] We next consider defendant's right to appeal from the denial of his motion to dismiss on grounds of lack of personal jurisdiction. Defendant asserts that he is vested with an immediate right to appeal pursuant to G.S. 1-277(b). While G.S. 1-277(b) appears to authorize such right, it is our duty on appeal to examine the underlying nature of defendant's motion: If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b). *Love v. Moore, supra; see Kaplan School Supply v. Henry Wurst,*

Inc., 56 N.C. App. 567, 289 S.E. 2d 607, *review denied*, 306 N.C. 385, 294 S.E. 2d 209 (1982).

The basis for defendant's appeal here concerns plaintiff's failure to strictly comply with Rule 3 of the Rules of Civil Procedure in commencing action by the issuance of a summons. Under Rule 3, a civil action may be commenced by the issuance of a summons when a person makes application to the court and requests permission to file a complaint within twenty days. Plaintiff in this case requested permission to file her complaint "in due time." Later, pursuant to plaintiff's motion, the trial court amended the order for the summons so that it complied with the twenty-day time limit under Rule 3. *See* Rule 4(i) (authorizing the court to amend process or proof of service). The actual filing date of plaintiff's complaint, which occurred three days after the summons was issued, was well within the statutory time limit. After reviewing the facts in the instant case, we conclude that the substance of defendant's appeal concerns a question of process under Rule 12(b)(4), not a question of jurisdiction, contemplated by appeals brought under Rule 12(b)(2). Defendant's appeal, therefore, is not authorized by G.S. 1-277(b) and is premature.

[4] Though not denominated such, defendant, in a final, separate argument again raises a question of *in personam* jurisdiction. Defendant asserts that the trial court lacked jurisdiction since neither party was a resident of North Carolina. Residency notwithstanding, defendant's contention lacks merit, since the trial court had clear grounds for jurisdiction under our "long-arm" statute, G.S. 1-75.4. Pursuant to G.S. 1-75.4(1)(a), defendant was a natural person present within North Carolina when he was served with process on 23 August 1982. Defendant, who lived and worked in Dare County from 1977 until 1982 when this action was instituted, and who, by claiming to be a North Carolina resident, caused a similar suit previously filed by plaintiff in a Virginia court to be dismissed based on a lack of jurisdiction, does not even raise for our consideration the question of minimum contacts contemplated by appeals brought pursuant to G.S. 1-277(b).

Defendant's first appeal from an interlocutory order must be and is dismissed.

II.

We next consider defendant's appeal from the 1 December order, in which the trial court, after considering evidence and testimony from both parties, awarded plaintiff alimony and counsel fees *pendente lite* and child support.

[5] Defendant, citing the general rule that an appeal removes the case from the jurisdiction of the trial court, contends that the trial court erred in proceeding to hear plaintiff's claim on the merits, since the previous order denying defendant's motions to dismiss was on appeal. *See Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 361, 230 S.E. 2d 671 (1976). The general rule, however, is subject to the exception, applicable to the case at bar, that an appeal from an interlocutory order not affecting a substantial right is a nullity and does not divest the trial court of jurisdiction. *Id.* The trial court was correct, therefore, in proceeding in the action and rendering judgment on the merits.

[6] Defendant also contends that the award of a total of $6,000 per month in alimony *pendente lite* and child support was not based upon proper findings of fact and contrary to the evidence. In recognition of the rule espoused by this court in *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981), *overruling Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970), we dismiss defendant's appeal as being premature.

In *Stephenson*, this court recognized that appeals from *pendente lite* awards are often "pursued for the purpose of delay rather than to accelerate determination of the parties' rights," and, in the interests of fairness and public policy, we held that awards *pendente lite* are interlocutory decrees not affecting a substantial right and not warranting an immediate right of appeal. *Id.* at 251-52; 285 S.E. 2d at 282. The *Stephenson* case had become precedent in a host of recent decisions dismissing appeals from *pendente lite* awards. In *Fliehr v. Fliehr*, 56 N.C. App. 465, 289 S.E. 2d 105 (1982), we expanded the *Stephenson* rule to prohibit an appeal from an order for child support, not designated *pendente lite*, but entered in conjunction with an order for alimony *pendente lite*. In *Dixon v. Dixon*, 62 N.C. App. 744, 303 S.E. 2d 606 (1983), wherein plaintiff had brought suit for divorce and equitable distribution, we held that defendant had no right to appeal a mandatory injunction ordering her to return property to

plaintiff's residence pending final disposition of plaintiff's action for divorce and equitable distribution. *See also Smart v. Smart*, 59 N.C. App. 533, 297 S.E. 2d 135 (1982); *Rokes v. Rokes*, 55 N.C. App. 397, 285 S.E. 2d 306 (1982) (*citing Stephenson, supra*).

The policy guiding the panel in *Stephenson*, to avoid unnecessary delay and to accelerate a just determination of the parties' rights, is especially pertinent in this case, where plaintiff's initial suit in a Virginia court was dismissed on defendant's motion for lack of jurisdiction, defendant contending to be a North Carolina resident. Plaintiff then commenced the present suit by serving defendant with a summons pursuant to G.S. 1A-1, Rule 3 because, plaintiff alleged, defendant was "in the process of removing property and assets from the State of North Carolina in an attempt to evade process and secrete himself in another state or country."

Pursuant to *Stephenson*, *Fliehr*, and other recent authority, defendant's second appeal from a *pendente lite* award is interlocutory and is therefore dismissed.

III.

Defendant's third and final appeal concerns the order finding him in contempt for failure to pay the previous award of alimony and counsel fees *pendente lite* and child support.

[7] We note at the outset a dispute as to when the order of contempt was entered. Since entry of the judgment is a critical moment in determining the timeliness of defendant's appeal, we will treat plaintiff as having made a motion to dismiss and rule accordingly on such motion. *See* Rules 25 and 37, Rules of Appellate Procedure.

Ordinarily, an appellant has thirty days from the time appeal is taken to file and serve upon all other parties a proposed record. Rule 11(b), Rules of Appellate Procedure. In this case, pursuant to defendant's motion, the trial court granted defendant sixty days in which to file the proposed record. The parties here agree that defendant served the proposed record on 10 May 1983. Plaintiff contends, however, that the contempt order was entered on 14 February and that defendant's appeal is therefore subject to dismissal, the record having been served more than sixty days after entry of the judgment. *See* Rule 25, Rules of Appellate Pro-

cedure. Defendant contends that the contempt order was not entered until 5 April and that having served the record in due time, he is entitled to appellate review. For reasons set forth below, we conclude that the critical date of entry was 14 March, and we therefore deny plaintiff's motion to dismiss the appeal.

A review of the record shows that, on 14 February, the court found defendant in contempt and asked plaintiff's attorney to prepare the formal written order. The clerk's notation in the record reflects a judgment purportedly entered on 14 February. Ordinarily, the clerk's notation in the record marks the date from which the time for notice of appeal runs. *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E. 2d 345, *review denied*, 300 N.C. 374, 267 S.E. 2d 675 (1980), *overruled on other grounds, Love v. Moore, supra.* An exception to this rule occurs, however, when, as here, the trial judge instructs one of the attorneys to prepare the final order, thus indicating a later date for final entry of the judgment. *Id.; see also Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). Another exception to the rule regarding date of entry occurs when, as did defendant in this case, a party makes a motion to alter or amend the judgment. Rule 3(c), Rules of Appellate Procedure. Since both exceptions apply to the case at bar, the time for serving the proposed record was extended.

A motion to alter or amend the judgment tolls the running of time for filing and serving notice of appeal until the motion is decided. Rule 3(c), Rules of Appellate Procedure. A hearing on defendant's motion in this case was held on 14 March. The record reflects that a final judgment was entered on 14 March, finding defendant in contempt. It appears from the record that the 14 February order of contempt was merged into this final order. Although the order was not signed by the trial judge until 30 March and not filed until 5 April, the critical moment of entry occurred on 14 March, as noted in the record. G.S. 1A-1, Rule 58; Rule 3(c), Rules of Appellate Procedure. We conclude, therefore, that the record was timely served. Since a contempt order affects a substantial right, defendant's third appeal warrants our immediate consideration. *See Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978).

[8] The first issue raised by defendant concerns the effect of a bond posted pursuant to G.S. 1-289 in order to stay execution of

the order awarding plaintiff alimony and counsel fees *pendente lite* and child support. G.S. 1-289 authorizes an appellant to stay execution of a money judgment by assuring payment of any amount due upon appeal from said judgment. Our courts have construed orders for the payment of alimony, alimony *pendente lite*, child support, and counsel fees to be money judgments under G.S. 1-289. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982); *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962); *Faught v. Faught*, 50 N.C. App. 635, 274 S.E. 2d 883 (1981). Defendant contends that the trial court erred in holding him in contempt since he had posted a bond for the amount due plaintiff.

If we hold, however, as defendant urges, that posting a bond under G.S. 1-289 effectively stayed execution of the judgment, then we will have granted defendant the right to stay execution of a nonappealable *pendente lite* award. (*See* discussion, *supra*, part II). This result would contravene the policy underlying *Stephenson* and its progeny wherein this court recognized the need to forestall appeals brought for purposes of delay. *See Stephenson, supra; Fliehr, supra.* We conclude, therefore, that while execution of a final judgment may be stayed pursuant to G.S. 1-289, execution of an interlocutory order like the one here is not subject to the stay provisions of G.S. 1-289.

[9] The contempt proceeding here was governed by G.S. 5A-21, which provides in pertinent part: "Failure to comply with an order of a court is a continuing civil contempt as long as . . . [the defendant] is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." To hold defendant in contempt, the trial court must find as a fact that defendant had the ability to comply with the award. *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E. 2d 677 (1980).

The trial court order included the following factual findings:

> 9. The Defendant's financial affidavits and federal income tax returns for 1980 and 1981 filed in the record on this action state that the Defendant has a net worth in the amount of two million dollars and receives substantial annual income . . .
>
> 10. According to the Defendant's 1980 federal income tax return, he reported income of approximately $196,667.71

and according to the Defendant's 1981 federal income tax return, he reported income of approximately $163,878.43.

11. The Defendant has had the means with which to comply with the terms of the order of December 16, 1982 at all times since the entry of the said order through and including the date of this hearing, February 14, 1983.

12. The Defendant has shown no extraordinary financial expenditure or other circumstance affecting his net worth since the date of the Court's prior order other than the payments of support as described in this order.

13. The Defendant's failure to make payment as set forth above has been willful, and without legal justification or excuse.

As evidenced by these trial court findings, defendant had the financial ability to comply with the previous order. The trial court's findings of fact in a contempt proceeding are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *Clark v. Clark, supra.* The record in this case reveals ample evidence to support the court's factual findings. The court was, furthermore, vested with authority under G.S. 5A-21(a) and (b) to hold defendant in contempt and order that he be imprisoned for so long as the contempt continued. We therefore affirm the order in its entirety.

Defendant's first appeal is dismissed.

Defendant's second appeal is dismissed.

The order of contempt, which forms the basis of defendant's third appeal, is affirmed.

Judges WEBB and JOHNSON concur.

GABRIEL WILLIAM ST. CLAIR AND SANDRA PRICE v. MAVIS ST. CLAIR RAKESTRAW AND HUSBAND, OLAN RAKESTRAW

No. 8226SC1169

(Filed 3 April 1984)

Evidence § 24; Rules of Civil Procedure § 32— unavailable witness—reading deposition into evidence error—no determination defendant served with notice

In a civil action in which plaintiffs sought to recover damages allegedly resulting from defendants' trespass to realty, trespass to chattels, conversion, intentional infliction of emotional distress, malicious prosecution, and abuse of process, the trial court erred in permitting the plaintiffs to read into evidence the deposition of the plaintiff St. Clair where, although the court did properly determine that Mr. St. Clair was unable to attend court, the record also showed that defendant was neither present nor represented at the taking of the deposition, and the court should have determined whether defendant had been properly served with notice. G.S. 1A-1, Rule 32.

Judge ARNOLD dissenting.

ON writ of certiorari to review judgment entered by *Sitton, Judge.* Judgment entered 14 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1983.

The defendant Mavis St. Clair Rakestraw is the only surviving child of the plaintiff St. Clair. They live next door to each other in Charlotte—Mr. St. Clair at 2108 Lombardy Circle and Mrs. Rakestraw at 2104. Though Mr. Rakestraw visited Charlotte occasionally, he had been working and for the most part living in Virginia for several years. The plaintiff Sandra Price, the daughter of a deceased son of Mr. St. Clair, is the niece of Mrs. Rakestraw; she lived in South Carolina, and held Mr. St. Clair's power of attorney to handle his property and affairs.

In this civil action the plaintiffs seek to recover damages allegedly resulting from defendants' trespass to realty, trespass to chattels, conversion, intentional infliction of emotional distress, malicious prosecution, and abuse of process. The trespass and conversion claims of Mr. St. Clair are based on allegations that while plaintiff St. Clair was away from home in the hospital, Mrs. Rakestraw, without authority, entered his premises and removed certain items of personal property belonging to him. The abuse of process, malicious prosecution and intentional infliction of emo-

tional distress claims of both plaintiffs are based on two court proceedings that Mrs. Rakestraw initiated—one to have Mr. St. Clair declared mentally incompetent, the other to nullify the power of attorney and to restrain Ms. Price from exercising it during the interim. The incompetency petition, among other things, contained allegations that Mr. St. Clair had terminal cancer, which he may not have known. The complaint in the other case contained allegations that the power of attorney was obtained by undue influence and fraud. One proceeding was filed 13 August 1980, the other 19 August 1980. Both proceedings were voluntarily dismissed by Mrs. Rakestraw on 18 September 1980, and this action was filed the next day.

In answering the complaint in this case Mrs. Rakestraw denied all claims, alleged that both proceedings were filed in good faith, and counterclaimed for slander, alleging that plaintiff St. Clair called her a thief. In answering the one claim against him, for conversion, Mr. Rakestraw denied participating in or authorizing the seizure of the articles involved, and moved to dismiss. His motion was eventually granted on 2 September 1981 by an order of summary judgment eliminating him from the case.

The remaining case against the defendant Mavis Rakestraw was on the calendar for trial during the 13 April 1982 session of Mecklenburg County Superior Court. When the calendar was called no lawyer acting for her was there and the court ascertained, by examining the file and questioning defendant and plaintiffs' lawyer, that defendant had no counsel of record, Judge Grist having permitted the lawyers that had represented her and Mr. Rakestraw since suit was filed to withdraw from the case several weeks earlier, but she had employed another lawyer, on some basis at least, who had discussed the case with plaintiffs' lawyer. That lawyer, sent for by the judge, stated that he had been paid $300 just to study the case, had not been engaged to try the case, and was not prepared to do so. Mrs. Rakestraw stated that she understood the lawyer was in the case for good, but that if he did not want to handle the case, she did not want him to. She also stated that: The lawyer had told her the case could not be reached for trial at that term, but had not told her he was not going to handle it; as a consequence she had not tried to obtain another lawyer or made any preparations to try the case, had not even notified her husband to be there, and that he could not

possibly make it to court from Virginia in time for the trial. After this discussion, the judge excused the lawyer from the case, but declined to continue the trial, which proceeded with defendant undertaking to represent herself. At the close of plaintiffs' evidence the claims for trespass, trespass to chattel, intentional infliction of emotional distress, and abuse of process were dismissed by the court. After all the evidence was in, the case had been argued on both sides, and the judge instructed the jury, verdict was rendered awarding Ms. Price $10,000 in damages for malicious prosecution, and Mr. St. Clair $10,000 for conversion and $8,000 for malicious prosecution.

Defendant's appeal from the judgment entered on the verdict was dismissed by the trial court for failure to timely serve the record on appeal; and the cause is before us on writ of certiorari. By cross-assignments of error, plaintiffs attempt to present several other questions for review.

Warren & McKaig, by Joseph Warren, III, and India Early Keith, for plaintiff appellees.

Badger & Johnson, by David R. Badger, for defendant appellant.

PHILLIPS, Judge.

Though the defendant contends with some force that the judge's refusal to continue the case improperly deprived her of a fair trial, by in effect requiring her to represent herself in this complicated and substantial case in which she had reason to believe counsel would assist her but no preparations for trial had been made, and her husband could not appear as a witness, the view of the appeal that we take makes it unnecessary to consider this contention.

The one assignment of error that does require determination pertains to the court permitting the plaintiffs to read into evidence the deposition of the plaintiff St. Clair. The court's ruling, pursuant to Rule 32(a)(4) of the North Carolina Rules of Civil Procedure, was based upon findings, which the affidavit of St. Clair's physician clearly supported, that he was unable to attend court because of illness and advanced age; but according to the

record defendant received no notice the deposition was going to be taken and its receipt into evidence was therefore improper.

Summons and complaint were served on defendant October 6, 1980, and the deposition was taken at plaintiff St. Clair's home October 28, 1980, three days before the defendant's first lawyer became counsel of record in the case by moving for an extension of time within which to file answer. Since the deposition was being taken before thirty days had expired following issuance of the complaint and summons, leave therefor was obtained from the court, as required by Rule 30(a) of the North Carolina Rules of Civil Procedure, and the court's order was attached to the notice, both dated October 13, 1980. Neither of the defendants nor their lawyer attended the deposition and before it was read into evidence, Mrs. Rakestraw, in opposing its admission, remarked to the court as follows:

> This deposition was taken in my father's home. And, I live next door. And, Mr. Warren—I didn't know then—I knew later that he was who he was. He arrived with another attorney. And then, my niece, Sandra St. Clair Slade Price, she arrived in a car; and then, my sister-in-law, Margie Price, she—Margie St. Clair, she arrived.
>
> All of these people went in my father's home. This was like two days before I had been told I never knew that there was a deposition. And, I was told that they took a deposition from my father.
>
> And, I think the circumstances that worried me and bothered me that they were doing these things to my father. And, I didn't know what they were doing to my father. I felt real ill and worried and wondered and was anxious and wanted to help him; but I was helpless.

Rule 32 of the North Carolina Rules of Civil Procedure in pertinent part provides:

> (a) Use of depositions.
>
> At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any *party who was present or represented at the tak-*

ing of the deposition or who had reasonable notice thereof, in accordance with the following provisions:

. . . .

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the witness is unable to attend or testify because of age, illness, infirmity . . . (Emphasis added.)

Though the court did properly determine that Mr. St. Clair was unable to attend court, since the record shows defendant was neither present nor represented at the taking of the deposition, the court should also have determined whether defendant had been properly served with notice. The record contains no indication that this question was addressed and the record does not show that any type of valid service was made on her. The record does reveal, however, that the notice addressed to Mrs. Rakestraw, which had been delivered to the sheriff, was returned unserved at the express request of plaintiffs' attorney. The damaging effect of the deposition is beyond question. Under the circumstances, therefore, we are compelled to conclude that its receipt into evidence was prejudicial error and that a new trial is required.

Too, even if defendant had been properly notified, the willingness of the plaintiffs to go ahead with the deposition without inquiring of defendant, who was next door, if she and her lawyer were going to attend, though not necessarily legal error, is nevertheless not to their credit. Strangers and lifetime enemies alike, engaged in litigation in this country, almost universally extend such courtesies to their adversaries; that the blood relative participants in this case could not do likewise is something to ponder, with sadness.

The merits of plaintiffs' several cross-assignments of error cannot be considered. Through them plaintiffs contend that the court erred in denying their motion to amend the complaint to allege defendant converted still other articles not previously alleged, by dismissing various of their claims at the end of their evidence, and in refusing to permit the jury to consider punitive damages in connection with plaintiffs' conversion and malicious prosecution claims. The purpose of cross-assignments of error, as

Rule 10(d) of the North Carolina Rules of Appellate Procedure makes plain, is to allow review of actions or omissions by the trial court which deprive the appellee of an *alternative* basis in law for supporting the judgment, order, or other determination from which appeal is taken. But plaintiffs' cross-assignments show no alternative ground for upholding the judgment that defendant appealed from; instead, they purport to show that the judgment was erroneously entered and an altogether different kind of judgment should have been obtained. Such issues can only be raised by appeal; and plaintiffs neither appealed from the judgment nor asked by their own petition for writ of certiorari that the errors now complained of be reviewed. *Stevenson v. N. C. Dept. of Insurance,* 45 N.C. App. 53, 262 S.E. 2d 378 (1980).

As to the defendant appellant's appeal, the judgment is reversed and the cause remanded for a new trial. As to the issues raised by the plaintiff appellees, the trial court's rulings are affirmed.

Affirmed as to plaintiff appellees.

Reversed and remanded as to the defendant appellant.

Judge EAGLES concurs in result.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

In her first assignment of error, defendant contends the trial court erred in requiring her to represent herself. Significantly, we note that the trial court did not require defendant to represent herself. The record indicates that prior to the case being calendared for trial, defendant had consulted a number of attorneys. One of those attorneys was allowed to withdraw because defendant refused to compensate her. Other attorneys consulted by defendant were never employed. When the case was called for trial, defendant was given every opportunity by the trial court to obtain counsel, but defendant failed to do so. When informed by the trial court that the case was properly calendared, that defendant had due notice of those circumstances, that plaintiffs were

ready for trial, and that the case would, therefore, proceed to trial, defendant failed to either object or to request a continuance. Defendant's first assignment of error preserved no question for our review, and it is, therefore, overruled. *See* Rule 10(b)(1) of the Rules of Appellate Procedure.

In her second assignment of error, defendant apparently contends that the jury award of damages to plaintiffs included a sum for attorneys' fees; again, this assignment of error is not related to any exception preserved at trial, and it is not considered. Appellate Rule 10(b)(1).

In her third assignment of error, defendant contends that use of plaintiff St. Clair's deposition at trial violated G.S. § 1A-1, Rule 32(a). Rule 32(a) permits a deposition to be used against a party "who was present or represented at the taking of the deposition or who had reasonable notice thereof. . . ." Defendant was not present or represented at the taking of plaintiff St. Clair's deposition and claims she did not receive notice of the taking of the deposition.

At trial, defendant did not object to the use of plaintiff St. Clair's deposition, but merely commented to the court on the circumstances surrounding the taking of the deposition. No question has been preserved under this assignment, and it is also not before us. Appellate Rule 10.

In her fourth assignment of error, defendant contends the trial court erred in allowing certain evidence to which defendant did not object at trial. This assignment likewise fails to preserve any question for our review. Appellate Rule 10(b)(1).

Plaintiffs contend the trial court committed several errors prejudicial to them. However, plaintiffs have not appealed from the judgment or brought their own petition for writ of certiorari to review the judgment. Instead, they have brought forward cross-assignments of error. The purpose of cross-assignments of error is to allow review to actions or omissions by the trial court "which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal was taken." Appellate Rule 10(d). The Drafting Committee Note that accompanies Appellate Rule 10(d) indicates that cross-assignments of error are in effect conditional assignments of

error by which an appellee may demonstrate alternative grounds for supporting the judgment in the event that prejudicial error is found in the original basis for judgment. Cross-assignments of error are not the correct procedural means for attacking all or part of a judgment, as plaintiffs have attempted to do here. *Stevenson v. N.C. Dept. of Insurance,* 45 N.C. App. 53, 262 S.E. 2d 378 (1980).

I find no error.

STATE OF NORTH CAROLINA v. MASON BRASWELL

No. 8329SC995

(Filed 3 April 1984)

1. Criminal Law § 53— expert medical testimony—cause of injury

Testimony by a physician who had been the victim's attending physician since a month after his injury that the victim's brain damage was caused by a gunshot wound to the head was admissible opinion testimony by an expert where the evidence showed that the physician had ample opportunity to acquire the factual knowledge upon which to base an expert opinion as to the cause of the injury.

2. Criminal Law § 46— flight of defendant—jury argument—supporting evidence

There was sufficient evidence to support the prosecutor's argument that defendant fled to Florida after shooting the victim where the evidence showed that the crime occurred in July of 1982; an officer testified that he was unable to locate defendant in July, August, and September of 1982; and defendant's wife testified that defendant was in Florida during the month of September 1982.

3. Criminal Law § 102.6— impropriety in jury argument—no prejudicial error

Although the prosecutor may have expressed a personal belief in arguing to the jury that this country is overrun by violence "because we compromise with violent people," such statement was at most of marginal impropriety and did not entitle defendant to a new trial.

4. Criminal Law § 138— improper aggravating factors—use of deadly weapon—cruel offense

In imposing a sentence for assault with a deadly weapon inflicting serious injury, the trial court erred in finding defendant's use of a deadly weapon as an aggravating factor since the use of a deadly weapon was an element of the offense. Also, the trial court erred in finding as an aggravating factor that the

offense was cruel where there was no evidence of special cruelty other than evidence showing that serious injury was inflicted. G.S. 15A-1340.4(a)(1).

Judge PHILLIPS concurring.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 3 February 1983 in Superior Court, HENDERSON County. Heard in the Court of Appeals 14 March 1984.

Defendant was convicted of assault with a deadly weapon inflicting serious injury under G.S. 14-32. We only briefly summarize the evidence here, and refer to other facts and circumstances as necessary in the body of this opinion.

On 25 July 1982, defendant, his girlfriend Elizabeth Mintz, and other individuals from the Henderson County area attended a campfire birthday party in a wooded area in Henderson County. There was uncontradicted testimony that most of the guests were drinking and some smoking marijuana; in particular, at about 1:30 a.m., Michael Pace, the victim, had become so intoxicated that his girlfriend and her sister began to help him to his truck. As the women attempted to assist him, Pace stumbled, and the three fell over Mintz's (now Elizabeth Mintz Braswell, defendant's wife) lounge chair. Mintz had a back problem and had recently been released from the hospital; she yelled out in pain.

The two women testified that they helped Mintz back into her chair, laid Pace down beside her with a cushion beneath his head, and walked away to get the truck and to get someone to assist them in getting Pace into his truck. Both women testified to hearing a gunshot, and one testified that she immediately turned around and saw defendant standing over Pace with a gun in his hand. The women also testified that Pace was bleeding from his head, and that it appeared that part of his brain was coming out of his skull.

Two other witnesses testified that they saw Pace trip over Mintz's chair, that they saw defendant striking Pace, then heard a noise, and saw defendant let go of Pace. However, both of those witnesses testified that they did not see a gun in defendant's hand. These witnesses helped defendant to his car and took him home.

Dr. William Hodges, a physician who treated Pace subsequent to the injury, testified over objection that the cause of Pace's brain damage was a gunshot wound, and that Pace will probably be severely paralyzed for the remainder of his life. The jury returned its verdict and at a subsequent hearing defendant was sentenced to ten years in prison. From the jury verdict and from the sentence imposed, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

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

VAUGHN, Chief Judge.

[1] Defendant first argues that the trial court erred in admitting the testimony of Dr. William Hodges, who testified that Michael Pace's brain damage was caused by a gunshot wound to the head. We hold such testimony was properly admitted.

Dr. Hodges has been the victim's attending physician at the Veterans' Administration Hospital in Asheville since September 1982, approximately a month after the injury. He was found by the trial court to be an expert in internal medicine and therefore qualified to express opinions within that field. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956) (competency of witness to testify as expert is matter within discretion of trial judge). Dr. Hodges testified that Pace was suffering from brain damage, and that medical records indicated that the cause of the injury was a gunshot wound to the head. Defendant's objection to this hearsay testimony was properly sustained. *State v. Hamilton*, 16 N.C. App. 330, 192 S.E. 2d 24 (1972).

After this objection was sustained, the prosecution rephrased its question, asking the doctor if he "knew" the cause of brain damage. Towards the end of its direct examination, the prosecution again asked Dr. Hodges if he had an opinion as to what caused the brain damage. Both times Dr. Hodges testified over defendant's objection that a gunshot wound caused the brain damage.

Defendant contends that Dr. Hodges was testifying to information of which he had no personal knowledge or, alternatively, that he gave opinion testimony unsupported by an adequate foundation. We find that Dr. Hodges' testimony as to the cause of Michael Pace's brain damage was admissible opinion testimony of a medical expert.

The basic principle governing expert testimony is that where an expert witness testifies as to facts based upon personal knowledge, that witness may testify directly in the form of an opinion. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980). Defendant insists Dr. Hodges lacked personal knowledge upon which to base his opinion. It is true that Dr. Hodges did not witness the scene of the victim's injury. However, a physician's opinion is rarely based on such eyewitness testimony; rather, admissible opinion testimony is usually based on observation and examination of the patient after the injury. *See, e.g., State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980) (physician who treated victim in emergency room permitted to state opinion that bruises on a kidnapping and rape victim's face "looked as though that pattern could have been made by fingers"). The record discloses that Dr. Hodges, as the victim's treating physician since September 1982, had ample opportunity to acquire the factual knowledge upon which a medical expert's opinion testimony as to causation of an injury is typically based. *See State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410 (1971) (in prosecution for rape, pathologist's testimony that victim's injuries "could have been caused by male organ" is admissible and does not invade province of jury).

It would have been perhaps preferable for the State to have developed a more detailed foundation for Dr. Hodges' medical opinion testimony; nevertheless, the foundation as laid at trial was legally sufficient. Where a proper foundation is laid, as here, any failure to bring out all the factors surrounding and supporting the opinion testimony goes to the weight to be given the testimony, and not to its admissibility. Eliciting the full factual basis for Dr. Hodges' opinion that Michael Pace's brain damage was caused by a gunshot wound was properly a matter for cross-examination. Defendant chose not to take advantage of the opportunity to challenge the factual basis for Dr. Hodges' opinion, asking him on cross-examination only a single question unrelated

to the opinion testimony. Defendant is not permitted to alter on appeal the strategy he chose at trial.

Defendant also assigns prejudicial error to two portions of the prosecution's closing argument. The defendant argues that the prosecutor improperly brought before the jury the fact that the defendant fled to Florida after he allegedly shot the victim. Defendant additionally contends that the prosecutor committed prejudicial error when he argued to the jury that this country is overrun by violence because "we compromise with violent people."

Attorneys are forbidden during jury argument to place before the jury "incompetent and prejudicial matters by injecting [their] own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). Despite these prohibitions, attorneys enjoy great freedom in jury arguments, and a defendant is entitled to a new trial only when counsel's abuse of the privilege to forcefully persuade the jury is excessive.

> The latitude permitted in jury argument is controlled by the judge's discretion. . . . Ordinarily [the judge's] discretion is not reviewable "unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. . . ." A new trial is awarded only in cases of extreme abuse in the argument.

State v. Bailey, 49 N.C. App. 377, 383-4, 271 S.E. 2d 752, 756, *review denied*, 301 N.C. 723, 276 S.E. 2d 288 (1980) (citations omitted; no new trial; solicitor's argument that the defendants were "lawless people" a mere "uncomplimentary characterization").

[2] As to the prosecution's argument concerning the flight of the defendant, there was evidence in the record to support the prosecutor's statements. Defendant's wife testified that the defendant was in Florida during the month of September 1982; the detective assigned to defendant's case testified that he was unable to locate defendant in July, August, and September of 1982. This may not be conclusive evidence of flight; it is nonetheless supportive of flight, and we therefore hold that undue prejudice did not result from the prosecution's argument.

Furthermore, any erroneous statements of the law concerning flight were cured by the judge's preface to his charge that the jury is to apply the law given to them by the court, coupled with the District Attorney's statement that "The Court will instruct you, I believe, that flight is evidence of guilt. . . ." The court did not instruct the jury on flight; the court did, however, properly instruct the jury on all law pertinent to the case. "Under these circumstances, we cannot say that [any] misstatements of law contained in the argument of the prosecutor are so material and prejudicial as to require a new trial." *State v. Harris*, 290 N.C. 681, 696, 228 S.E. 2d 437, 445 (1976).

[3] Nor is the defendant entitled to a new trial because the State's attorney argued that this country is overrun by violence "because we compromise with violent people." Although counsel arguably expressed a personal belief, which expression is not allowed in jury argument, counsel's observation was at most a marginal impropriety. The statement did not create the material prejudice necessary to support an award of a new trial. *Cf. State v. Britt, supra* (new trial where jury told defendant had been on death row for prior conviction of first degree murder in same case, where prosecution continued to argue irrelevant principles of law even after court sustained defendant's objection, and prosecutor expressed his personal belief as to defendant's testimony).

[4] Although not entitled to a new trial, defendant is entitled to a new sentencing hearing. The crime for which defendant was convicted, assault with a deadly weapon inflicting serious injury, includes the element of use of a deadly weapon. G.S. 14-32(b). Defendant received a sentence in excess of the presumptive sentence based in part upon the trial court's finding of use of a deadly weapon as an aggravating factor. G.S. 15A-1340.4(a)(1) states 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." *See State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983) (sentence for armed robbery conviction cannot be enhanced by possession or use of deadly weapon, because such possession or use is element of crime). This Court has specifically held that the trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defend-

ant is convicted of a G.S. 14-32 assault. *State v. Hammonds,* 61 N.C. App. 615, 301 S.E. 2d 457 (1983).

The same analysis applies to the trial court's finding that the offense was especially cruel. There was no evidence of special cruelty other than the evidence showing that serious injury was inflicted. There was, therefore, insufficient evidence to support that aggravating factor. In *State v. Hammonds, supra,* this Court awarded a new sentencing hearing in a G.S. 14-32 conviction, stating:

> The evidence showed that defendant approached the victim without provocation and shot him in the face. The use of a deadly weapon and the seriousness of the injury involved here may be evidence of an especially heinous, atrocious and cruel crime. However, the same evidence proved the deadly weapon and serious injury elements of the crime.

Id. at 616, 301 S.E. 2d at 458.

We hasten to add, however, that there may be cases where serious injury is inflicted but the evidence will also show the crime to have been especially heinous, atrocious or cruel. This is not true in the case before us.

An error in the application of aggravating factors can never be deemed harmless, *State v. Ahearn,* 307 N.C. 584, 602, 300 S.E. 2d 689, 698 (1983), and defendant is therefore entitled to a new sentencing hearing.

Remanded for resentencing.

Judges WHICHARD and PHILLIPS concur.

Judge PHILLIPS concurring.

Though I agree that error prejudicial to defendant has not been shown and that he would almost certainly be convicted if retried, some evidence that the court not only received, but assisted in presenting, was so grossly erroneous that it requires disapproval, lest it be repeated to another defendant's prejudice. A doctor, who never saw the victim of defendant's assault until two

months following the injury, was not merely permitted, but was directed, to answer the following question:

> Q. Do you *know* the cause of Michael Pace's brain damage? (Emphasis added.)

This manifestly improper question did not ask for the doctor's opinion, but his knowledge, which he did not have. And its erroneousness was accentuated by the fact that it had been asked before and answered sensibly, though unresponsively, that Pace's injury occurred two months before he met him. Nevertheless, instead of leaving the District Attorney to his own devices or suggesting that he ask a proper question, as would have been appropriate, His Honor admonished the witness to listen to the question and answer it as stated, and told the District Attorney, "ask him your question again." In that setting that the witness then professed to know what he obviously did not know, that the cause was a bullet wound, is not surprising. In a closer case this aggravated impropriety on the court's part would require a new trial, in my opinion.

TEDDY RAY BRYANT AND WIFE, OMA P. BRYANT v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 8317SC387

(Filed 3 April 1984)

1. **Rules of Civil Procedure § 15.1— denial of motion to amend complaint—avoiding further delays**

The trial court's denial of plaintiffs' motion to amend their complaint to allege an unfair trade practice was within the court's discretion to deny the amendment to avoid further delays in the trial where the case had already been continued at least once and the motion to amend was made just a few days before trial. G.S. 1A-1, Rule 15(a); G.S. 75-1.1.

2. **Insurance § 136— fire insurance—sufficient evidence to support jury award**

In an action to recover under a fire insurance policy, the evidence was sufficient to support the jury award of $34,750 for damages to plaintiffs' home, although the lowest estimate by plaintiffs' witnesses of the value of the home was $44,750 and defendant insurer offered no evidence concerning the value of the home.

3. Rules of Civil Procedure § 59— Rule 59 motion to set aside verdict—appellate review

An order setting aside a verdict under G.S. 1A-1, Rule 59 as being against the greater weight of the evidence will not be disturbed upon appeal absent a showing of abuse of discretion. However, where the trial court grants the Rule 59 motion based on an issue of law, its decision may be fully reviewed on appeal.

4. Insurance § 122— fire insurance—misrepresentations during investigation not material—policy not voided

Misrepresentations made by the insureds during a fire loss investigation concerning their finances and marital status were not material misrepresentations within the purview of G.S. 58-176(c) so as to void their fire insurance policy.

APPEAL by plaintiffs from *Hairston, Judge.* Judgment entered 27 September 1982 in SURRY County Superior Court. Heard in the Court of Appeals 6 March 1984.

Defendant issued a contract in September, 1980, insuring plaintiffs' home and its contents. The policy coverage was increased in February, 1981 to $50,000.00 for the dwelling and $25,000.00 for personal property. On 14 April 1981, plaintiffs' home and its contents were destroyed by fire. Defendant denied coverage, alleging that plaintiffs deliberately set the fire and made material misrepresentations to defendant during the fire investigation. After trial, the jury found that plaintiffs did not set the fire, that they made no material misrepresentations and that plaintiffs were entitled to $34,750.00 in damages to the dwelling and $12,500.00 for damage to personal property. The trial court denied plaintiffs' motions for judgment notwithstanding the verdict, or, alternatively, a new trial on the issue of damage to the dwelling. The court then granted defendant's motion to set aside the verdict and for judgment notwithstanding the verdict on the issues of material misrepresentation and damages, and granted defendant's conditional motion for a new trial on the two issues.

From the order denying their motions, setting aside part of the jury verdict and awarding a conditional new trial, plaintiffs appealed.

Gardner, Gardner, Johnson, Etringer and Donnelly, by Gus L. Donnelly, Sr., for plaintiffs.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by W. T. Comerford, Jr. and G. Gray Wilson, for defendant.

WELLS, Judge.

[1] In their first assignment of error, plaintiffs contend that the trial court erred in denying their pre-trial motion to amend their complaint. Plaintiffs sought to allege a claim under N.C. Gen. Stat. § 75-1.1 (1981), North Carolina's unfair trade practice act, on the grounds that defendant forged a portion of plaintiffs' insurance application, then tried to deny coverage under the policy because of misrepresentations in the application. The trial court denied plaintiffs' motion to amend after defendant agreed to withdraw the portion of its defense based on misrepresentations in plaintiffs' insurance application.

A motion to amend under N.C. Gen. Stat. § 1A-1, Rule 15(a) of the Rules of Civil Procedure ". . . is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." (Citations omitted) *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 298 S.E. 2d 409 (1982), *pet. disc. rev. denied*, 308 N.C. 194, 302 S.E. 2d 248 (1983). A motion to amend may be properly denied where such change would result in ". . . (a) undue delay, (b) bad faith or dilatory tactics, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* In the case at bar, plaintiffs' case had already been continued at least once, and the motion to amend was made just a few days before trial. It was clearly within the trial court's discretion to deny the amendment to avoid further delays in the trial. Plaintiffs' first assignment of error is overruled.

In their second assignment of error, plaintiffs contend that the trial court erred in denying their motion for judgment notwithstanding the verdict as to damages to real property, or, alternatively, setting aside the verdict and allowing a new trial on that issue.

A motion for judgment notwithstanding the verdict, or judgment N.O.V., is in effect a directed verdict granted after the jury verdict. Shuford, *N.C. Civ. Prac. & Proc.* (2d ed. 1981) § 50-8. A motion for judgment N.O.V. ". . . shall be granted if it appears that the motion for directed verdict could properly have been granted." N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) of the Rules of Civil Procedure. A motion for judgment N.O.V., like a motion for a directed verdict, raises the question whether there was suffi-

cient evidence to go to the jury, viewing all the evidence in the light most favorable to the nonmovant. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). On appeal, the appellate court may review the trial court's decision fully, determining the sufficiency of the evidence on the same standards applied by the trial judge. *Huff v. Thornton*, 23 N.C. App. 388, 209 S.E. 2d 401 (1974), *aff'd*, 287 N.C. 1, 213 S.E. 2d 198 (1975). A motion to set aside the verdict as against the greater weight of the evidence is permitted under Rule 59 of the Rules of Civil Procedure. A Rule 59 motion is addressed to the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

[2] In support of their assignment of error, plaintiffs argue only that there was insufficient evidence to support the jury award of $34,750.00 for damages to plaintiffs' dwelling, and that, therefore, the trial court should have granted their motion for judgment N.O.V. This argument is more properly addressed to plaintiffs' motion to set aside the verdict under Rule 59. Plaintiffs' contention that the trial court erred in denying their motion for judgment N.O.V. is not properly supported by argument in their brief, and therefore that portion of their assignment of error is deemed abandoned, Rule 28(b)(5) of the Rules of Appellate Procedure. As to the Rule 59 motion, plaintiffs point out that the only evidence of damages to their house was the opinion testimony of two witnesses, estimating value of the dwelling just before the fire at $53,000.00 and $44,750.00, respectively. Defendant offered no evidence concerning the value of the dwelling. The only other evidence concerning the value of the dwelling was a stipulation that defendant paid $9,902.37 to the holder of plaintiffs' mortgage. Plaintiffs therefore contend that there was insufficient evidence to support the jury verdict of $34,750.00 in damages to the home, and that in fact the jury erroneously subtracted the amount of defendant's payment to plaintiffs' mortgagee from the amount of damages. While the lowest estimate of the value of plaintiffs' home was $44,750.00, the jury was nevertheless free to weigh the credibility of the witnesses and to reject all or part of the opinion testimony. *Hedgepeth v. Coleman*, 183 N.C. 309, 111 S.E. 517 (1922), Brandis, *North Carolina Evidence* § 126 (1982 & 1983 Supp.). It is mere speculation to assert that the jury arrived at the damage figure by subtracting the amount of defendant's pay-

ment to plaintiffs' mortgagee from the value of the dwelling. We hold, therefore, that the trial court did not abuse its discretion in refusing to set aside the damages verdict as against the greater weight of the evidence. Plaintiffs' second assignment of error is overruled.

[3] In their third assignment of error, plaintiffs contend that the trial court erred by allowing defendant's motions to set aside the verdict, for judgment N.O.V., and a conditional new trial as to the issues of misrepresentation and damages. As discussed under plaintiffs' second assignment of error, an order setting aside a verdict under Rule 59 will not be disturbed upon appeal, absent a showing of abuse of discretion. However, where the trial court grants the Rule 59 motion based on an issue of law, its decision may be fully reviewed on appeal. *In re Will of Herring,* 19 N.C. App. 357, 198 S.E. 2d 737 (1973). In the case at bar, the trial court granted defendant's Rule 59 motion because ". . . there were too many misrepresentations, and there's no question that they were material. . . ." The court's ruling regarding the effect of the misrepresentations on the insurance contract clearly involved an issue of law and is therefore fully reviewable on appeal.

The evidence in this case shows that members of the Stokes County Sheriff's Department and the State Bureau of Investigation began investigating the cause of the fire within hours after plaintiffs' home was destroyed. Roger Cranford, a fire investigator hired by defendant, also began an investigation within about a week of the fire, aided by the county and SBI reports. On 24 April 1981, Cranford asked plaintiff Teddy Bryant a number of questions concerning Bryant's financial condition. Bryant told Cranford that he was behind one payment on his mortgage and that his only other debts were ". . . just normal bills." At a deposition on 1 July 1981, Bryant revealed additional debts and judgments totalling $22,293.00. In May, 1982, after the present lawsuit was filed, Bryant revealed he owed an additional $3,000.00 or so in debts, bringing his total revealed obligations to about $26,000.00. At trial, defendant demonstrated the existence of another $2,000.00 in debts not previously revealed by Bryant. Bryant also indicated that at the time of the fire he was married to Oma Bryant, when, in fact, Bryant was still legally married to his first wife. Teddy and Oma Bryant, who had lived together for fifteen years prior to the fire, were later legally married.

It is an established principle of insurance law that a policy may be voided where an insured makes material misrepresentations to his insurer. The question whether a misrepresentation is material depends upon a number of factors, including when the misrepresentation is made, the terms of the insurance contract and applicable statutes, and the nature of the misrepresentation. A misrepresentation made in the insurance application is material if ". . . the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk." *Willetts v. Insurance Corp.*, 45 N.C. App. 424, 263 S.E. 2d 300, *disc. rev. denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980). In this case, however, defendant does not contend that plaintiffs concealed or misstated their financial condition in the insurance application, and therefore the misrepresentations could not have affected defendant's judgment in determining whether to accept the risk. *See generally* 7 *Couch on Insurance* 2d § 35:110 (1961 & 1983 Supp.), 45 C.J.S. *Insurance* §§ 487, 488 (1946 & 1979 Supp.).

[4] Defendant argues instead that plaintiffs' misstatements concerning their finances and marital status were made during the course of the fire investigation and thereby violated a disclosure clause in their insurance policy. The "disclosure clause," made mandatory in insurance contracts by the terms of N.C. Gen. Stat. § 58-176(c) (1982), provides that:

> This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

The question before us thus becomes whether plaintiffs' misrepresentations concerning their finances and marital status were material within the meaning of G.S. 58-176(c). Our research has failed to disclose any decision of our state courts determining whether information furnished after a loss regarding an insured's finances or marital status is material, nor does either party cite such a case. We turn, therefore, to an analogous area of law for guidance. Clauses requiring an insured to co-operate fully with an insurer during a loss investigation are commonly included in insurance contracts, and an insured's failure to comply may result

in avoidance of the policy. Our courts have held that a misrepresentation by an insured constitutes a breach of a co-operation clause only when the misrepresentation results in some actual detriment to the insured. *Henderson v. Ins. Co.*, 254 N.C. 329, 118 S.E. 2d 885 (1961), 44 Am. Jur. 2d *Insurance* § 1431 (1982 & 1983 Supp.), Annot. 13 A.L.R. 4th 837 (1982 and 1983 Supp.).

Applying this rule to the case before us, we hold that a misrepresentation during a loss investigation is material within the meaning of G.S. § 58-176(c) only when the misrepresentation prejudices the insurer. In this case, plaintiffs' misstatements did not prevent a prompt investigation of the fire by law enforcement officials and defendant's agents, nor did the statements concern the amount of the loss or the origin of the fire. We fail to see, therefore, how defendant was prejudiced by the inaccurate information given to defendant by plaintiffs. We hold that the trial court's order setting aside the jury's verdict and ordering a new trial was based upon a misapprehension of law. It is clear that there was sufficient evidence to support the jury's verdict and since it was error for the trial court to grant defendant's Rule 59 motion and for judgment N.O.V., there remains no sound reason to order a new trial.

The judgment of the trial court is reversed and this cause is remanded to the trial court with instructions that judgment for plaintiffs be entered on the jury's verdict.

Reversed and remanded.

Judges ARNOLD and BRASWELL concur.

WACHOVIA BANK & TRUST COMPANY, N.A. v. VERNON L. GUTHRIE AND JOYCE GUTHRIE

No. 833DC162

(Filed 3 April 1984)

1. Appeal and Error § 31.1— plain error rule—inapplicability to civil cases

The "plain error" rule for errors in the charge applies only in criminal cases. However, assuming that the "plain error" exception to the App. Rule

10(b)(2) requirement that objection to the charge be made before the jury retires should extend to civil cases, there was no fundamental error in this case which would cause the appellate court to invoke its powers under App. Rule 2 to suspend the operation of App. Rule 10(b)(2).

2. Witnesses § 5— internal memorandum—inadmissibility for corroboration

The trial court did not abuse its discretion in refusing to allow into evidence an internal memorandum written by plaintiff's employee for the purpose of corroborating the employee's testimony where the memorandum contained extraneous matters not in evidence and its admission could have unfairly prejudiced defendants.

APPEAL by plaintiff from *Rountree, Judge.* Judgment entered 4 October 1982 in District Court, CARTERET County. Heard in the Court of Appeals 17 January 1984.

This is a civil action wherein plaintiff, a bank, seeks to recover from defendants money allegedly owed to it as the unpaid balance on a promissory note.

On or about 28 November 1975, defendants executed a promissory note in favor of plaintiff bank in the original amount of $5,457.26. The note was secured by a mortgage on defendants' fishing trawler, the "Carmen Louise." The terms of the note provided for payment of principal and interest in forty-two monthly installments of $151.96, beginning in February of 1976. Defendants made payments on the note until June of 1977.

On 1 December 1981, plaintiff instituted the present action seeking to recover the alleged unpaid balance of $4,066.04 due on the note plus interest and attorney fees. Defendants responded, denying the material allegations of the complaint and asserting in substance the affirmative defense of accord and satisfaction. Defendants alleged that, at the request of plaintiff, they had signed certain documents purporting to transfer the "Carmen Louise" to plaintiff, that plaintiff thereafter sold the "Carmen Louise" to a third party, and that, at the time of the transfer, the "Carmen Louise" had a value in excess of the amount owed on the note.

Both sides presented evidence at trial. The testimony of Mr. Bennett, an officer of plaintiff bank who supervised the loan to defendants, constituted the plaintiff's case in chief. Plaintiff's witnesses in rebuttal were Mr. Bennett again, Mr. Russell, the owner-operator of a boat repair yard, and Mr. Oglesby, the third

party to whom the boat was allegedly sold. Defendant Vernon L. Guthrie testified for the defendants.

In addition to the factual allegations in the complaint, plaintiff's evidence tended to show that the "Carmen Louise" had been under repair at a repair yard owned and operated by Mr. Russell and that defendants could not pay the bill for the repairs. Consequently, the boat lay unused in the water at Russell's dock for a period of several months until it sank. After determining that the repair bill would not be paid by defendants, Mr. Russell consulted Mr. Bennett about removing the "Carmen Louise." The two of them arranged to transfer the boat to Mr. Oglesby for an unspecified price. The arrangements for the transfer included having defendants sign certain documents "releasing" the boat to plaintiff bank. The exact nature of the documents signed is not clear and they have not been made part of the record. Plaintiff's evidence also tended to show that the value of the "Carmen Louise" at the time of the transfer to Oglesby was less than the amount said to be owing on the note. Plaintiff asserts that it received nothing from the transfer of the boat.

Defendants' evidence tended to show basically the same facts as plaintiff's evidence. Defendants were behind in their payments to the bank and owed Mr. Russell a substantial sum for repairs on the boat. Vernon Guthrie testified that he signed certain papers at the request of Mr. Bennett in order to "turn the boat over to Wachovia so they could get rid of it." The major material difference in the evidence presented by plaintiff and defendants pertained to the estimated value of the boat when it was transferred to Oglesby. Defendant Vernon Guthrie gave his opinion that the fair market value of the "Carmen Louise" at that time was between eight and ten thousand dollars, in excess of the amounts allegedly due on the note and on the repair bill. Defendants contend that their release of the vessel to Wachovia and its subsequent sale constituted accord and satisfaction of the amount due on the note.

Plaintiff submitted several documents into evidence, including the promissory note and security agreement. At the close of its rebuttal testimony, plaintiff tendered as evidence an internal memorandum from Mr. Bennett to other officers in plaintiff Wachovia Bank. The memorandum explained what was happening

with the "Carmen Louise" and the promissory note. Plaintiff asserted that the memorandum was offered to corroborate Mr. Bennett's testimony. Upon the objection of counsel for defendants, the court did not allow the memorandum into evidence.

The court then instructed the jury on the law, summarized the evidence and submitted the following issue: "What amount, if any is the plaintiff entitled to recover of the defendant?" Although exceptions to the jury instructions and the summary of the evidence are noted in the record, neither party objected to the jury charge prior to the retirement of the jury. To the issue submitted, the jury answered, "None," and the court entered judgment for the defendants on this verdict. Plaintiff's motion for a new trial was denied and plaintiff appealed.

Mason and Phillips, by L. Patten Mason, for plaintiff appellant.

H. Buckmaster Coyne for defendant appellee.

EAGLES, Judge.

I

In its argument, plaintiff purports to bring forward several exceptions and assignments of error relating to the trial court's instructions to the jury. Briefly summarized, plaintiff's arguments are: (1) that the court failed to instruct the jury properly on the law arising from the facts of the case, (2) that the court failed to instruct the jury properly on the substance and effect of the parties' stipulations, (3) that the court made several erroneous statements in its summary of the evidence that were not corrected, and (4) that the court did not correctly answer a question raised by the jury after deliberations had begun.

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

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

tion out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Applying the rule here, it does not appear that any of plaintiff's exceptions relating to the jury instructions are properly before this Court. The record affirmatively discloses that plaintiff was afforded an opportunity, as required by the rule, to note its objection to the jury charge prior to the retirement of the jury. Neither the record nor the transcript, however, indicate that the required objection was made.

[1] In its memorandum of additional authority, plaintiff cites us to the recent case of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), for the proposition that, where an appellant fails to object to the jury charge as required by Rule 10(b)(2), the court may nevertheless review the charge for " '[p]lain errors or defects affecting substantial rights.' " *Id.* at 660, 300 S.E. 2d at 378, *quoting* Rule 52(b), Fed. R. Crim. P. *See U.S. v. McCaskill*, 676 F. 2d 995 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982) (stating "plain error" rule). Plaintiff notes that *State v. Odom* appears to limit the application of the "plain error" rule to criminal cases but contends that the instant case presents appropriate circumstances for extending the rule to civil actions. We disagree. Our reading of *State v. Odom* convinces us that our Supreme Court intended the "plain error" rule to apply only in criminal cases. We are aided to this interpretation by our awareness that Appellate Rule 2 allows us to suspend the operation of the Rules of Appellate Procedure in appropriate cases to, among other things, "prevent manifest injustice to a party." N.C. R. App. P. 2. Therefore, we decline to enlarge the "plain error" rule adopted in *State v. Odom* to encompass civil cases. *But cf. In re Will of Maynard*, 64 N.C. App. 211, 307 S.E. 2d 416 (1983) ("plain error" extended in *dicta* to civil cases). Assuming *arguendo* that the "plain error" exception to the operation of Rule 10(b)(2) should extend to civil cases, we perceive no plain error sufficient to warrant a waiver of the operation of Rule 10(b)(2) in this case.

"Rule 10(b)(2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory." *State v. Fennell*, 307 N.C. 258, 263, 297 S.E. 2d 393, 396 (1982). Our review of the record in this case does not reveal any error in the court's charge to the jury that is so

fundamental that we would invoke our powers under Appellate Rule 2 to suspend Rule 10(b)(2) and consider plaintiff's relevant exceptions and assignments of error and the arguments advanced in support of them.

II

[2] Plaintiff next contends that it was error for the trial court to refuse to allow into evidence the internal memorandum written by Mr. Bennett, an employee witness for plaintiff, concerning the transfer of the "Carmen Louise." Plaintiff contends that this memorandum corroborates Mr. Bennett's testimony regarding the release of the boat as security for the note.

In North Carolina, corroborative evidence in the form of a prior consistent statement, written or verbal, is admissible evidence provided that it is substantially consistent with the witness's testimony at trial. *See* Brandis, N.C. Evidence §§ 51-52 (1982). Where the statement goes beyond corroboration and touches upon matters not in evidence, it is not admissible. *Id.; e.g., State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976). With regard to the admissibility of corroborative evidence in civil cases, trial judges in North Carolina are allowed considerable discretion. *Miller v. Kennedy*, 22 N.C. App. 163, 205 S.E. 2d 741, *cert. denied*, 285 N.C. 661, 207 S.E. 2d 755 (1974); *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968). *See generally*, Brandis, *supra*, § 51.

Here, the memorandum that plaintiff offered into evidence, while corroborating Bennett's testimony, contained extraneous matters not in evidence. Its admission could have unfairly prejudiced defendants; its exclusion worked no prejudice to plaintiff. The trial court did not abuse its discretion in refusing to allow the memorandum into evidence.

III

Finally, plaintiff excepts to and assigns as error the trial court's entry of judgment and the denial of its motion under G.S. 1A-1, Rule 59(a), for a new trial. The arguments advanced in support of these assignments of error depend on our finding merit in plaintiff's previous arguments, considered and rejected above. Accordingly, we find that the evidence does support the verdict and that judgment was properly entered thereon. It was not error for

the court to deny plaintiff's motion for a new trial. The judgment appealed from is affirmed.

No error.

Judges HEDRICK and HILL concur.

JEAN LEE TETTERTON, ADMINISTRATRIX OF THE ESTATE OF ORLANDER B. TETTERTON, DECEASED v. LONG MANUFACTURING COMPANY, INC., AND REVELS TRACTOR COMPANY, INC.

No. 833SC476

(Filed 3 April 1984)

Appeal and Error § 3— review of constitutional question

The appellate court will not pass upon the constitutionality of a statute where the record does not affirmatively disclose that the constitutionality of the statute was raised, discussed, considered, or passed upon in the trial court.

Judge BECTON concurring in the result.

APPEAL by plaintiff and defendant Revels Tractor Company, Inc., from *Reid, Judge.* Judgment entered 23 February 1983 in Superior Court, PITT County. Heard in the Court of Appeals 13 March 1984.

This is a civil action wherein plaintiff seeks to recover damages for the wrongful death of her intestate, Orlander B. Tetterton, resulting from the alleged negligence of defendants. The record before us discloses the following:

Plaintiff filed her complaint on 6 October 1981, alleging that her intestate was killed on 8 July 1981 as a proximate result of the negligence of defendants. Defendant Long Manufacturing manufactured the tobacco bulk harvester that caused the death of Mr. Tetterton, and defendant Revels Tractor Company sold the harvester to Mr. Tetterton. Defendant Long Manufacturing filed its answer on 25 November 1981, alleging among other things that plaintiff's claim was barred by the applicable statute of limitations, set out in N.C. Gen. Stat. Sec. 1-50(6). On 3 December 1981 defendant Revels Tractor Company filed its answer denying

any liability to plaintiff and filed crossclaims against defendant Long seeking contribution and indemnity. On 30 November 1982 defendant Long filed a motion for summary judgment, which it supported with pleadings, answers to interrogatories, and affidavits. On 23 February 1983 the trial court entered summary judgment for defendant Long on plaintiff's claims and defendant Revels' crossclaims. Plaintiff and defendant Revels appealed.

Gaylord, Singleton, McNally & Strickland, by L. W. Gaylord, Jr., and Vernon G. Snyder, III, for plaintiff, appellant.

Young, Moore, Henderson & Alvis, P.A., by John E. Aldridge, Jr., and Robert C. Paschal, for defendant Revels Tractor Company, Inc., appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Patricia L. Holland, for defendant Long Manufacturing Company, Inc., appellee.

HEDRICK, Judge.

The record shows that all parties entered into the following stipulation:

> (4) For the sole purpose of this appeal, summary judgment on behalf of Long Manufacturing Company, Inc. would only be appropriate if plaintiff's action is barred by the applicable North Carolina statute of limitations.

The only assignment of error brought forward and argued in plaintiff's brief is set out in the record as follows:

> I. The Court improperly granted Motion for Summary Judgment by defendant Long Manufacturing Company, Inc., in that the statute upon which defendant's Motion was based is unconstitutional on its face.

The only assignment of error brought forward and argued in defendant Revels' brief is set out in the record as follows:

> I. The Court improperly granted the Motion for Summary Judgment of the Defendant, Long Manufacturing Company, Inc., in that the Statute relied upon by both the movant and the Court is unconstitutional.

The only argument advanced on appeal by appellants is that N.C. Gen. Stat. Sec. 1-50(6) is unconstitutional.

In *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971), the plaintiff appealed from a decision dismissing his suit as barred by the applicable statute of limitations. Plaintiff's argument on appeal was that the statute in question was unconstitutional. In upholding the decision of the trial court, our Supreme Court said, "Having failed to question the constitutionality of G.S. 136-111 in the trial court, plaintiff may not on appeal attack the statute upon that ground. 'It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below.' " *Id.* at 187, 181 S.E. 2d at 437 (quoting *Johnson v. Highway Commission*, 259 N.C. 371, 373, 130 S.E. 2d 544, 546 (1963)). *See also Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 274 S.E. 2d 853, *disc. rev. denied and appeal dismissed*, 303 N.C. 181, 280 S.E. 2d 453 (1981):

> The record does not contain anything in the pleadings, evidence, judgment or otherwise, to indicate that any constitutional argument was presented to the trial court. The appellate court will not decide a constitutional question which was not raised or considered in the trial court. . . . The record must affirmatively show that the question was raised and passed upon in the trial court. . . . This is in accord with the decisions of the United States Supreme Court. *Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953).

Id. at 618, 274 S.E. 2d at 857-58.

The record before us does not affirmatively disclose that the constitutionality of N.C. Gen. Stat. Sec. 1-50(6) was raised, discussed, considered, or passed upon in the trial court. We will not pass upon the question in this case, where it is raised and discussed for the first time on appeal.

Summary judgment for Long Manufacturing Company will be affirmed, and the cause is remanded to the Superior Court for further proceedings.

Affirmed.

Judge HILL concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Because, and only because, I find a clear suggestion in *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982) and *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983) that the applicable statute of repose, N.C. Gen. Stat. Sec. 1-50(6), is constitutional, I concur in the result affirming the trial court. Indeed, because I personally believe G.S. Sec. 1-50(6) is constitutionally infirm on several grounds, I could have more easily concurred in the opinion authored by Judge Hedrick had I been convinced that the "constitutionality of [the statute] was [not] raised, discussed, considered, or passed upon in the trial court." Although the judgment itself is silent on the point, the representations made by the parties at oral argument coupled with the stipulations in the record suggest that the trial court considered, and passed upon, the constitutionality of the statute. The "Stipulated Facts" show, among other things, that the plaintiff's intestate was killed while working with the tobacco harvester one day after he purchased it and that plaintiff's action was filed more than six years after the initial sale and delivery of the tobacco harvester. The "Stipulation of Agreed Record on Appeal" recites, among other things, that "for the sole purpose of this appeal, summary judgment on behalf of Long Manufacturing Company, Inc., would only be appropriate if plaintiff's action is barred by the applicable North Carolina statute of limitations."

For the reasons set forth above, I concur in the result.

SOUTH CAROLINA INSURANCE COMPANY v. MARVIN B. SMITH, AND W. L. GORE

No. 835SC635

(Filed 17 April 1984)

Insurance § 91.1— automobile liability insurance—effect of employee exclusion clauses

G.S. 20-279.21(e) limits the operative effect of employee exclusion clauses in automobile policies required by the Financial Responsibility Act to the extent that an insurer may not exclude employees from policy coverage unless workers' compensation is available to those employees.

APPEAL by defendants from *Small, Judge.* Judgment entered 19 April 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 April 1984.

This appeal arises from a summary judgment granted in an action for a declaratory judgment. Prior to the bringing of this action, defendant Smith had filed suit against his employer, defendant Gore. In that action, Smith alleged that he was injured while standing in the back of Gore's truck, as a result of Gore's negligently moving the truck in such a manner that a freezer in the back of the truck fell on Smith. Plaintiff South Carolina Insurance Company, as Gore's automobile liability insurer, then brought this action for a declaratory judgment. Plaintiff seeks a declaration that its policy did not cover the truck at the time of the accident and that plaintiff is under no duty or obligation to appear and defend the action that defendant Smith brought against defendant Gore.

Based on the pleadings and certain written stipulations entered into by the parties, the trial court granted plaintiff's motion for summary judgment on the grounds that the policy contained an employee exclusion clause which relieved plaintiff of any duty or obligation to appear and defend the action Smith instituted against Gore. From the order granting plaintiff's motion, defendants appeal.

Walton, Fairley & Jess, by Ray H. Walton, for defendant-appellant Smith.

David Rock Whitten, for defendant-appellant Gore.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for plaintiff-appellee.

VAUGHN, Chief Judge.

In order to determine whether summary judgment was properly granted plaintiff insurer, we must examine the effect of North Carolina's Financial Responsibility Act on an employee exclusion clause in an automobile liability policy. Plaintiff argues that the employee exclusion clause contained in the "Personal Auto Policy" it issued to defendant Gore relieves it of any liability under the policy arguably arising from the accident in question. Defendants' position is that regardless of the validity of the exclusionary clause, G.S. 20-279.21(e), part of North Carolina's Financial Responsibility Act, subjects the plaintiff to liability under the policy unless evidence is produced showing that defendant employee Smith was covered by North Carolina's Workers' Compensation Act, i.e., that defendant employer Gore was required to provide workers' compensation insurance for its employee.

We first examine the policy exclusion and applicable statutory provision. The employee exclusion provision reads as follows:

> A. We do not provide Liability Coverage for any person:
> . . .
>
> 4. For bodily injury to an employee of that person during the course of employment. This exclusion does not apply to bodily injury to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.

North Carolina's Financial Responsibility Act requires all owners of motor vehicles to carry liability insurance covering both the owner and persons using the vehicle with the owner's permission. The portion of that act on which defendants base their argument is G.S. 20-279.21(e), which provides:

> Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

We note preliminarily that North Carolina adheres to the majority rule that an employee exclusion clause is a valid limitation on coverage in an automobile liability insurance policy. *See, e.g., Insurance Co. v. Insurance Co.*, 256 N.C. 91, 123 S.E. 2d 108 (1961). *See also Dahm v. Employers Mut. Liability Ins. Co. of Wis.*, 74 Wis. 2d 123, 246 N.W. 2d 131 (1976) (fellow employee exclusion clause not contrary to public policy). Indeed, the parties do not contest the validity of the clause but disagree as to its applicability in light of North Carolina's Financial Responsibility Act.

As the particular question before us has never been confronted by the courts of this State, in addition to reviewing pertinent North Carolina authority, we have examined cases from other jurisdictions that have dealt with the effect of similar acts on insurance policy provisions excluding employees from coverage. Based on our consideration of this primary authority from North Carolina and secondary authority from other jurisdictions, we conclude that G.S. 20-279.21(e) controls the policy provision in such a manner that although it does not void the exclusionary clause in question, it limits its effect. Specifically, we hold that G.S. 20-279.21(e) limits the operative effect of employee exclusion clauses in automobile liability policies required by the Financial Responsibility Act to the extent that an insurer may not exclude employees from policy coverage unless workers' compensation is available to those employees. Put otherwise, the validity of the exclusion is contingent on the existence of workers' compensation. In the case before us, the record is devoid of any evidence pertaining to workers' compensation. Therefore, the summary judgment entered in favor of the plaintiff must be reversed and the cause remanded for factual findings as to whether workers' compensation was available to the defendant employee.

The starting point of our analysis is that nothing else appearing, the exclusionary clause in the policy before us would defeat coverage. Defendant Smith, otherwise a "covered person" under

the language of the policy, would be excluded from coverage by plaintiff insurer due to his status as an employee acting in the course of his employment for defendant Gore. *See State Farm Mutual Automobile Ins. Co. v. Karasek*, 22 Ariz. App. 87, 88, 523 P. 2d 1324, 1325 (1974) ("[W]e start from the premise that if we are governed by the clear and unambiguous terms of the policy [the insured] cannot recover"); *General Accident Fire & Life Assur. Corp. v. Kimberly*, 61 Ga. App. 153, 6 S.E. 2d 78 (1939) (language of employee exclusion clause neither uncertain nor ambiguous). The principle that employee exclusion clauses are valid where no contrary statutory provision exists was stated thus by an Ohio court:

> Although such a result may seem unfortunate, in absence of some statutory requirement, an owner of an automobile is not obligated, when . . . [contracting] for liability insurance, to provide coverage for those of his [or her] employees who may drive the automobile with . . . permission or in the course of their employment. . . .

Morfoot v. Stake, 174 Ohio St. 506, 510, 190 N.E. 2d 573, 576 (1963). *See Younts v. Insurance Co.*, 281 N.C. 582, 585, 189 S.E. 2d 137, 139 (1972) (in absence of any provision in Financial Responsibility Act broadening liability of insurer, such liability must be measured by the terms of its policy as written).

Accordingly, in cases where a financial responsibility act is not involved, either because the jurisdiction has not adopted such an act, or because the court declined to consider its effect on an exclusionary clause, it has been uniformly held that such clauses operate to exclude an employee from coverage and that the insurer is thus relieved of liability. *See, e.g., Griffin v. Speidel*, 179 So. 2d 569 (Fla. 1965) (court did not address issue of effect of such a statute on employee exclusionary clause); *Gibbs v. Insurance Co.*, 224 N.C. 462, 31 S.E. 2d 377 (1944) (antedating North Carolina's Financial Responsibility Act).

The more problematic cases are those where it becomes necessary to evaluate the effect of legislation mandating automobile liability insurance on these otherwise valid exclusions. North Carolina has adopted such legislation as Chapter 20, Article 9A of the General Statutes, entitled "Motor Vehicle Safety and Financial Responsibility Act of 1953," and we must therefore consider

the impact of such statutory authority on the policy provision in question. To properly evaluate the effect of G.S. 20-279.21(e) on the policy exclusion in question, it is necessary to understand the policies behind both the North Carolina Financial Responsibility Act generally and behind employee exclusion clauses.

The purpose of any exclusion in a policy of insurance is manifestly to limit the liability of the insurer, and the particular purpose of an employee exclusion clause "is to protect the owner from the expense of double coverage where . . . [an] employee is covered by [workers'] compensation." *Farmers Insurance Group v. Home Indemnity Co.*, 108 Ariz. 126, 129, 493 P. 2d 909, 912 (1972). *See also Dahm v. Employers Mut. Liability Ins. Co. of Wis., supra* (purpose of fellow employee exclusion clause is to leave injured employee to a remedy under workers' compensation law or to an action against fellow employee).

The primary purpose of the compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists. *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964). Furthermore, the Act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967).

We next turn to case law from other jurisdictions. The Ninth Circuit Court of Appeals interpreted California statutes similar to North Carolina's as they applied to an employee exclusion clause in an automobile liability policy. That court stated:

> Cal. Veh. Code § 16451 [comparable to G.S. 20-279.21(b)(2)] requires that motor vehicle liability insurance policies cover permissive users. Cal. Veh. Code § 16454 [comparable to G.S. 20-279.21(e)] allows an exception for liability of the assured imposed on the assured by any . . . [workers'] compensation law. The [employee exclusion clause] . . . falls within the § 16454 exception *only to the extent that it excludes* [*workers'*] *compensation payments.*

United States v. Transport Indem. Co., 544 F. 2d 393, 395 (9th Cir. 1976) (emphasis added). *Accord, Dahm v. Employers Mut. Liability Ins. Co. of Wis., supra* (employee exclusion clause in

employer's liability policy invalid in absence of compliance with statutory requirement that employer provide workers' compensation).

In *Makris v. State Farm Mutual Automobile Ins. Co.*, 267 So. 2d 105 (Fla. 1972), a Florida court reversed a summary judgment entered in favor of the employer's insurance company. The court noted that the insurer inadequately supported its position "by relying on decisions which hold that the provisions of an insurance policy excluding coverage for bodily injury to an employee while acting in the scope of . . . employment are valid." *Id.* at 107. Plaintiff at bar likewise relies on cases which uphold the validity of employee exclusion clauses. As in *Makris*, however, the essential validity of such exclusions is not at issue. What is at issue is the effect of statutes mandating automobile liability insurance on these otherwise valid exclusions from coverage. The court in *Makris* concluded that in light of the purpose of the Florida Financial Responsibility Law, similar to North Carolina's Financial Responsibility Act, certified automobile insurance policies are for the benefit of the public using the highways of that state, and that therefore such policies "may not contain exclusions which destroy the effectiveness of the policy as to any substantial segment of that public." *Id.* at 108.

The court reasoned that to hold otherwise would at times leave persons who were injured while an employee was driving an employer's vehicle without remedy, and that such a result was in derogation of the Financial Responsibility Law and against public policy. As already discussed, the primary purpose of North Carolina's Act is to compensate victims of financially irresponsible motorists, i.e., to provide them with a remedy. Were we to accept plaintiff's argument, we would likewise be making possible situations wherein an injured employee may be left remediless. Such a result would contravene the established purpose of our Financial Responsibility Act.

The courts of Arizona have interpreted a provision of that state's Safety Responsibility Act which, unlike North Carolina's, expressly allows the inclusion of employee exclusion clauses in motor vehicle liability policies. Ariz. Rev. Stat. Ann. § 28-1170 E (Supp. 1983-4) states that "[t]he motor vehicle liability policy need not insure liability under any [workers'] compensation law nor

liability on account of bodily injury to . . . an employee of the insured while engaged in the employment, other than domestic, of the insured. . . ." This statute by its very terms seems to make possible a situation of no coverage where a policy contains an employee exclusion clause and an injured employee is not covered by Arizona's workers' compensation laws. But the statute has not been so construed. Arizona courts have interpreted § 28-1170 E to allow exclusion of an employee from coverage under an employer's automobile liability policy *only* when workers' compensation is available to that employee. *See, e.g., Farmers Insurance Group v. Home Indemnity Co., supra; State Farm Mutual Automobile Ins. Co. v. Karasek, supra* ("obvious purpose" of § 28-1170 E "is to allow a policyholder to avoid a situation where [that person] might be required to purchase the same liability coverage from two different carriers, that is, . . . [a workers'] compensation insurance carrier and [a] motor vehicle liability carrier").

As there exists an Arizona policy that the goal of automobile insurance is to effect indemnity against loss, the Supreme Court of Arizona observed that their construction of the statute

> permits an owner having [workers'] compensation to contract for automobile liability insurance which excludes his [or her] employees. [The owner] thereby obtains the benefit of a lower premium, but [the] policy still conforms fully to the purpose of the Financial Responsibility Act.

Farmers Insurance Group v. Home Indemnity Co., supra, at 129, 493 P. 2d at 912. Likewise does our holding make double coverage unnecessary, encourage the effectuation rather than the negation of coverage and satisfy the purpose of our Financial Responsibility Act.

Our holding also conforms fully to North Carolina rules of construction relating to insurance policies. First, "[a]n insurance policy is a contract, and is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions." *Poultry Corp. v. Insurance Co.*, 34 N.C. App. 224, 226, 237 S.E. 2d 564, 566 (1977). As to the effect of any statute on an insurance policy, the law is clear that a statutory requirement or limitation applicable to a policy of insurance is to be read into the policy as if written therein and controls a contrary provision actually written into the policy. *Har-*

relson v. Insurance Co., 272 N.C. 603, 609-10, 158 S.E. 2d 812, 817-8 (1968). In *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E. 2d 597, 604 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E. 2d 334 (1979), our Supreme Court expressly held that the provisions of the Financial Responsibility Act are written into every automobile liability policy as a matter of law, and prevail when they conflict with a policy term. Furthermore, if there is any ambiguity in an automobile liability policy which requires interpretation as to whether policy provisions impose liability, the provisions will be construed in favor of coverage and against the insurer. *Wright v. Casualty Co.*, 270 N.C. 577, 587, 155 S.E. 2d 100, 107 (1967). *See also Insurance Co. v. Insurance Co.*, 269 N.C. 341, 346, 152 S.E. 2d 436, 440 (1967) (noting that exclusions from and exceptions to undertakings by insurers are not favored). Our holding manifestly complies with these rules of construction.

Although we have reviewed at length authority supporting our decision, we emphasize that the plain language of G.S. 20-279.21(e) is alone sufficient to justify our holding. That provision simply allows an exemption from policy coverage of an employee only insofar as there are benefits available to that employee pursuant to North Carolina's Workers' Compensation Act. Our review of pertinent authority was for the purpose of demonstrating the underlying reasons for our holding.

We are aware that some contrary authority exists. We observe, however, that many cases cited by plaintiff as being in conflict with our holding involve only the validity of an employee exclusion clause rather than the effect of a financial responsibility act on such a clause. Those cases therefore do not address the issue with which we are concerned. The cases cited by plaintiff that apparently support its position are at variance with the greater weight of authority and, we believe, less well-reasoned than cases espousing the majority viewpoint. *See, e.g., Employers' Liability Assurance Corp. v. Owens*, 78 So. 2d 104 (Fla. 1955) (court enforced exclusion as written into policy; dissent noted that majority ignored Florida's Financial Responsibility Act); *Hagerty v. Myers*, 333 Mass. 387, 131 N.E. 2d 176 (1955) (court reasoned that if it did not adopt a construction enforcing employee exclusion regardless of availability of compensation, then the distinction between domestic and nondomestic employees rendered meaningless). Other cases enforcing these

clauses and ostensibly supporting plaintiff's position are distinguishable. *See, e.g., Western Mutual Insurance Co. v. Wann*, 147 Colo. 457, 363 P. 2d 1054 (1961) (employee exclusion clause enforced where policy voluntarily procured); *Stillwell v. Iowa National Mutual Insurance Co.*, 205 Va. 588, 139 S.E. 2d 72 (1964) (similarly).

Summary judgment is not to be granted where there remains a material issue of fact to be determined. "A fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E. 2d 405, 409 (1982) *quoting City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980). A resolution of the case at bar is dependent on whether defendant Smith, as defendant Gore's employee, has workers' compensation coverage available to him. There is no evidence in the record on this point. Thus a material issue of fact remains and summary judgment was improperly granted. *See Dahm v. Employers Mut. Liability Ins. Co. of Wis., supra* (reversed and remanded summary judgment for insurer where record failed to show that employer was required to provide workers' compensation).

Reversed and remanded.

Judges BRASWELL and EAGLES concur.

EDD W. DEARMON, JR., ADMINISTRATOR OF THE ESTATE OF WILLIAM AMARILLO v. B. MEARS CORPORATION, A FLORIDA CORPORATION, RICHARD HENSEL AND MARILYN HENSEL, D/B/A HENSEL & SONS, AND ALLEN F. CANADY

No. 8326SC186

(Filed 17 April 1984)

1. Process § 9.1; Rules of Civil Procedure § 4— automobile accident involving truck leased by foreign defendant—jurisdiction over truck owner

By applying the provisions of G.S. 1-75.4(3), the long-arm statute, and the *prima facie* showing of agency afforded by G.S. 20-71.1 to the facts that the deceased was killed in North Carolina by a motor vehicle owned by the defendant B. Mears Corp., a Florida corporation, the trial court was correct in holding, for purposes of the Rule 12(b) motion, that North Carolina does have

personal jurisdiction over the B. Mears Corp. Furthermore, there was sufficient contact with this state by B. Mears Corp. to satisfy the "minimum contact" requirement in that the truck owned by B. Mears was using North Carolina roads, the accident occurred on a North Carolina highway, and this state has an obligation to protect persons using these roads. G.S. 1A-1, Rule 4(j) and (j1).

2. Automobiles and Other Vehicles § 105.2— genuine issue of material fact as to agency relationship between owner of truck and driver

In an action arising from an automobile accident, there was a genuine issue of fact as to whether an agency relationship existed between the owner of a truck and the driver of the vehicle where the vehicle was leased to a couple and the driver was not an employee of the owner of the truck. G.S. 20-71.1.

APPEAL by defendant B. Mears Corporation from *Snepp, Judge.* Order entered 22 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 January 1984.

This is a wrongful death action in which plaintiff's intestate was killed on 23 December 1979 in Robeson County, North Carolina when he was struck in the median of Highway I-95 by a Peterbilt truck tractor bearing a Florida license. The Peterbilt tractor was titled with the Florida Department of Motor Vehicles in the name of B. Mears Corporation, a Florida corporation. The B. Mears Corporation has no property in North Carolina, is not licensed to do business in North Carolina, does no business in North Carolina, has no employees in North Carolina, and pays no taxes in North Carolina. At the time of the accident the Peterbilt tractor was leased by B. Mears Corporation to Richard Hensel and Marilyn Hensel, d/b/a Hensel & Sons, and was operated by Allen F. Canady, their agent. Though B. Mears Corporation had title to the tractor, it did not have control of the vehicle on the accident date.

Plaintiff filed a summons on 22 December 1981 and an unverified complaint on 31 December 1981 alleging that Canady was negligent in operating the vehicle and that he was the agent and employee of defendant B. Mears Corporation. On 1 March 1982, B. Mears Corporation filed a motion to dismiss pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure, contending *inter alia* that North Carolina did not have personal jurisdiction over defendant B. Mears Corporation. An affidavit supporting the motion stated that the subject vehicle was leased

to Richard and Marilyn Hensel at the time of the collision and that defendant Canady was not an employee of B. Mears Corporation. Plaintiff thereafter filed an amended complaint naming Richard and Marilyn Hensel as additional defendants. B. Mears Corporation reasserted its Rule 12(b) motion to dismiss.

The trial court concluded that North Carolina had personal jurisdiction over defendant B. Mears Corporation and denied defendant's motion to dismiss. Defendant appeals.

DeLaney, Millette, DeArmon & McKnight, by Steven A. Hockfield for plaintiff-appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins, III, for defendant-appellant.

EAGLES, Judge.

I

[1] The first issue is whether the trial court erred in denying defendant B. Mears Corporation's motion to dismiss for lack of *in personam* jurisdiction over it. Resolution of this issue depends upon a two-part determination: (1) whether the statutes permit the courts of this jurisdiction to entertain the action against the defendant; and (2) if so, whether the exercise of this statutory power comports with due process of law. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Defendant argues that neither prong of this test has been satisfied. We do not agree.

1. *Statutory grounds.* The pertinent "long-arm" statute is G.S. 1-75.4(3), which 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) or Rule 4(j1) of the Rules of Civil Procedure under the following circumstances:

> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. *Dillon, supra; Sparrow v. Goodman,* 376 F. Supp. 1268 (W.D.N.C. 1974).

In concluding that North Carolina had personal jurisdiction over B. Mears Corporation, the trial judge also relied upon G.S. 20-71.1(b), which provides in pertinent part as follows:

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

This statute shows a clear legislative intent to provide victims of highway collisions with the opportunity to recover from the owner as well as the driver of the vehicle involved in the accident. *See Broadway v. Webb,* 462 F. Supp. 429 (W.D.N.C. 1977). It enables the plaintiff relying on an agency theory to submit a *prima facie* case to the jury. *Scallon v. Hooper,* 49 N.C. App. 113, 270 S.E. 2d 496 (1980), *disc. review denied,* 301 N.C. 722, 276 S.E. 2d 284 (1981). Since the owner of a vehicle may be held liable for the negligence of an non-owner/operator under the doctrine of *respondeat superior, Howard v. Sasso,* 253 N.C. 185, 116 S.E. 2d 341 (1960), proof of ownership is sufficient to take the case to the jury on the question of the legal responsibility of the defendant for the operation of the vehicle. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309 (1953).

For the purpose of jurisdictional fact-finding, a *prima facie* showing is sufficient to support a finding of jurisdiction. *See Ghazoul v. International Management Services, Inc.,* 398 F. Supp. 307 (S.D.N.Y. 1975); *Kemper v. Rohrich,* 508 F. Supp. 444 (D. Kan. 1980). Hence the evidence that B. Mears Corporation is the owner of the Peterbilt tractor constituted *prima facie* evidence of agency sufficient to support a finding of jurisdiction.

Applying the provisions of G.S. 1-75.4(3) and the *prima facie* showing of agency afforded by G.S. 20-71.1 to the facts alleged, i.e., that the deceased was killed in North Carolina by a motor vehicle owned by the defendant B. Mears Corporation, a Florida

corporation, we conclude that the trial court was correct in holding, for purposes of the Rule 12(b) motion, that North Carolina does have personal jurisdiction over the B. Mears Corporation.

2. *Minimum contacts.* Due process requires that the defendant have certain minimum contacts with the forum state so that maintenance of the suit therein does not offend "traditional notions of fair play and substantial justice." *International Shoe Company v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). Whether the exercise of jurisdiction pursuant to the long-arm statute comports with due process is the critical inquiry. *Chadbourn, Inc. v. Katz,* 285 N.C. 700, 208 S.E. 2d 676 (1974).

The determination of whether minimum contacts are present cannot be made by using a mechanical formula or rule of thumb, but must be made by ascertaining what is fair and reasonable and just in the circumstances, and depends upon the facts of a particular case. *Dillon, supra; Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492 (1963). Fairness to both the plaintiff and the defendant must be considered. *Dillon, supra.*

The criteria for determining whether sufficient minimum contacts exist include: the quantity, quality and nature of the contacts, the source and connection of the cause of action with the contacts and with the forum state; the interest of the forum state with respect to the activities and contacts of the defendant; an estimate of the inconvenience to the defendant in being forced to defend suit away from home; and the location of crucial witnesses and material evidence. *Fieldcrest Mills, Inc. v. Mohasco Corp.,* 442 F. Supp. 424 (M.D.N.C. 1977); *Phoenix America Corp. v. Brissey,* 46 N.C. App. 527, 265 S.E. 2d 476 (1980); *Georgia R.R. Bank & Trust Co. v. Eways,* 46 N.C. App. 466, 265 S.E. 2d 637 (1980).

Applying these criteria, we believe that defendant B. Mears Corporation has sufficient contacts with North Carolina and that it is fair and does not offend due process to require defendant to defend in this state. The Peterbilt tractor owned by B. Mears Corporation was in North Carolina using North Carolina roads built and maintained to a large degree with North Carolina taxpayers' funds. This state has an obligation to protect persons using these roads, whether they are citizens of this state or out-

of-state citizens. Indeed, plaintiff's intestate was a citizen of this state. The methods of protection are diverse and the cost of protection is substantial. B. Mears Corporation, through ownership of the vehicle, is using North Carolina highways and enjoys not only the use of the highways but also the protection afforded to all users.

The accident occurred on a North Carolina highway, so the cause of action arose in this state. Since the conduct giving rise to the cause of action occurred in North Carolina, material evidence and crucial witnesses are more likely to be located within this state. Further, the inconvenience to a corporate defendant in being forced to defend suit away from home is not overwhelming in today's mobile society.

North Carolina courts consistently hold that a non-resident owner-principal is liable for his agent's acts, even though the principal has never entered this state. *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974). Our courts hold that a principal may be subjected to this state's long-arm jurisdiction on account of the acts of his agent since this is reasonable and just according to our traditional concepts of fair play and substantial justice. *Id.* For these reasons we conclude that there was sufficient contact with this state by B. Mears Corporation to satisfy the "minimum contacts" requirement of *International Shoe, supra.*

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980), relied upon by defendant, is clearly distinguishable. The plaintiffs in that case were New York residents who brought a products liability action in Oklahoma state court against a New York retailer, from whom they purchased an automobile in New York, and a New York wholesale distributor, among others, claiming that the injuries they suffered in a collision in Oklahoma while driving the automobile to their new home in Arizona were caused by the allegedly defective design and placement of the gasoline tank. The New York defendants' only connection with Oklahoma was that the accident occurred in Oklahoma. The Supreme Court held that that connection, standing alone, was not sufficient to confer jurisdiction over the New York defendants upon the Oklahoma state court.

In *World-Wide Volkswagen*, the New York defendants were not the owners of the automobile; the negligent act or omission,

i.e., defective design of the gas tank, did not occur in Oklahoma; and the plaintiffs were not Oklahoma citizens. In contrast, in the present case, B. Mears Corporation is the owner of the Peterbilt tractor involved in the accident; the alleged negligent act did occur in North Carolina; and the plaintiff is, and plaintiff's intestate was, a North Carolina citizen.

II

[2] The remaining issue is whether the trial court erred in denying defendant's motions to dismiss for failure to state a claim upon which relief can be granted and for summary judgment. Inasmuch as we have concluded that the trial court properly found jurisdiction, the question of the denial of the motion for summary judgment is interlocutory and we need not consider it. Even so, a genuine issue of material fact exists as to whether an agency relationship existed between B. Mears Corporation and the driver of the vehicle as shown by the forecast of evidence showing that the vehicle was leased to Richard and Marilyn Hensel and that the driver was not an employee of B. Mears Corporation, and G.S. 20-71.1, which mandates a *prima facie* showing of agency through proof of ownership. The function of the trial judge under Rule 56 is to determine whether a genuine issue of material fact exists—not to decide the issue. *Econo-Travel Motor Hotel Corp. v. Taylor,* 301 N.C. 200, 271 S.E. 2d 54 (1980).

Defendant argues that the lease agreement is not in dispute and its legal effect is a matter of law for determination by the court, citing *Peterson v. McLean Trucking Co.,* 248 N.C. 439, 103 S.E. 2d 479 (1958). We note that our Supreme Court has carefully distinguished *Peterson* and its progeny, confining its holdings to cases involving interstate carriers under leases in which the lessee was operating under an I.C.C. certificate. *See Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610 (1963). Nothing in the record indicates the Peterbilt tractor was exercising franchise rights under I.C.C. authority.

The decision of the trial judge is

Affirmed.

Judges HEDRICK and WELLS concur.

IN THE MATTER OF: ALICE MARIE DELANCY

No. 8310SC592

(Filed 17 April 1984)

1. **Administrative Law § 2— *construction and constitutionality of statute—failure to exhaust administrative remedies***

The superior court was without jurisdiction to consider in a declaratory judgment action the construction and constitutionality of G.S. 90-29(b)(11), a portion of the Dental Practice Act, where petitioner failed to exhaust her administrative remedies by seeking a declaratory ruling from the State Board of Dental Examiners as to the construction and constitutionality of the statute.

2. **Physicians, Surgeons, and Allied Professions § 5— dental hygienist—practicing without supervision by dentist—conditioning restoration of license on agreement not to own dental practice**

The State Board of Dental Examiners did not exceed its statutory authority or commit an error of law in suspending petitioner's license to practice dental hygiene for 14 months for practicing without the supervision of a licensed dentist in violation of G.S. 90-233(a) and in conditioning the restoration of her license after a period of only 60 days upon her written agreement not to own, manage, supervise or control a dental practice for a 12-month period. Furthermore, the condition for restoration was rationally related to the legislative goal of protection of the public health and welfare and did not violate petitioner's due process and equal protection rights under Art. I, § 19 of the N.C. Constitution; nor did it grant exclusive emoluments or establish monopolies in violation of Art. I, §§ 32 and 34 of the N.C. Constitution. G.S. 90-229(a)(iv).

APPEAL by respondent, North Carolina State Board of Dental Examiners, from *Bowen, Judge.* Order entered 21 April 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1984.

This is an appeal by the North Carolina State Board of Dental Examiners (hereinafter Board) from an order directing it to modify an agency order that suspended the license of petitioner Alice DeLancy to practice dental hygiene. The record reveals the following:

Petitioner was issued a license to practice dental hygiene in September, 1967. In November, 1981, petitioner opened her own practice, "The Smile Clinic," in which she performed various dental hygiene services in exchange for compensation. Ms. DeLancy was not supervised by a licensed dentist in her performance of these services, as is required by N.C. Gen. Stat. Sec. 90-233(a). On

8 March 1982 the Board issued a Notice of Hearing, which alleged that Ms. DeLancy had violated the law requiring supervision of dental hygiene services. A hearing on the matter, initially scheduled for 16 April 1982, was postponed to 22 October 1982 when petitioner filed an action in federal court challenging the constitutionality of N.C. Gen. Stat. Secs. 90-221(f) and 90-223(a), the statutes requiring that her work be supervised by a licensed dentist. On 20 August 1982, following trial on the merits, United States District Court Judge Franklin T. Dupree, Jr., upheld the constitutionality of the challenged statutes. On 28 October 1982 the Board made findings of fact and conclusions of law and entered the following order:

> 1. License No. 348 issued to Respondent for the practice of dental hygiene is suspended for a period of fourteen (14) months commencing upon surrender of such license and her current renewal certificate to the Board at its offices in Raleigh. Surrender is to be made on or before 5:00 p.m. on the seventh (7th) day following the date of this order.
>
> 2. On the sixtieth (60th) day after her license and renewal certificate are surrendered to the Board, said license and renewal certificate shall be restored to Respondent upon her written consent to the following conditions:
>
> A. She shall not, for a period of twelve (12) months, own, manage, supervise, control or conduct herself or by and through another person or persons any enterprise wherein acts or practices enumerated in G.S. 90-29(b)(1) through (10) are done, attempted to be done, or represented to be done.
>
> B. She shall, for a period of twelve (12) months, violate no provision of the Dental Practice Act, the Dental Hygiene Act, or the Board's rules and regulations.

On 10 November 1982 petitioner filed a "petition for judicial review and for declaratory judgment, and motion for stay" of the final agency decision in Wake County Superior Court, pursuant to N.C. Gen. Stat. Chap. 150A. On 21 December Judge Bailey granted petitioner's request for a stay of the Board's order "to the extent it prohibits Ms. DeLancy's ownership of a dental hygiene clinic." On 22 April 1983 Judge Bowen entered the following order: "WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DE-

CREED that the Agency Order dated October 28, 1982, be modified by striking the condition which appears on page 6 of the Order in paragraph 2A." Respondent appealed.

Sanford, Adams, McCullough & Beard, by H. Hugh Stevens, Jr., Catherine B. Arrowood, and Nancy H. Hemphill, for petitioner, appellee.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald, Gary S. Parsons, and Carson Carmichael, III, for respondent, appellant.

Barringer, Allen & Pinnix, by Thomas L. Barringer, Noel L. Allen, and R. Bradley Miller, amicus curiae North Carolina Dental Hygienists Association.

Parker, Sink, Powers, Sink & Potter, by William H. Potter, Jr., amicus curiae North Carolina Dental Society, Inc.

HEDRICK, Judge.

The standard of review applicable to judicial consideration of a final agency decision is set out in N.C. Gen. Stat. Sec. 150A-51, which provides:

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

> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

In construing a similar statute, N.C. Gen. Stat. Sec. 62-94, which governs appeals from orders of the Utilities Commission, our Supreme Court said: "The proper scope of review can be determined only from an examination of the issues presented for review by the appealing party. The nature of the contended error dictates the applicable scope of review." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E. 2d 232, 236 (1981).

The petition for judicial review filed by Ms. DeLancy contains allegations that the Board exceeded its statutory authority, and that its decision was affected by other error of law, was unsupported by substantial evidence, was arbitrary and capricious, and was unconstitutional in that it violates Art. I, Secs. 19, 32, and 34 of the North Carolina Constitution. Our review, as well as that of the Superior Court, is limited to whether the disciplinary action of the Board resulted in prejudice to the substantial rights of Ms. DeLancy as a result of one of these five types of errors.

[1] Before we proceed to the issues properly before us, we wish to point out one aspect of this case which we believe is *not* properly before us, contrary to petitioner's claims. In her petition for judicial review, Ms. DeLancy also sought a declaratory judgment "that a dental hygienist may have an ownership interest in a dental practice wherein dental hygiene services are being performed." Resolution of this issue requires construction of N.C. Gen. Stat. Sec. 90-29(b)(11). In the event the court construed the statute so as to prohibit dental hygienists from owning their own practice, petitioner further sought to have the statute declared unconstitutional. On appeal to the Superior Court, Judge Bowen construed the statute in accordance with petitioner's request and declared that a contrary construction would be unconstitutional.

We believe this issue was not properly before Judge Bowen and is not properly before this Court. While Condition A, the disciplinary measure complained of by petitioner, contains language similar to that of N.C. Gen. Stat. Sec. 90-29(b)(11), Ms. DeLancy was at no time charged with violation of that portion of the Dental Practice Act. Indeed, the statute is nowhere men-

tioned in the Final Agency Order. Furthermore, we note the provisions of N.C. Gen. Stat. Sec. 150A-17, which provides:

> On request of a person aggrieved, an agency shall issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency. . . . A declaratory ruling is subject to judicial review in the same manner as an agency final decision. . . .

Our courts have held that failure to seek a declaratory ruling from the agency under this statute will be considered a failure to exhaust administrative remedies and will thus bar petitioner's right to seek a declaratory judgment in Superior Court. *Porter v. Dept. of Insurance,* 40 N.C. App. 376, 253 S.E. 2d 44, *disc. rev. denied,* 297 N.C. 455, 256 S.E. 2d 808 (1979). Nothing in the record suggests that petitioner sought such a ruling prior to asking the Superior Court to consider the question. We thus hold that the Superior Court was without jurisdiction to consider the construction and constitutionality of N.C. Gen. Stat. Sec. 90-29(b)(11), as are we.

Turning now to the propriety of the Board's imposition of disciplinary sanctions on the facts of this case, we first review relevant statutory provisions. N.C. Gen. Stat. Sec. 90-229 in pertinent part provides:

> (a) The North Carolina State Board of Dental Examiners shall have the power and authority to
>
> . . .
>
> (iii) Revoke or suspend a license to practice dental hygiene;
>
> (iv) Invoke such other disciplinary measures, censure or probative terms against a licensee as it deems proper;
>
> in any instance or instances in which the Board is satisfied that such applicant or licensee:
>
> . . .
>
> (6) Has engaged in any act or practice violative of any of the provisions of this Article. . . .

N.C. Gen. Stat. Sec. 90-233(a) in pertinent part provides: "A dental hygienist may practice only under the supervision of one or more licensed dentists." N.C. Gen. Stat. Sec. 90-221(f) provides:

> "Supervision" as used in this Article shall mean that acts are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control and approval.

The record shows that the following stipulation was before the Board when it made its decision:

> 5. Respondent's [Petitioner in the instant case] performance of functions constituting the practice of dental hygiene has not been pursuant to the order, control and approval of a licensed North Carolina dentist nor was a licensed North Carolina dentist physically present at the time of performance of such functions by Respondent.

A reading of the above-quoted statutes and stipulation makes it clear that petitioner violated the provisions of the Dental Hygiene Act and that the Board is vested by statute with authority to discipline Ms. DeLancy for that violation. Indeed, this much is not disputed. The single narrow question before this Court, then, is the propriety of the Board's choice of sanctions.

[2] In her petition for judicial review, Ms. DeLancy first claims that the Board exceeded its statutory authority and committed "error of law" in imposing a fourteen-month suspension of her license "with restoration conditioned upon agreement to unlawful conditions." The heart of petitioner's argument is that Condition A, requiring Ms. DeLancy to forego owning, managing, supervising or controlling a dental practice for a twelve-month period, is unrelated to the violation which was the subject matter of the administrative proceeding and is thus unlawful. This lack of relationship between the violation and sanction imposed, she contends, renders the Board's actions arbitrary and capricious and its order "unsupported by findings or evidence."

We do not agree that there is no reasonable relationship between petitioner's violation of the statutes requiring that her work be properly supervised and the sanction imposed by the

Board. While petitioner focuses on the Board's prohibition of *ownership,* we think it clear from our consideration of the record as a whole and the Board's order in particular that the Board's concern is with *control.* Whether petitioner owns or merely manages an enterprise in which dentistry is practiced, she is likely to exercise a good deal of control over the existence and extent of supervision provided by dentists to dental hygienists in that practice. The record before the Board and before this Court suggests that Ms. DeLancy is not in personal agreement with the legislative judgment that such supervision offers important protection to the public interest. Further, she has demonstrated a willingness to act on her personal disagreement by deliberately violating the statutory provisions. Agreement by petitioner to Condition A would merely require that she work for a twelve-month period in a setting that offers both less opportunity and less financial incentive to "take shortcuts" in regard to supervision than would be available in a practice owned or managed by her. Because we believe Condition A is reasonably related to the violation complained of, we believe the Board did not exceed its statutory authority in imposing this particular "probative term" pursuant to N.C. Gen. Stat. Sec. 90-229(a)(iv). For the same reason, we find that the Board did not act in an arbitrary and capricious fashion. As to whether the Board's order was supported by substantial evidence when the record is considered as a whole, we note that Ms. DeLancy's violation of the statute has never been in dispute, and, indeed, was stipulated to prior to issuance of the Final Agency Order. Furthermore, we find no "error of law" in the Board's order that may be said to have prejudiced petitioner's substantial rights.

Petitioner further contends that Condition A is unconstitutional, in that it "violate[s] her rights to due process and equal protection under Article I, section 19 of the North Carolina Constitution, and grant[s] exclusive emoluments and establish[es] monopolies in violation of Article I, sections 32 and 34 of the North Carolina Constitution." The arguments advanced by Ms. DeLancy in support of this proposition relate almost exclusively to the construction and constitutionality of N.C. Gen. Stat. Sec. 90-29(b)(11), which, as we have said, is not before this Court at the present. In regard to the constitutionality of the Board's choice of

disciplinary sanctions, we find the statements of Professor Charles Daye particularly apposite:

> Often when a petitioner complains that the agency is acting in excess of authority or jurisdiction it will be alleged that such agency action violates the petitioner's constitutional rights. . . . In substance such an allegation is no more than an assertion that one has a constitutional right that agencies act within their statutory powers . . . before they can constitutionally affect one's interests. This claim, while perhaps arguably sound, really risks confusing the real issue, which is one of statutory construction, and not constitutional interpretation. Moreover it adds nothing since agency action in excess of authority . . . will be set aside on judicial review in any event.

Daye, *North Carolina's New Administrative Procedure Act: An Interpretative Analysis*, 53 N.C. L. Rev. 833, 913 n. 368 (1975) (citing 2 F. Cooper, *State Administrative Law* (1965)). We have held that Condition A was imposed by the Board pursuant to its statutory authority, and that the condition is reasonably related to the violation which was the subject matter of the agency proceeding. We think it clear that the Board's authority to regulate the licensing of dental hygienists is within the police power of the State, and that the Board's action in the present case was rationally related to the legislative goal of protection of the public health and welfare. We thus hold the Board did not act in an unconstitutional manner in allowing petitioner to agree to Condition A in lieu of an additional twelve-month suspension of her license.

The result is: the order of the Superior Court modifying the final agency decision by striking Condition A is reversed, and the cause is remanded to the Superior Court with directions that it enter an order affirming the final agency decision and order dated 28 October 1982.

Reversed and remanded.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. ALLIE BRYAN ALDRIDGE, III

No. 838SC94

(Filed 17 April 1984)

1. **Criminal Law § 81— best evidence rule—inapplicable**

In a prosecution for breaking and entering, among other charges, the "best evidence rule" did not apply to the introduction of photostatic copies of a check and receipt from a buyer of silver which was allegedly stolen since defendant admitted signing the receipt and accepting the check made out to him and the only question before the jury was his purpose in so doing, not the issuance or terms of the document.

2. **Criminal Law § 117.4— failure to show reversible error in failure to give interested witness instruction**

Defendant failed to show error in the trial court's giving of only an accomplice instruction and in its failure to give a special interested witness instruction concerning the testimony of a witness for the State who testified pursuant to a sentence reduction agreement where there was nothing in the record to indicate that defendant submitted "a requested instruction" in writing and before the charge, as required by G.S. 15A-1231(a) and where the court did instruct the jury that the accomplice was an "interested witness" and that the jury should "examine every part of her testimony with the greatest care and caution."

3. **Criminal Law § 86.2— cross-examination of defendant concerning prior criminal record—no error**

G.S. 14-7.5 only precludes revealing to the jury the indictment which shows that defendant is a habitual felon, and does not prevent the prosecution from cross-examining defendant concerning his prior criminal record.

4. **Criminal Law § 80.1— foundation for copies of judgments against defendant—procedure governing evidence of prior convictions—proper**

The procedure of G.S. 14-7.4, governing evidence of prior convictions, is not unconstitutionally vague, and defendant failed to show that the prosecution did not lay a proper foundation for copies of judgments in prior proceedings against defendant.

5. **Criminal Law § 138— aggravating factor of pecuniary gain improperly considered**

In a prosecution for breaking and entering, larceny, receiving, possession of stolen goods, and safecracking, the trial court erred in considering as an aggravating factor that the offense of possession of stolen goods was committed for hire or pecuniary gain since there was no evidence that defendant was hired to commit the offense. G.S. 15A-1340.4(a)(1)(c).

State v. Aldridge

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 23 September 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 28 November 1983.

A church in Goldsboro was broken into and numerous items of silver, collectors' coins, jewelry, and other valuables, with a value of $7,857.00 were taken. Information developed through the Police Information Network led to the location of the silver, the arrest of several persons, and in turn to the eventual apprehension of defendant in Texas.

Defendant was indicted on felony charges of breaking and entering, larceny, receiving, possession of stolen goods, and safecracking. A habitual felon charge was later added to the indictment. At trial, the State's evidence tended to show the following: An accomplice testified that defendant came to her house on the morning of the break-in and asked about getting rid of some silver. After she and others living there agreed to help, she drove with defendant to South Carolina where they sold the silver. They received cash, as well as a check which defendant cashed two days later. The accomplice testified under a sentence reduction agreement.

The State also presented evidence from an FBI agent who interviewed defendant in Texas. The agent testified that defendant admitted helping the accomplice sell the silver, despite suspicions as to its origin, but that he only drove her around and received a small amount for his trouble. Defendant admitted signing a receipt from the store in South Carolina and cashing the check, but said he gave the money to her.

Defendant did not testify. He did not raise any significant new or contradictory substantive evidence on cross-examination, but concentrated on the credibility of witnesses and the sufficiency of the circumstantial evidence to defend against the charges. The jury returned verdicts of not guilty of breaking and entering, larceny, and safecracking, and guilty of possession of stolen goods.

At the separate hearing on the habitual felon charge, law enforcement officers presented evidence that defendant had prior convictions of (1) breaking and entering and larceny, (2) possession of a firearm by a felon, and (3) breaking and entering. Defendant

offered no evidence. The jury found him guilty of being an habitual felon. Defendant received a sentence of forty years imprisonment.

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

Barnes, Braswell & Haithcock, P.A., by Tom Barwick, for defendant appellant.

JOHNSON, Judge.

I

[1] The State introduced over defendant's objection, photostatic copies of the check and receipt from the buyer of the silver. Defendant contends that this violated the "best evidence rule," which requires production of originals. Had the contents of the check been at issue, we would agree. However, defendant admits signing the receipt and accepting the check made out to him. The only question before the jury was his purpose in so doing, not the issuance or terms of the documents. It is well settled that the best evidence rule applies only where the contents or terms of the document are controverted. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *see* 2 H. Brandis, N.C. Evidence § 191 (1982). Therefore, this assignment of error is without merit.

II

Defendant next contends that the court improperly admitted, during the accomplice's testimony, hearsay evidence of statements made by two others in conversation with defendant regarding plans to split up the items and sell them. We fail to see how this reflects significantly on defendant's own conduct. Defendant has the burden of showing prejudice, and that a different result would have been reached absent this evidence. G.S. 15A-1443(a); *State v. Jeffers*, 48 N.C. App. 663, 269 S.E. 2d 731 (1980), *disc. review denied and appeal dismissed*, 301 N.C. 724, 276 S.E. 2d 285 (1981). In light of the testimony that defendant physically brought the items into the house and his own statements that they should split up the items, and that he had actually gone to the store and signed the receipt, we do not find any prejudice.[1]

1. Defendant relies on *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967), for the proposition that we should find error and reverse *ex mero motu*. The holding in

III

[2] Because the accomplice testified pursuant to a sentence reduction agreement, defendant argues that the court committed reversible error in only giving an accomplice instruction. Where testimony is given pursuant to such "quasi-immunity," the trial court is not required to give a special interested witness instruction absent a request. *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983); *State v. Maynard*, 65 N.C. App. 81, 308 S.E. 2d 665 (1983). While the record contains a "requested instruction," there is nothing in the record to indicate that defendant submitted it in writing and before the charge, as required by law. G.S. 15A-1231(a); *State v. Harris*, 47 N.C. App. 121, 266 S.E. 2d 735 (1980), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 577 (1982). In fact, the request bears no signature of counsel, so we cannot be certain it was submitted at all. Apparently, defense counsel orally offered to type up such an instruction, but no indication of its submission is contained in the record on appeal. Our appellate courts have consistently held that the appellant has the duty to see that the record is properly made up. *State v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981); *State v. Pennell*, 54 N.C. App. 252, 283 S.E. 2d 397 (1981), *disc. review denied and appeal dismissed*, 304 N.C. 732, 288 S.E. 2d 804 (1982). The record before us does not support defendant's contention. We note that defense counsel, although he had an opportunity to object to the instructions at the end of the charge, did not do so. *See* App. R. 10(b)(2). It also appears that the prosecution undertook to show fully to the jury the nature of the agreement under which the accomplice testified. Finally, the court did instruct the jury that the accomplice was an "interested witness" and that the jury should "examine every part of her testimony with the greatest care and caution." In light of all these circumstances, and on the record before us, we do not find reversible error.

Fowler was grounded expressly on the fact that it was a capital case, however. *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975) is also distinguishable: there substantial alibi testimony contradicted the State's eyewitness, and the incompetent hearsay was an official police document which constituted an official accusation, signed by a magistrate.

IV

[3] The trial court denied defendant's motion *in limine* to prevent the State from cross-examining him on his prior criminal record. In so doing, the court rejected his argument, which defendant renews here, that G.S. 14-7.5 precludes such cross-examination when a defendant is tried on a habitual felon charge. We find nothing in the statute or the case law to support this contention: the statute requires only that "the indictment that the defendant is an habitual felon shall not be revealed to the jury . . ." during trial on the underlying offense. *Id.* It is well established that, if the accused takes the stand in his own behalf, he may be questioned about prior convictions, with a few exceptions not applicable here. *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978). We find no evidence that the jury knew of the habitual felon indictment during the trial on the underlying offense, and, therefore, conclude that this assignment is without merit.

V

Finally, defendant raises several challenges to his conviction and sentence as an habitual felon.

A

[4] The State produced law enforcement officers who were present at prior proceedings against defendant to testify concerning the offenses involved and lay a foundation for copies of the judgments. Defendant contends that this procedure does not suffice, and that G.S. 14-7.4, governing evidence of prior convictions, is unconstitutionally vague. G.S. 14-7.4 is very similar in form and purpose to G.S. 8-35, "Authenticated copies of public records," and the procedure followed was more than sufficient according to the cases decided under that statute. *See State v. Watts*, 289 N.C. 445, 222 S.E. 2d 389 (1976); *State v. Herald*, 10 N.C. App. 263, 178 S.E. 2d 120 (1970). Defendant has not brought forward copies of the judgments as exhibits, so we must presume that the trial court did not abuse its discretion in admitting them into evidence. *State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971). Defendant's constitutional contention is similarly without merit.

B

Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon.

G.S. 14-7.6. A Class C felon is punishable by up to 50 years or life imprisonment, G.S. 14-1.1(a)(3); the presumptive sentence is 15 years. G.S. 15A-1340.4(f)(1).

Here, the trial court found as aggravating factors (1) that the offense was committed for hire or pecuniary gain, (2) that the offense involved property of great monetary value or caused great monetary loss, and (3) that defendant had a prior conviction or convictions. The court found no mitigating factors, and sentenced defendant to 40 years. Defendant concedes that the sentence does not exceed the statutory limits, but argues that by comparison with other felonies the sentence is disproportionately long and, therefore, in violation of the Eighth Amendment.

Because we decide that the trial court erred as a matter of state law in sentencing defendant, we need not reach his constitutional contention. *See Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980).

> When a convicted felon is given a sentence in excess of the presumptive sentence, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. G.S. 15A-1444(a1).

State v. Teague, 60 N.C. App. 755, 757, 300 S.E. 2d 7, 8 (1983). We treat defendant's constitutional challenge as such an appeal, and hold that the trial court erred in imposing the sentence in this case.

[5] Our cases are clear that the language "for pecuniary gain" in former G.S. 15A-1340.4(a)(1)(c) does not allow the court to find this as an aggravating factor where it is inherent in the offense itself. *State v. Thompson*, 62 N.C. App. 585, 303 S.E. 2d 85 (1983). The recent clarification of G.S. 15A-1340.4(a)(1)(c) to read "the defendant was hired or paid to commit the offense" reinforces this reading. *State v. Thompson, supra.* We find no evidence that defendant was hired to commit the offense; the fact of possession, or the subsequent sale, of the stolen goods may not be thus considered. The court erred in making this finding. We must assume that every factor in aggravation contributed to the severity of the sentence, and, therefore, we must remand for resentencing.

State v. Ahearn, 307 N.C. 584, 300 S.E. 2d 689 (1983). We find no error with the other aggravating factors, however.[2]

We have considered defendant's remaining assignments of error and find them to be without merit.

VI

We conclude that in the guilt-innocence and habitual felon phases of the trial, no prejudicial error appears in the record before us. However, we remand to correct error in the sentencing.

Remanded for resentencing.

Chief Judge VAUGHN and Judge BECTON concur.

TED C. ELMORE v. JANICE W. ELMORE

No. 8325DC137

(Filed 17 April 1984)

Abatement and Revival § 13— denial of divorce as matter of law—effect of death of plaintiff pending appeal

An action for an absolute divorce abated upon the death of the plaintiff during the pendency of his appeal from the trial court's entry of a directed verdict denying the divorce as a matter of law even though property rights incidental to the marital status would be affected by the grant or denial of a divorce.

APPEAL by plaintiff from *Mullinax, Judge.* Judgment entered 24 June 1982 in District Court, CATAWBA County. Heard in the Court of Appeals 13 January 1984.

Plaintiff appeals from a directed verdict denying him an absolute divorce.

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2. While it may be that considering prior convictions in aggravation of an habitual felon sentence is duplicative, we find no authority to hold such a practice improper.

Corne, Pitts, Corne & Grant, P.A., by Stanley J. Corne, for plaintiff appellant.

Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant appellee.

WHICHARD, Judge.

I.

The dispositive issue is whether, when the trial court directs a verdict denying an absolute divorce as a matter of law, the action abates upon the death of the plaintiff during pendency of his appeal. We hold that it does.

II.

Plaintiff (husband) brought this action against defendant (wife) for absolute divorce based on continuous separation for more than one year. Plaintiff's evidence, in brief summary, showed the following:

Plaintiff had served as a deputy sheriff, had been shot and wounded in the line of duty, and was paralyzed as a result. His marriage with defendant had thereafter deteriorated.

Four years before plaintiff filed this action, the liability carrier which covered the shooting incident built an apartment for him onto the house which he had occupied with defendant. Plaintiff thereafter lived in the apartment alone, and neither party had anything further to do with the other.

Defendant continued to occupy the house in which both parties formerly had lived. Plaintiff had continuing access thereto through a door from his apartment. He unlocked the door and entered the house from time to time, but only when defendant was away. Plaintiff kept the apartment side of the door locked, and defendant never came into the apartment.

The reputation in the neighborhood was that plaintiff and defendant were living separate and apart. A seventy-four-year-old neighbor came by twice daily to take care of problems which resulted from plaintiff's physical incapacity. She never observed any association between plaintiff and defendant, except that she heard defendant "bless him out a 'heap' of times."

Following presentation of evidence and arguments of counsel on defendant's motion for directed verdict, the court stated: "I think that as a matter of law by living as they are they're holding themselves out as man and wife." It thus granted defendant's motion for directed verdict and entered judgment denying the divorce.

Plaintiff appeals.

III.

Defendant has filed with this Court a motion to dismiss plaintiff's appeal on the ground that "the appeal has become moot and should abate for the reason that the plaintiff-appellant died on April 27, 1983." Plaintiff's counsel responded, acknowledging the 27 April 1983 death of his client, but arguing that the motion nevertheless should be denied because property rights would be affected by the grant or denial of the divorce.

At oral argument counsel for both parties acknowledged the 27 April 1983 death of plaintiff. Counsel for defendant again urged that the action should abate on that account, and counsel for plaintiff argued that it should not. A threshold question is thus presented as to the effect on the action of plaintiff's death during pendency of the appeal.

IV.

G.S. 1A-1, Rule 25(a) provides: "No action abates by reason of the death of a party if the cause of action survives." G.S. 28A-18-1 provides:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> . . .
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

The common law places a claim for absolute divorce in the category of actions which do not survive the death of a party, and in which "the relief sought could not be enjoyed, or granting it would be nugatory after death." The rule has been stated as follows:

> The cases from all states . . . hold that a pending divorce suit abates on the death of either party. Since death itself dissolves the marital status and accomplishes the chief purpose for which the action is brought, there is no longer a marital status upon which a final decree of divorce may operate. The jurisdiction of the court to proceed with the action is terminated. The marital status of the parties is the same as if the suit had never been begun.

1 R. Lee, North Carolina Family Law § 48, at 253 (1979).

The following is a further statement of the rule:

> The later cases fully support the settled rule stated in the original annotation [104 A.L.R. 654] to the effect that upon the death of one of the parties to a purely divorce action before the entry of a final decree therein, whether before or after the entry of an interlocutory decree or a decree nisi, the action abates, with the consequence that the action may not be continued and no final decree of divorce may be entered thereafter, since the object sought to be accomplished by the final decree—that is, the dissolution of the marriage relation—is already accomplished by the prior death of one of the parties, and there is then no status of marriage upon which the final decree of divorce may operate; and that the result is that notwithstanding the pending divorce action and the fact that a divorce might have been granted had no death occurred, the wife is regarded as the widow of the deceased husband, or the husband is regarded as the widower of the deceased wife, as the case may be.
>
> . . . .
>
> It is the general rule that an action for divorce proper, being truly a personal action based upon the personal relationship and status of marriage, terminates with the death of either spouse, not only because of its personal character, but because the marriage is ipso facto dissolved by death.

Annot., 158 A.L.R. 1205, 1206 (1945).

One court expressed the rationale somewhat more colorfully. It stated:

> No decree for a divorce having been pronounced, none can now be entered. The prayer of this bill in that respect, has been answered by the inevitable decree of a tribunal higher than any earthly forum. The marriage relation is dissolved forever, and all litigation between the original parties must cease.

Swan v. Harrison, 42 Tenn. (2 Cold.) 534, 539-40 (1865). The United States Supreme Court stated similarly: "[N]o power can dissolve a marriage which has already been dissolved by act of God." *Bell v. Bell*, 181 U.S. 175, 178, 45 L.Ed. 804, 807, 21 S.Ct. 551, 553 (1901); *see* Annot., 3 A.L.R. 1403, 1422-23 (1919).

In *Webber v. Webber*, 83 N.C. 280 (1880), our Supreme Court applied an exception to the foregoing general rule in situations governed by the "rule of relation," under which "all judicial proceedings during a term are treated as if they took place on the first day of the term." *Id.* at 280. The plaintiff in *Webber* died after commencement of the divorce trial, but before the jury retired. The Court held that the trial court erred in declining to proceed with the cause following the plaintiff's demise, since by the rule of relation the entire proceeding would be deemed "to have been conducted and concluded on a day when the party was in life." *Id.* at 284. It stated, however, that unless prevented by the rule of relation "[i]t is clear that the action does not survive, and consequently abates." *Id.* at 280.

The instant facts differ from those in *Webber*. Plaintiff's death here did not occur during trial, but several weeks subsequently. The trial court did not abate this action by reason of plaintiff's death during trial; rather, it directed a verdict for defendant denying a living plaintiff a divorce. This case thus does not involve an abatement during trial which, by virtue of the "rule of relation," was erroneous; and the holding in *Webber* does not control.

"[T]he relief sought could not be enjoyed, or granting it would be nugatory," G.S. 28A-18-1(b)(3), unless upon reversal and remand a judgment of divorce could be entered nunc pro tunc as

of the date of the original trial or some other date prior to plaintiff's demise. Such would not be consistent with the function and purpose of judgments nunc pro tunc, however.

> The general rule is that an amendment of the record of a judgment, and a nunc pro tunc entry thereof, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission or an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide. The power of the court in this regard is to make the journal entry speak the truth by correcting clerical errors and omissions, and it does not extend beyond such function. . . . The nunc pro tunc order must conform to and be no broader in its terms than the judgment originally entered.
>
> . . . [T]he office of entering, and the power to enter, a judgment nunc pro tunc are restricted to placing upon the record evidence of judicial action which has actually been taken; and . . . the correction of the record of a judgment by amendment and the entry of such amendment nunc pro tunc presuppose a judgment actually rendered at the proper time. Indeed, there is even authority to the effect that a judgment nunc pro tunc is beyond the jurisdiction of the court and void, where no judgment had previously been rendered.

46 Am. Jur. 2d *Judgments* § 201, at 443-45 (1969). For judgment nunc pro tunc to be proper,

> [i]t must appear that a judgment was rendered and not entered, or that the case had reached the stage when there was nothing more to do than to render the judgment as a matter of form, or that the judgment through some clerical error or omission did not express what the court had actually adjudged; *but it cannot be used as a power of amendment to make the judgment different from what was rendered, although that may have been erroneous.*

2 T. Wilson & J. Wilson, McIntosh North Carolina Practice and Procedure § 1625, at 116 (2d ed. 1956) (emphasis supplied). The

foregoing would appear to obtain notwithstanding the advent of G.S. 1A-1, Rule 6(c). *See id.* at 66 (D. Phillips Supp. 1970).

The foregoing general rules have been expressly applied to divorce actions. *See* Annot., 19 A.L.R. 3d 648 (1968). "The courts have generally maintained that a judgment of divorce may be entered nunc pro tunc only when it has actually been made or rendered previously." *Id.* at 652. The court "cannot cause an order or judgment [of divorce] that was never previously made or rendered to be placed upon the record of the court." *Black v. Industrial Commission of Arizona*, 83 Ariz. 121, 125, 317 P. 2d 553, 555-56 (1957), *overruled on other grounds*, 109 Ariz. 174, 507 P. 2d 99 (1973).

V.

Counsel for plaintiff has argued that the action should not abate because property rights would be affected by the grant or denial of the divorce. It is true that "death of a party terminates only the action as one for divorce and does not necessarily prevent it from being revived and continued insofar as it seeks an adjudication of property rights between the parties." 1 R. Lee, *supra*, at 253; *see also* 2A W. Nelson, Divorce and Annulment § 21.10, at 307 (2d ed. 1961) ("death abates a [divorce] proceeding . . ., and is usually ground for its dismissal; but it does not do so to the extent that property rights or interests are involved"); 27A C.J.S. *Divorce* § 188, at 783 (1959) ("Where an appeal is prosecuted from a decree or judgment denying a divorce, and while the appeal is pending one of the parties dies, the appeal will usually be dismissed, unless property rights are involved . . . .").

Plaintiff did not seek an adjudication of property rights, however. He sought only an absolute divorce and custody of a child born of the marriage. The only property rights affected by the grant or denial of a divorce here are those purely incidental to the marital status. As to those,

> [i]t may be stated as a general proposition . . . that, while property rights, as such, involved in a divorce action, may prevent the abatement of the action upon the death of one of the spouses, the fact that the surviving spouse will, if the action is abated, be enabled to share in the estate of the other

> as the widow or the widower, is, according to the weight of authority, no reason against its abatement.
>
> . . . [I]t has been said or held that no final decree may be entered after the death of one of the parties, simply because property rights would incidentally be affected.

Annot., 104 A.L.R. 654, 656 (1936). The highest court of one jurisdiction has stated in this regard:

> While it has been held in some jurisdictions that a party defeated in a divorce action by a judgment, and thereby deprived of property rights, may prosecute an appeal after the death of the other party . . ., it has never been held that an action . . . may be prosecuted to judgment after the death of the plaintiff because incidentally it might take away property rights from the other party, but the contrary has been held. (Citations omitted.)

Cox v. Dodd, 242 Ala. 37, 40, 4 So. 2d 736, 738 (1941).

It is clearly the general rule that an action solely for absolute divorce abates upon the death of one of the parties, and the marital status cannot thereafter be altered. To hold that the marital status becomes unalterable, but that property rights incidental thereto do not, would be illogical and inconsistent. The foregoing statements of authority thus appear grounded in sound reason and logic.

VI.

We believe the trial court clearly erred in granting defendant's motion for directed verdict. Plaintiff's evidence not only tended to show that the parties had separated, but that the separation was caused by defendant's constructive abandonment of plaintiff. We are nevertheless compelled to hold, pursuant to the foregoing authorities, that this action abated upon the 27 April 1983 death of the plaintiff. The appeal thus has become moot, and is accordingly dismissed.

Action abated; appeal dismissed.

Judges WEBB and WELLS concur.

FRED FLEMING v. K-MART CORPORATION, SELF-INSURED

No. 8210IC1314

(Filed 17 April 1984)

Master and Servant § 65.2— workers' compensation—findings of total disability rather than partial disability supported by evidence

The Industrial Commission could properly reject a deputy commissioner's finding that plaintiff's injury sustained while lifting boxes of paint in the course of his employment was exclusively a scheduled injury under G.S. 97-31, and in light of the repeated medical testimony that plaintiff was totally and permanently disabled, its conclusion that plaintiff was entitled to compensation under G.S. 97-29 was entirely proper. The Commission found that plaintiff, as a result of his accidental injury, suffers from back and leg pains; that this pain resulted from arachnoiditis, a condition of the spinal nerve roots, which resulted from operations undergone to relieve the pain caused by the accident.

APPEAL by defendant from opinion and award of the Industrial Commission entered 7 September 1982, as amended 1 October 1982. Heard in the Court of Appeals 14 November 1983.

Plaintiff sustained a back injury in December 1978 while lifting boxes of paint in the course of his employment with defendant. Examination by physicians revealed a slipped disk, for which plaintiff underwent two operations in 1979. The operations did not relieve plaintiff's chronic pain in his lower body. Because the pain apparently arose from scar tissue resulting from the operations, and because further operations would only create more scar tissue, plaintiff's doctor advised him that further operations would not help. Plaintiff now lives with sustained pain, which prevents him from remaining in any one position for any extended period.

Following an evidentiary hearing, Deputy Commissioner Morgan R. Scott filed an opinion and award which included the following findings: that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant resulting in injury to his back, and that plaintiff sustained a 50 percent permanent partial disability as a result. Deputy Commissioner Scott found that plaintiff's only injury was to his back, and that this constituted a scheduled injury under G.S. 97-31. Therefore, the Deputy Commissioner awarded plaintiff compensation exclusively under that section, at a rate of $132 per week for

150 weeks and apportioned other amounts as attorneys' fees, witness fees, and costs.

Upon appeal by plaintiff, the full Commission issued an opinion and award which included the following relevant findings: that as a result of his occupational injury plaintiff developed arachnoiditis, a binding down of the nerve roots emanating from the spine causing impairment and dysfunction; that the arachnoiditis was responsible for the pain in plaintiff's back and leg; and that plaintiff could not pursue work of any kind and suffered a permanent total disability. A majority indicated its willingness to concede that absent the arachnoiditis, which causes scarring of nerves branching out from the spinal cord, it would limit its award to that mandated by G.S. 97-31. However, specifically because of the arachnoiditis, and relying on uncontradicted evidence by the physicians that plaintiff was totally incapable of work, the Commission awarded total disability compensation under G.S. 97-29. As subsequently amended, the Commission awarded plaintiff $88 per week during the period of total permanent disability. In addition, the Commission ordered defendant to pay plaintiff's related medical expenses already incurred and arising during the period of disability. From this order defendant appeals.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr., for defendant appellant.

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., by Francis O. Clarkson, Jr., for plaintiff appellee.

JOHNSON, Judge.

The sole question presented by this appeal is whether the Commission erred in determining that plaintiff is permanently and totally disabled and entitled to compensation under G.S. 97-29, rejecting the earlier finding that his injury is only a scheduled injury, compensable exclusively under G.S. 97-31. It is well established that jurisdiction on an appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). The Commission found that plaintiff, as a result of his accidental

injury, suffers from back and leg pain; that this pain resulted from arachnoiditis, a condition of the spinal nerve roots, which resulted from operations undergone to relieve the pain caused by the accident; that plaintiff was totally unable to pursue work of any kind and had sustained a permanent total disability.

These findings are amply supported by the evidence. Both physicians who testified, an orthopedic surgeon, Dr. Price, and a neurologist, Dr. Coffee, were recognized as experts and testified that they had examined plaintiff on numerous occasions. Although both testified that their ratings for permanent partial disability related only to the back injury, they also both gave uncontradicted and repeated testimony that plaintiff was incapable of performing any type of gainful employment.[1] Their testimony concerning plaintiff's arachnoiditis and pain amply supports the Commission's findings with respect to plaintiff's actual medical condition; that condition is not in dispute here. In addition, plaintiff testified that he suffered pain in his left leg, foot, and toes. Further, that he cannot walk more than a city block without having to sit down because of pain, yet he cannot sit up for more than 15 minutes at a time without severe pain. Apparently, plaintiff spends most of his time in a recliner chair.

Defendant contends that the Commission erred in finding that plaintiff suffered permanent total disability. Both physicians testified that plaintiff's pain resulted solely from his back injury, and that plaintiff suffered no permanent partial disability to his legs. Therefore, argues defendant, the only injury shown is the "loss of use of the back." This constitutes a "scheduled injury" under G.S. 97-31, which provides that payments thereunder ". . . shall be in lieu of all other compensation, including disfigurement, . . ." When all of an employee's injuries are included in the

1. There was apparently some confusion in Dr. Price's mind as to the maximum allowable award:

> I feel that he is totally disabled from work, will not be able to return to the type of work he was doing nor to any other type of gainful employment. Therefore, he is unable to do any kind of job and in that respect he is essentially 100% disabled. However, as I understand it by the standards of the Industrial Commission, the maximum permanent partial disability that I can award him based on his problem is 50% permanent partial disability. I don't know how to differentiate the problem of 50% permanent partial disability from total inability to work and will leave that up to the legal minds.

schedule set out in G.S. 97-31, compensation is exclusively under that section. *Perry, supra.* Therefore, contends defendant, plaintiff's sole right to compensation arises under G.S. 97-31(23), as found by the Deputy Commissioner.

The apparent contradiction in the physicians' testimony results from the multiple meanings of "disability." As used in the Workers' Compensation Act, "disability" specifically relates to incapacity to earn wages. G.S. 97-2(9). Our courts have repeatedly held that as used in the Act "disability" signifies impairment of wage-earning capacity, not physical impairment or infirmity. *See e.g. Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982). In medical parlance, however, the primary meaning is "a lack of the ability to function normally, physically or mentally." Dorland's Illustrated Medical Dictionary 384 (26th ed. 1981); *see also* 3B Lawyers' Medical Cyclopedia § 27.1 *et seq.* (3d ed. 1983) (disability guidelines describing physical and mental impairment). Viewed with this distinction in mind, the physicians' testimony no longer appears self-contradictory. Dr. Coffee agreed that his disability rating for plaintiff's leg would be zero, since he found no "actual functional incapacity." His testimony that plaintiff nevertheless suffered sufficient pain so as to be totally incapable of gainful employment is not in actual conflict with the lack of medically defined functional incapacity. Similarly, Dr. Price reported that ". . . there is no disability to the leg. He has leg pain but the problem is not in the leg itself but originates in the back." Again, in *medical* terms no functional disability was apparent; however, this by no means excluded the possibility that plaintiff suffers sufficient pain in his legs to be *legally disabled* within the meaning of the Act.

Defendant contends that this pain is only "referred pain," caused by the back injury, and that only the back *injury* itself may be considered. The Supreme Court's ruling in *Perry, supra*, however, leads to the opposite conclusion. There the plaintiff also suffered a back injury and had resulting pain in his legs. The Commission made a scheduled injury award under G.S. 97-31(23), for permanent partial disability from loss of use of the back. The Supreme Court remanded, holding that in light of the uncontradicted evidence of disabling pain in plaintiff's legs, the Commission must also consider a disability award under G.S. 97-31(15) for

loss of use of both legs.[2] Following *Perry*, we hold that the Commission acted properly in considering this "referred pain" and looking beyond G.S. 97-31(23). Plaintiff's award clearly should not have been limited to that provided by that section. The Workers' Compensation Act mandates compensation for *all* disability caused by the work-related accident. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Holder v. Neuse Plastic Co.*, 60 N.C. App. 588, 299 S.E. 2d 301 (1983).

The full Commission found that as a result of work-related accident plaintiff had developed arachnoiditis and was permanently and totally disabled. Both physicians identified arachnoiditis as the cause of disabling pain. As used in this type of case, arachnoiditis means scarring around the nerve roots emanating from the spinal column, resulting in pressure on the nerve and consequent pain. *See* 1 J. Schmidt, Attorneys' Dictionary of Medicine, A-263-64 (1982). The affected nerves are located not only in the back, but radiate systemically outward through the trunk and thence down into the legs. *See* 3B R. Gray, Attorneys' Textbook of Medicine § 100.41 (3d ed. 1983); H. Gray, Anatomy of the Human Body 1002 (28th ed. C. Goss ed. 1966). They are not located in, nor do they serve, *only* the back and legs. *Id.* The medical testimony indicated pain in the buttocks, posterior thigh, the popliteal area (behind the knee), the calf and the foot. Thus, the Commission could properly reject the Deputy Commissioner's finding that plaintiff's injury was exclusively a schedule injury under G.S. 97-31, and in light of the repeated medical testimony that plaintiff was totally and permanently disabled, its conclusion that he was entitled to compensation under G.S. 97-29 is entirely proper and conclusive here.[3]

We, therefore, do not need to reach the Commission's unnecessary conclusion that the spinal cord is not part of the back.

2. The *Perry* court did not rely exclusively on pain as the disabling condition, citing evidence of "absent ankle jerk" and "numbness." Clearly, however, pain was the real cause of the disability. Here also, pain is the primary problem; however, there was also evidence of "slight restriction" of leg movement, and loss of reflexes in the left leg.

3. Other states have also approved permanent total disability awards for arachnoiditis. *See in particular Huda v. Continental Can Company, Inc.*, 265 A. 2d 34 (Del. 1970) (facts very similar to this case); *see also Brooks v. Haines City Citrus Growers Ass'n*, 382 So. 2d 725 (Fla. App. 1980).

The necessary findings of fact are supported by the evidence, and they in turn support the conclusions of law. Therefore, the opinion and award of the full Commission is

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

STEPHEN MICHAEL GEORGE AND WIFE, SHARON GEORGE v. RAY A. VEACH AND WIFE, FRANCES M. VEACH

No. 8321DC348

(Filed 17 April 1984)

1. **Sales § 6.4; Vendor and Purchaser § 6.1— defective septic tank system—breach of implied warranty by builder-vendor**

   Plaintiffs' evidence was sufficient for the jury on the issue of defendant builder-vendor's breach of an implied warranty of habitability because of a defective septic tank system where it tended to show that plaintiffs had occupied a house purchased from defendant for only six months when the septic tank system failed; the natural soil on the site precluded use of any septic system; the initial septic tank system was not properly constructed by defendant; a "soil transplant" was performed on the site with the wrong type of soil; restrictive covenants permitted only single family residences on plaintiffs' lot; and sewage overflow created a health hazard and rendered plaintiffs' house unsuitable for use as a residence.

2. **Sales § 6.4; Vendor and Purchaser § 6.1— implied warranty by builder-vendor—applicability to septic tank system**

   The implied warranty of a builder-vendor of a dwelling that the dwelling was constructed in a workmanlike manner and is habitable extends to a septic tank system for the dwelling.

3. **Sales § 6.4; Vendor and Purchaser § 6.1— septic tank system—implied warranty of builder-vendor—effect of inspection by county**

   A builder-vendor is not insulated from liability on an implied warranty of habitability on the ground that a defective septic tank system was designed, approved and inspected by the county health department.

APPEAL by plaintiffs from *Alexander, Judge.* Judgment entered 18 November 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 16 February 1984.

Plaintiffs purchased from defendants a house built by defendant Ray A. Veach (defendant-builder), who was in the business of building and selling houses. Public sewage disposal was unavailable, and the house thus was equipped with a septic tank system. This system failed a few months after plaintiffs occupied the house. Efforts to remedy the failure were unsuccessful.

Plaintiffs thus brought this action for breach of implied warranty and unfair or deceptive trade practices (G.S. 75-1.1). At the close of plaintiffs' evidence the trial court granted directed verdict for defendant Frances M. Veach on all claims and for defendant-builder on the unfair or deceptive trade practices claim. At the close of all the evidence it granted defendant-builder's motion for directed verdict on the implied warranty claim.

Plaintiffs appeal.

Morrow and Reavis, by John F. Morrow, for plaintiff appellants.

Frye, Booth, Porter & VanZandt, by Leslie G. Frye, for defendant appellee.

WHICHARD, Judge.

Plaintiffs' sole contention is that the court erred in granting directed verdict for defendant-builder on the implied warranty claim. We agree, and accordingly reverse.

In this jurisdiction an implied warranty accompanies the sale of newly constructed dwellings.

> [I]n every contract for the sale of a recently completed dwelling . . . the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and . . . this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E. 2d 776, 783 (1974).

Directed verdict for defendant-builder on the implied warranty claim presented here was proper only if the evidence, considered in the light most favorable to plaintiffs, was legally insufficient to take the case to the jury and support a verdict for plaintiffs. *Koonce v. May*, 59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982). The evidence, so considered, showed the following:

[1] Due to poor soil conditions, no acceptable septic system was available for the lot at the time of construction. An expert witness testified that defendant-builder performed a "soil transplant" with the wrong type of soil. Other evidence indicated that, prior to repairs made by plaintiffs, a septic tank line had been placed in the wrong area, and a French drain had been improperly installed. Sewage overflow created a health hazard and rendered plaintiffs' house unsuitable for use as a residence. Restrictive covenants permitted only single family residences on plaintiffs' lot, and plaintiffs bought the house for use as a residence.

Evidence for plaintiffs thus showed that (1) the initial septic tank system was poorly constructed by defendant, (2) the improper soil transplant resulted in a major structural defect, and (3) the natural soil on the site precluded use of any septic system and thus precluded residential use of the property. Nothing else appearing, such evidence would suffice to take the case to the jury and support a verdict for plaintiffs.

[2] Defendant-builder argues, however, that "the implied warranty theory as regards the sale of residential property [is] not applicable to septic tanks/sewage systems." Our Supreme Court has stated that the implied warranty covers "the dwelling, together with all its fixtures." *Hartley, supra.* It also has held that the implied warranty covers the ability of property to support a septic tank system. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975). It stated:

> [W]here a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be

> used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purposes to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants.

Hinson, supra, 287 N.C. at 435, 215 S.E. 2d at 111.

While not directly on point, we find *Hinson*, considered together with *Hartley*, instructive. To hold that an implied warranty covers the ability of property to support a septic tank system, but does not extend to the system itself, would be illogical and inconsistent, and would render vacuous the warranty as to the supportive capacity of the underlying property. Further, where a dwelling house lies beyond the reach of public or community sewage facilities, a septic tank or on-site sewage disposal system is generally an essential element of habitability. A holding that the implied warranty is "not applicable to septic tanks/sewage systems" thus would render the warranty virtually vacuous in its entirety. We thus reject defendant-builder's contention that the implied warranty is not applicable to septic tank/sewage systems.

[3] Defendant-builder also argues that he should be insulated from liability because the Forsyth County Health Department designed the system, oversaw his construction of it, and approved the completed system. An implied warranty arises by operation of law, *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 202, 225 S.E. 2d 557, 567-68 (1976), and imposes strict liability upon the warrantor, *see* W. Prosser, *Law of Torts* §§ 95, 97 (4th ed. 1971). Defendant-builder cites no authority for the proposition that government regulation of a construction activity insulates a builder-vendor from the liability which an implied warranty imposes. He analogizes, instead, to cases holding builders free from liability where they have constructed in accord with plans and specifications furnished by the property owner. *See Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 241-42, 273 S.E. 2d 504, 506-07 (1981); Annot., 6 A.L.R. 3d 1394 (1966). The rationale of those cases is that where a builder merely follows the owner's plans, it would be inequitable to allow the owner to recover from him for construction defects caused by flaws in the plans.

Plaintiffs did not design the septic tank system here, however, and the rationale of those cases is thus inapposite. As

noted, fault on the part of the builder-vendor is not a prerequisite to liability under the doctrine of implied warranty. *Griffin, supra*; W. Prosser, *supra*. The initial vendee need only show that the house was not constructed in a workmanlike manner or was not habitable.

A neighboring jurisdiction has rejected the position for which defendant-builder contends. *See Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E. 2d 792 (1970). The court there stated:

> [D]efendants contend that they installed the septic tank and field drains therefrom in accordance with the specifications of the Greenville County Health Department and that such fact should relieve them from liability.
>
> The short answer to the foregoing contention is that this action for breach of an implied warranty is not based on negligence. There was an implied warranty which bound the defendants absolutely for the existence of the warranted qualities in the building, irrespective of any fault on their part.

Id. at 414-15, 175 S.E. 2d at 795.

In a subsequent case, *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E. 2d 728 (1976), that court again affirmed a judgment for a house purchaser. It did so on the ground that failure of a septic tank system to function properly breached an implied warranty that the house was fit for use as a residence. It gave as a *ratio decidendi* "the reasonable expectations of the parties," stating: "When a product is sold, the parties contemplate an expected use of the product. One of the primary objectives of the law of contracts and sales is to carry out the reasonable expectations of the parties." *Id.* at 502, 229 S.E. 2d at 730. It stated further: "The sale contemplated the use of the house as the dwelling; an implied warranty does no more than fulfill the reasonable expectations of the parties." *Id.* at 503, 229 S.E. 2d at 731.

We find these cases persuasive. We also note that this Court has held that a vendor of a modular home, who was the defendant in a breach of warranty action brought by the vendee, could not recover over from a third-party defendant which had placed its seal of inspection on the home. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E. 2d 183 (1978). The rationale of that holding would seem

to preclude insulating a vendor from liability on an implied warranty of habitability on the ground that a defective septic system was inspected by a county health department. We note further that this Court has held that, absent express contractual agreement between a builder-vendor and his well-drilling subcontractor, the builder-vendor is liable to the purchaser for breach of implied warranty if the water supply is inadequate; and he cannot recover over from the well-drilling subcontractor. *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E. 2d 727 (1976). The rationale of that holding also would seem to preclude insulating the vendor from liability on the basis of the health department's inspection, absent contractual agreement by the health department to assume responsibility for the functioning of the septic system. There is no evidence here of such contractual agreement.

"The basic and underlying principle of [the implied warranty doctrine] is a recognition that in some situations the rigid common law maxim of *caveat emptor* is inequitable." *Hinson, supra*, 287 N.C. at 435, 215 S.E. 2d at 111. We believe the facts here present such a situation. The county health department originally looked at the lot in question and informed defendant-builder that the soil was unsuitable for development. Because defendant-builder was "unhappy" with this finding, a State soil specialist was asked to conduct a further examination. A county health department official then approved the lot for a septic tank system on condition that the lot be modified by a soil transplant. The county official testified that he consulted with the State soil specialist, who approved the soil transplant idea. Plaintiffs' evidence indicates, however, that the State soil specialist never approved the soil transplant or any other modification. After the experience with plaintiffs' lot, the county health department decided against future use of soil transplants as a means of modifying lots otherwise unsuitable for septic tank systems. Some evidence thus shows that the county health department approved the lot for a septic tank system only after defendant-builder expressed his unhappiness with the initial disapproval and despite the contrary recommendation of a State expert. As between defendant-builder and plaintiff-buyers, then, the equities favor plaintiff-buyers, since defendant-builder apparently had some notice of the risk involved.

Further, by virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation. He also is better positioned to evaluate and guard against the financial risk posed by a defective septic system, and to absorb and spread across the market of home purchasers the loss therefrom. In terms of risk distribution analysis, he is the preferred or "least cost" risk bearer. Finally, he is in a superior position to develop or utilize technology to prevent such defects; and as one commentator has noted, "the major pockets of strict liability in the law" derive from "cases where the potential victims . . . are not in a good position to make adjustments that might in the long run reduce or eliminate the risk." R. Posner, *Economic Analysis of Law* 140-41 (2d ed. 1977).

Since septic tank systems by their nature must ultimately fail, the vendee has the burden of proving that a system is of sufficiently new construction to fall within the implied warranty. The duration of an implied warranty is determined by the standard of reasonableness. *Wagner Construction Co., Inc. v. Noonan*, 403 N.E. 2d 1144, 1148 (Ind. App. 1980). Plaintiffs carried their burden here by showing that they only had occupied the house for approximately six months when the system failed. Whether the implied warranty reasonably endured for this period was appropriately for the jury to determine.

In summary, considering the evidence in the light most favorable to plaintiffs, it was legally sufficient to take the case to the jury under an implied warranty theory of liability. For reasons set forth above, we reject defendant-builder's contentions that an implied warranty is not applicable to septic tanks/sewage systems, and that he should be insulated from liability because of the role of the county health department in the installation of the system. We believe our Supreme Court's decisions in *Hartley* and *Hinson*, the equities of the situation, and the policy considerations which underlie the implied warranty doctrine, combine to dictate this result.

We thus hold that the court erred in granting directed verdict for defendant-builder on the implied warranty claim. The judgment is accordingly reversed, and the cause is remanded for

further proceedings, consistent with this opinion, limited to the implied warranty claim against defendant-builder.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

PLYMOUTH FERTILIZER COMPANY, INC. v. RODERICK EARL SELBY, SR., D/B/A RODDY SELBY & SONS

No. 832SC539

(Filed 17 April 1984)

Appeal and Error § 57.5— evidence not supporting findings—findings of fact not supporting conclusion

In an action instituted by plaintiff to recover a sum of money plus interest on an alleged account which was tried before a judge without a jury, the evidence did not support the findings of fact, and the findings did not support the conclusions of law. Rather than opening and closing arguments, the attorneys submitted their arguments in "briefs" and the judgment was not signed until two months after the end of the trial. Several important issues were not addressed by the findings of fact and the evidence did not support other findings of fact.

Judge JOHNSON concurs in the result.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 11 February 1983 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 3 April 1984.

This is a civil action wherein plaintiff seeks to recover of defendant the sum of $7,525.66 plus interest on an alleged account. After a trial before the judge without a jury, the judge made detailed findings and conclusions and entered a judgment that plaintiff have and recover of defendant the sum of $9,549.93 plus interest. Defendant appealed.

Hutchins, Cockrell & Neumann, P.A., by Howard P. Neumann, for plaintiff, appellee.

Stubbs & Chesnutt, P.A., by Marcus Chesnutt and Jerry F. Waddell, for defendant, appellant.

HEDRICK, Judge.

Defendant has so ignored the North Carolina Rules of Appellate Procedure as to render this appeal subject to dismissal. We suspend the Rules, however, to prevent manifest injustice and to expedite a final decision in this case. Rule 2, North Carolina Rules of Appellate Procedure.

The record discloses that after the trial Judge Bruce and the attorneys representing plaintiff and defendant engaged in the following colloquy:

> COURT: You got opening and closing arguments.
>
> MR. NEUMANN: I'll waive the opening.
>
> COURT: Let me ask you this, would you prefer to submit it on Briefs?
>
> MR. NEUMANN: I certainly wouldn't object to that.
>
> MR. CHESNUTT: What is the Court's pleasure.
>
> COURT: Well, I'd rather you submit it on Briefs because I'm hungry and I got to be back here at two o'clock.
>
> MR. CHESNUTT: Judge, where do you want us to mail them?
>
> COURT: To—do you stipulate that the Judgment can be signed out of Session, out of County?
>
> MR. CHESNUTT: Yes sir.
>
> MR. NEUMANN: We stipulate.
>
> COURT: Mail them to P. O. Box 792, Mount Olive, 28365.
>
> MR. NEUMANN: You give us a time limit to have these submitted to you?
>
> COURT: Well, what do you all want to do? *I'd rather you not wait too long until I forget everything about it . . .*

(Emphasis added.)

The dialogue quoted above took place on 8 November 1982. The judgment was signed on 11 February 1983. The record does not disclose when the "briefs" were sent to Judge Bruce, but the

findings of fact made by him and the conclusions of law drawn therefrom demonstrate that the attorneys waited "too long."

The evidence does not support the findings of fact, and the findings do not support the conclusions of law. The evidence adduced at trial discloses that in 1978 the defendant and his two sons, Roddy Selby, Jr., and Vance Selby, purchased agricultural supplies consisting primarily of fertilizer from the plaintiff. These purchases were charged to the account of "Roddy Selby and Sons." Yet Judge Bruce found as a fact that in 1978 "Plaintiff extended credit to Defendant under the name of Selby Farms for materials purchased." The evidence at trial discloses that on 22 January 1979 the defendant paid the "Roddy Selby and Sons" account in full. Yet Judge Bruce found as a fact that "[o]n January 22, 1979, Defendant paid the then outstanding balance owed to Plaintiff in the name of Selby Farms."

In addition to finding facts not supported by the evidence, the court failed to make findings resolving critical issues raised by the evidence. While the court found that "various purchases of fertilizer and chemicals were made on the account of Roddy Selby and Sons subsequent to February 5, 1979," Judge Bruce failed to designate the identity of the persons making the "various purchases" referred to. The record shows that the defendant's entire defense was based on his contention that shortly after he paid the account in full on 22 January 1979, he notified plaintiff's agent that he was "bowing out," and that his sons would henceforth be operating their own business. In this regard defendant testified:

> Q. Now, did you have any discussion with Mr. Dunbar in January or early months of 1979 relative to your account?
>
> A. Yes sir. As soon as we found out the boys had acquired a loan to buy the property that we had cultivated in '78, I closed the account out and I saw Jimmy, I believe it was down at O'Neals's.
>
> Q. Is that Jimmy Dunbar?
>
> A. Yes sir. Me and the two boys were together and I notified him at that time that I no longer would be with the boys, that they would be standing alone because they had their own credit established at Farmer's Home Administration.

Q. And had they purchased their own land?

A. Yes sir.

Q. And where did that conversation take place?

A. At O'Neal's Cafe, I guess it is, at Rose Bay.

. . .

Q. And do you remember what the occasion was when you saw Mr. Dunbar?

A. Yes, we had gone to Swan Quarter Equipment Company to pick up some parts for one of the tractors, I believe and coming back by the boys wanted to stop and see Jimmy about establishing credit with him and I told him then that I would be bowing out.

Q. You told who?

A. Jimmy.

Q. Now subsequent to January 19, 1979, that's the date of that check, did you charge anything with Plymouth Fertilizer Company, Inc. in your name?

A. What before that day?

Q. After that?

A. No, not after that day. No.

Q. Did you authorize your sons to charge anything in your name at Plymouth Fertilizer Company, Inc. after . . .

A. No sir, not in my name itself. No.

Q. You did not?

A. No.

Q. Did you—did Jimmy—did you tell Jimmy Dunbar that you were not authorizing any further charges in your name or on your account?

A. I told him to delete my name completely off the ledger that I was going to start doing my business with Cargill, Incorporated in Belhaven, which I did.

Q. Did you—did you charge your stuff with Cargill subsequent to January 19th, 1979?

A. Right.

Defendant's sons corroborated his testimony in regard to his conversation with Jimmy Dunbar. When Mr. Dunbar was examined as to whether defendant notified him of his withdrawal from the business, he testified as follows:

Q. Jimmy, do you recall meeting with Mr. Selby and his two sons down there at Rose Bay sometime in early February?

A. I don't remember it.

Q. Do you remember Mr. Selby ever coming to you and telling you he wasn't going to be responsible for this account?

A. No sir.

MR. NEUMANN: Nothing further.

RECROSS EXAMINATION OF MR. DUNBAR by MR. CHESNUTT:

Q. Are you . . .

COURT: Are you denying such a meeting took place?

A. I'm denying I don't remember it.

COURT: Well, you don't remember having any conversation with this man at Rose Bay at any time?

A. Not on that date. No sir.

COURT: Well, have you ever had a conversation with him at Rose Bay?

A. Not that I know of.

The court made no finding of fact as to this matter.

Plaintiff offered evidence tending to show that in January 1979 defendant's sons asked that the name of the account be changed from "Roddy Selby and Sons" to "Selby Brothers." Plaintiff's agent testified that, "[A]t that time we told them that if

their father would sign the personal guaranty that he would be responsible for the account, we would change it. Otherwise we would leave it like it is." The trial court made no finding whatsoever as to this matter.

Since we have already stated that the evidence does not support the findings, it seems unnecessary to point out that the findings do not support the conclusions. But lest upon remand the parties or the court become even more confused, we want to point out that we are uncertain any construction of the evidence would support the conclusions of law made by Judge Bruce.

Because resolution of the issues raised by the pleadings and the evidence depends considerably upon the credibility of the witnesses, we believe the interests of justice require us, in the exercise of our discretion, to order a new trial in open court.

For the reasons stated, the judgment is vacated and the cause is remanded to Superior Court for a new trial.

New trial.

Judge HILL concurs.

Judge JOHNSON concurs in the result.

RICHARD L. WARREN v. JOSEPH HARRIS COMPANY, INC., W. S. CLARK AND SONS, INC. AND MURRY (MONK) FULCHER

JAMES A. PERRY v. JOSEPH HARRIS COMPANY, INC., W. S. CLARK AND SONS, INC. AND MURRY (MONK) FULCHER

No. 833SC534

(Filed 17 April 1984)

Sales §§ 17.1, 17.2; Uniform Commercial Code §§ 11, 14— cabbage seeds—breach of express and implied warranties

Plaintiffs' evidence was sufficient for the jury on issues of defendants' breach of an express warranty that cabbage seeds sold to plaintiffs were suitable for fall planting and winter growth in Carteret County and of defendants' breach of implied warranty of fitness of the seeds for a particular purpose. G.S. 25-2-313; G.S. 25-2-315.

Warren v. Joseph Harris Co. and Perry v. Joseph Harris Co.

APPEAL by plaintiffs from *Lane, Judge.* Judgment entered 17 November 1982 in Superior Court, CARTERET County. Heard in the Court of Appeals 3 April 1984.

In these two civil cases, consolidated for trial, plaintiffs seek to recover damages from the defendants for their alleged breach of express and implied warranty. Summary judgment for defendant Joseph Harris Company, Inc., was entered in both cases on 17 September 1981. At the close of plaintiffs' evidence, defendants' motion for a directed verdict was allowed. Plaintiffs appealed.

Wheatly, Wheatly & Nobles, P.A., by C. R. Wheatly, III, for plaintiffs, appellants.

William W. Aycock, Jr., for defendants W. S. Clark and Sons, Inc., and Murry (Monk) Fulcher, appellees.

HEDRICK, Judge.

Plaintiffs have attempted to bring forward and argue numerous exceptions relating to the exclusion of evidence. Plaintiffs have, however, failed to comply with Rule 28, North Carolina Rules of Appellate Procedure, in regard to preparation of their brief. Thus these exceptions present no question for review.

Plaintiffs also assign error to the court's ruling directing a verdict for defendants. This assignment of error is preserved for review pursuant to Rule 10, North Carolina Rules of Appellate Procedure, which in pertinent part provides: "Upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law . . . notwithstanding the absence of exceptions or assignments of error in the record on appeal."

Evidence introduced at trial, considered in the light most favorable to plaintiffs, tends to show the following:

Plaintiffs Richard Warren and James A. Perry were, at the time of the events in question, cabbage farmers in Carteret County. Defendant W. S. Clark and Sons, Inc., is a North Carolina corporation engaged in the retail sale of agricultural products. De-

fendant Murry (Monk) Fulcher is an employee of defendant W. S. Clark and Sons.

Cabbage is grown in Carteret County in two ways. First, seed may be planted in seed beds in the fall months, and the young plants transferred to the fields in the winter months. When cabbage is grown this way, the types of seed most commonly used in this part of the state are known as Rio Verde and A-C 5. Certain other types of seed will not produce a marketable cabbage head when planted under these conditions. These types, because of the weather conditions in Carteret County, will instead tend to "flower out," that is, a stalk grows through the center of the cabbage, the head becomes soft, and the plant goes to seed. Carteret County farmers refer to kinds of cabbage that do not tend to "flower out" when planted in the fall by saying that these types "winter over"; that is, these types will produce a marketable head of cabbage despite Carteret County weather conditions.

The second way in which cabbage is grown in Carteret County does not involve growing cabbage from seed. Instead, the young plants are ordered from Florida and planted directly in the fields.

In August 1979 plaintiff Richard Warren went to W. S. Clark and Sons and spoke with Murry Fulcher. Mr. Fulcher informed plaintiff that there was a shortage of Rio Verde and A-C 5 seed, and offered to sell plaintiff "Sanibel" seed instead. Plaintiff testified as follows:

> So I asked him did he know if these cabbage would winter over or had any experience with them, because I had never heard of this type cabbage.

Mr. Fulcher then called the New York seed company that sold the seed. Plaintiff testified:

> I asked Mr. Fulcher to ask the man or the woman, ever who it was he was talking to, to be sure to ask him if these cabbage seed would winter over in eastern North Carolina, specifically Carteret County, the area I was concerned with. Mr. Fulcher asked this question and assured me that these cabbage would winter over and do as good, if not better, than the AC 5 or the Rio Verde. Therefore, based upon this con-

> versation and the information Mr. Fulcher had received, I ordered 20 pounds of the Sanibel seeds.
>
> . . .
>
> I told Mr. Fulcher that if he didn't really know anything about it and he was not sure of these Sanibel seeds, not to even order them, that I would wait and get Florida plants, what I know I could make a crop with. And he stated these cabbage would be all right. Therefore we ordered the seed.

Plaintiff also testified about a later conversation with Mr. Fulcher, in which the following interchange occurred:

> I said, "Monk, now are you sure, absolutely sure, have no doubt in your mind that these seeds are going to do well in eastern North Carolina and Carteret County?" And Mr. Fulcher replied to me, said, "I'll guarantee this seed will be as good, if not better, than the AC 5's or the Rio Verde."

Plaintiff planted the seed on 28 September and transferred the plants to fields in January, 1980. In early March, plaintiff observed that the plants "were beginning to look funny." Plaintiff informed Mr. Fulcher of the plants' unusual appearance and his concern that the cabbage was going to "run up." Plaintiff testified:

> I told him, I said, "Now, Monk, if there's any doubt in your mind at this point, I have still got time to order plants from Florida and still raise a crop." He said, "No," said, "I don't think you have anything to worry about," said, "that's the way these cabbage grow." Said, "They grow funny and different than your other type cabbage."

As a result of this conversation, plaintiff did not order plants from Florida. More than 50 per cent of the cabbages he raised from Sanibel seed went to seed and were thus unmarketable.

Plaintiff James Perry testified as follows:

> I asked Monk, I said, "Monk, Richard told me you found some cabbage seed," and he said, "Yes, I couldn't find any Rio Verde or AC 5 but I found a cabbage called Sanibel that I believe will grow just as good a crop or not better than the AC 5 or the Rio Verde, and the only stipulation on them is

you can't put them quite as far apart as you do the Rio Verde or they will get big on you and if they get too big you can't market them." So I said, "Murry, you know the type of weather we have in Carteret County." He said, "Jimmy, I believe these cabbage is going to be the cabbage of the future for you boys. You put more plants per acre and I believe they will produce more." I said, "Okay, I want you to order me five pounds."

Mr. Perry also testified to a later conversation with Mr. Fulcher:

I called him and I told him, I said, "Monk, these cabbage don't look right," and I said, "Now we still got time to get the cabbage plants out of Florida." And I said, "What are you thinking about?" He said, "Jimmy, I think that's the way to go. I wouldn't worry with them. I believe they'll be all right." So I didn't do anything.

Plaintiffs argue that this evidence, considered in the light most favorable to them, is sufficient to raise a question for the jury as to whether defendants expressly warranted the Sanibel seed. They further contend that there was sufficient evidence of an implied warranty of fitness for a particular purpose to require submission of this issue to the jury.

N.C. Gen. Stat. Sec. 25-2-313 provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or

> "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Whether the parties to the transaction have created an express warranty is a question of fact. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982).

N.C. Gen. Stat. Sec. 25-2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

Our examination of the record reveals ample evidence from which the jury might find that Mr. Fulcher made an "affirmation of fact or promise" to plaintiffs, that such affirmation related to the goods, that his representations became "part of the basis of the bargain," and that the goods did not conform to the affirmation or promise. Furthermore, there was substantial evidence that Mr. Fulcher knew at the time of sale that the goods were required for a "particular purpose," *to wit*, fall planting and winter growth, that plaintiffs relied on Mr. Fulcher's skill or judgment in selecting suitable goods, and that Mr. Fulcher was aware of their reliance. Because we believe plaintiffs' evidence was sufficient to raise an issue as to the existence of an express warranty and of an implied warranty of fitness for a particular purpose, we hold the trial court erred in directing a verdict for defendants. The judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Judges HILL and JOHNSON concur.

JOHN PAYNE AND HIS WIFE, MARY PAYNE v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 834SC600

(Filed 17 April 1984)

Fraud § 9— homeowner insurance policy—refusal to reimburse for losses—bad faith and fraud properly alleged

Plaintiffs' causes of action alleging defendant acted in bad faith by refusing to provide coverage for plaintiffs' theft losses and alleging fraud by defendant were properly pleaded, and the trial court erred in granting defendant's motion to dismiss plaintiffs' causes of action.

APPEAL by plaintiffs from *Tillery, Judge.* Order entered 21 March 1983 in DUPLIN County Superior Court. Heard in the Court of Appeals 5 April 1984.

Plaintiffs sought compensatory and punitive damages upon defendant's refusal to reimburse plaintiffs for losses to personal property allegedly insured by a homeowner policy issued by defendant. In their complaint, plaintiffs alleged that defendant's agent, Ronnie K. Williams, assured them that defendant could provide insurance protection against theft and other losses to any of plaintiffs' real and personal property, wherever located. Plaintiffs alleged that they relied upon this statement, and thereafter applied for and received a homeowner policy from defendant on 16 June 1981, insuring plaintiffs' real and personal property for one year. The terms of the policy, however, mentioned only property of plaintiffs located in their home near Lyman, North Carolina, in Duplin County. No mention was made of property owned by plaintiffs in South Carolina. Plaintiffs further alleged that certain personal property was stolen from their home in South Carolina in November, 1981, and that, although they promptly reported the loss, defendant denied liability under the insurance contract.

Plaintiffs then filed suit, alleging three causes of action in support of their claim for damages: breach of contract, bad faith, and fraud. In its answer, defendant denied liability on the grounds that it was not licensed to insure property located outside North Carolina, that plaintiffs' policy covered only property located in plaintiffs' Duplin County residence, and that plaintiffs' three causes of action failed to state a claim for which relief could

be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure.

Upon reviewing the pleadings and arguments of counsel, the trial court granted defendant's motion to dismiss plaintiffs' second and third causes of action for failure to state a ground for which relief could be granted. From the order dismissing plaintiffs' claims for bad faith and fraud, plaintiffs appealed.

Ingram & Ingram, by Carolyn Burnette Ingram and Charles Marshall Ingram, for plaintiffs.

Crossley & Johnson, by John F. Crossley, for defendant.

WELLS, Judge.

As a preliminary matter, we note that the trial court's order disposes of fewer than all of the issues in the suit before us. Ordinarily, an order which adjudicates fewer than all the claims of the parties is interlocutory and is not immediately appealable. The trial court's order in this case provides that there is no just reason for delay, and is therefore appealable, N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure.

A motion under Rule 12(b)(6) ". . . addresses itself solely to the failure of the complaint to state a claim . . ." Wright & Miller, 5 *Fed. Prac. & Proc.* § 1356 (1969). "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" (Citations omitted) (Emphasis in original) *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). In reviewing the motion ". . . the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true. . . . However, the court will not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened . . ." Wright & Miller, *supra* at § 1357. Where a claim for punitive damages for breach of contract is challenged by a Rule 12(b)(6) motion it must be remembered that:

> North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract,

> with the exception of breach of contract to marry. . . . The general rule in most jurisdictions is that punitive damages are not allowed even though the breach be wilful, malicious or oppressive. . . . Nevertheless, where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages. . . .
>
> Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. . . . Such aggravated conduct was early defined to include 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness. . . .'

(Citations omitted) *Newton v. Insurance Co., supra.*

Keeping the foregoing rules in mind, we now examine plaintiffs' second and third causes of action in detail to determine whether, when viewed in the light most favorable to plaintiffs, they state a claim for which relief can be granted. Plaintiffs' second cause of action alleges that defendant acted in bad faith by refusing to provide coverage for plaintiffs' theft losses and that defendant's actions were ". . . wilful, wanton, intentional and malicious. . . ." Plaintiffs support their claim with two specific examples of alleged bad faith on the part of defendant:

> (A) A statement made by an adjuster of Defendant company to the *feme* Plaintiff, in substance, that although Defendant company did in fact represent to and purport to provide theft coverage in a situation like Plaintiffs', in fact Defendant company discouraged the payment of any such claims for benefits pursuant to such theft coverage; and,
>
> (B) Numerous excuses, in the form of company requirements, offered to Plaintiffs as to why Defendant company was refusing to compensate Plaintiffs for their theft loss, with Defendant company being informed and corrected upon the statement and expression of each such requirement that Plaintiffs met such requirement, and with Defendant

company thereafter posing yet other, different requirements or excuses to Plaintiffs.

A similar claim for relief was held sufficient to withstand a Rule 12 (b)(6) motion to dismiss in *Dailey v. Integon Ins. Corp.*, 57 N.C. App. 346, 291 S.E. 2d 331 (1982). In that case the plaintiff sought punitive damages after its insurer refused to negotiate concerning plaintiff's fire losses. The plaintiff alleged that the defendant had acted in bad faith and had taken ". . . wilful, oppressive and malicious actions" showing "reckless and wanton disregard of the Plaintiff's rights." Under the rule of *Dailey*, therefore, we hold that the trial court erred in dismissing plaintiffs' second cause of action under Rule 12(b)(6). *Compare Newton v. Ins. Co., supra*, refusing to determine whether an allegation of bad faith without more was sufficient to support a claim for punitive damages.

Plaintiffs base their third claim upon allegations of fraud by defendant. N.C. Gen. Stat. § 1A-1, Rule 9(b) of the Rules of Civil Procedure requires that circumstances constituting fraud must be stated with particularity. The essential elements of a claim for fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981).

In their complaint, plaintiffs alleged the following events and circumstances in support of their claim of fraud:

. . .

19. That in or about the month of June 1981, Defendant company, by and through its duly licensed agent, sales representative and employee, Ronnie K. Williams, made certain oral representations to Plaintiffs, which said representations made these Plaintiffs believe that Defendant would provide policy coverage for all of Plaintiffs' personal property, wherever located, even including their personal property located in or at their said South Carolina residence awaiting transfer to their North Carolina residence, and further that this said coverage provided would protect against any loss and/or destruction of all Plaintiffs' said personal property by

reason of theft or otherwise; that Plaintiffs were induced by these said representations to purchase said policy of insurance, and Plaintiffs purchased said policy of insurance, in reliance upon the assurances, representations, promises and statements of Defendant's agent Williams . . . and that all of the assurances, representations, promises and statements of said agent Williams are imputed and attributed to Defendant company.

20. That the assurances, representations, promises and statements made by Defendant, by and through its agent Williams, to Plaintiffs, that they had their desired property coverage, and that all of their personal property, wherever located, was covered against any and all loss and/or destruction, including loss by theft, were false; that Defendant, in making such assurances, representations, promises and statements, knew they were false; that Defendant made such false representations, assurances, promises and statements with the intent to deceive Plaintiffs, and that Plaintiffs relied upon said false representations, assurances, promises and statements, and thereby were deceived, to their injury, in that, as more specifically set forth hereinabove, Plaintiffs sustained and suffered a theft loss, made due demand upon Defendant for benefits to be paid under their said policy coverage to compensate them for said loss, and that Defendant has denied that such benefits are due, and has failed and refused, and continues to fail and refuse, to pay the same.

Plaintiffs' pleading clearly alleges each of the necessary elements of fraud. It is equally clear that fraud constitutes one form of aggravation which will permit a claim of punitive damages. *Newton v. Ins. Co., supra.*

We hold, therefore, that the trial court erred in granting defendant's motion to dismiss plaintiffs' third cause of action. For the foregoing reasons, the order of the trial court must be and is

Reversed.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. TOMMY FRANKLIN ESSICK

No. 8322SC787

(Filed 17 April 1984)

1. **Narcotics § 3.3— testimony that material appeared to be marijuana—qualification of witness**

A police detective was sufficiently qualified to give an opinion that the "vegetable type material" which he observed "appeared to be marijuana" where he testified that he had been employed by the sheriff's department for three and a half years and that he was on a special drug case assignment at the time of the offense in question.

2. **Criminal Law § 42.6— chain of custody—access of others to evidence locker**

The fact that officers other than those who gathered and sealed certain evidence may have had access to the evidence locker did not destroy the chain of custody of the evidence.

3. **Narcotics § 4— conspiracy to sell and deliver marijuana—sufficiency of evidence**

The State's circumstantial evidence was sufficient to support conviction of defendant for conspiracy to sell and deliver marijuana.

4. **Conspiracy § 3.1— dismissal of charge against co-conspirator—plea to lesser charge by other co-conspirator—conviction of defendant**

The dismissal of charges against one co-conspirator for conspiracy to sell and deliver marijuana upon a finding of no probable cause and the acceptance of a negotiated plea of guilty to a lesser charge by the second co-conspirator did not constitute judgments of acquittal of both co-conspirators on the conspiracy charges so as to require that defendant's conviction on the conspiracy charge be set aside.

5. **Solicitors § 1— failure of witness to testify for defendant—no prosecutorial misconduct**

There was no evidence that a witness refrained from testifying for defendant because of prosecutorial misconduct where affidavits from two assistant district attorneys showed that they contacted the witness's attorney to clarify whether the witness was to testify at trial, the attorney's response was that his client "knew nothing about which he could testify," and the witness was never subpoenaed by defendant.

6. **Criminal Law § 181— motion for appropriate relief—oral testimony not necessary**

The trial court is not required to permit oral testimony when considering a motion for appropriate relief made pursuant to G.S. 15A-1414 when only questions of law arise or when the court determines from the materials submitted that the motion is without merit. G.S. 15A-1420(c)(1).

State v. Essick

APPEAL by defendant from *Davis, Judge.* Judgment entered 15 April 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 7 February 1984.

The defendant was charged with feloniously conspiring with Troy Melton and Billy Joe Burcham to sell and deliver marijuana in violation of N.C.G.S. 90-95(a)(1). On defendant's plea of not guilty, the matter was tried on 11 April 1983 in Superior Court. The jury returned a verdict of guilty on 15 April 1983. Judgment was entered on the verdict sentencing the defendant to ten years.

Defendant filed a motion for appropriate relief alleging that the State improperly influenced one of the defendant's witnesses causing him not to appear and further alleging that the verdict was contrary to the evidence. The motion was heard on 31 May 1983 and was denied.

The evidence for the State tends to show that on 2 September 1982, two law enforcement officers in a private plane observed the defendant and Troy Melton carrying on a conversation at defendant's pickup truck parked outside of Dean's Pool Hall. At trial Mr. Melton testified that he and the defendant discussed the price of some marijuana. After the conversation, the defendant left and made a phone call. Later, Billy Joe Burcham arrived at the pool hall and went inside to meet Troy Melton. Shortly thereafter Melton and Burcham left Dean's Pool Hall in separate vehicles. They traveled some distance, stopping at a white frame house, not visible from the road, where the transfer of marijuana took place. Melton drove a short distance from the house before being stopped by law enforcement officers who were in radio contact with the airplane. The officers seized from the trunk of the car material later identified as marijuana and identified at trial as State's Exhibits one through eleven.

Warrants were issued against Melton and Burcham on 13 October 1982 on the charge of conspiring with the defendant to sell and deliver marijuana in violation of N.C.G.S. § 90-95(a)(1) (1981 and Supp. 1983). Prior to the trial, charges against Burcham were dismissed for lack of probable cause. Melton testified for the State and after trial the State accepted a no contest plea to the lesser charge of maintaining a motor vehicle for purposes of keeping controlled substances.

From the judgment of the court and the order denying the motion for appropriate relief, defendant appeals.

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

Smith, Michael & Penry by Robert B. Smith, Jr., for the defendant-appellant.

EAGLES, Judge.

I.

Defendant's first three exceptions and assignments of error raise evidentiary questions. For the reasons stated below, we find no error.

A.

[1] The defendant assigns as error that the prosecution failed to lay a proper foundation for admission into evidence of testimony by Detective Sammy Hampton that he saw marijuana in the trunk of the car that had been operated by Troy Melton. The basis for defendant's contention is that Detective Hampton was not properly qualified to give an opinion that the "vegetable type material" which he observed "appeared to be marijuana."

Determination that a witness possesses the requisite skill to testify as an expert is a question of fact generally within the exclusive province of the trial court. *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548 (1975); *State v. Young*, 58 N.C. App. 83, 87, 293 S.E. 2d 209, 212 (1982). Further, where there is evidence of qualification, the trial court's decision to permit one to testify as an expert is tantamount to holding him to be an expert in the field of his testimony. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956). Detective Hampton testified at trial that he had been employed by the sheriff's department for three and a half years and at the time of the criminal offense he was on a special drug case assignment. We conclude that there was no abuse of discretion by the trial court and that based on Detective Hampton's experience, he was better qualified than the jury to form an opinion on the subject matter to which he testified. *State v. Phifer*, 290 N.C. 203, 213, 225 S.E. 2d 786, 793 (1976).

B.

[2] Defendant assigns as error that the prosecution failed to establish a connected chain of custody in order to permit proper introduction of the bags of marijuana into evidence. He bases this contention on the use of such phrases as "to the best of my knowledge" and "as far as I know." These phrases were used by the testifying officers when asked whether any persons other than themselves had access to the evidence locker. The fact that officers other than those who gathered and sealed the evidence may have had access to the evidence locker does not destroy the chain of custody. *State v. Newcomb*, 36 N.C. App. 137, 243 S.E. 2d 175 (1978). There was no testimony that any tampering with the evidence occurred. We therefore conclude that the evidence is properly admissible.

C.

[3] The defendant further argues that the trial court erred in denying his motions to dismiss based on the State's failure to present sufficient evidence of conspiracy to submit the case to the jury or to sustain the jury's verdict.

A motion to dismiss in a criminal case requires the court to weigh all of the evidence in the light most favorable to the State and the State is entitled to all reasonable inferences that arise from the evidence. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981). If more than a scintilla of evidence as to each element of the offense is presented, then the case must be submitted to the jury. *State v. Agnew*, 294 N.C. 382, 387, 241 S.E. 2d 684, 688 (1978).

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution. . . . The existence of a conspiracy may be established by direct or circumstantial evidence. "Direct proof of the charge [conspiracy] is not essential, for such is rarely ob-

tainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." [Citations omitted.]

State v. Abernathy, 295 N.C. 147, 164-165, 244 S.E. 2d 373, 384 (1978).

A review of the record tends to show that there was ample circumstantial evidence to sustain the charges. Reasonable inferences drawn from the evidence of meetings, personal conversations and the telephone call tend to show that there was a mutual, implied understanding that there would be a sale and delivery of marijuana. This assignment of error is without merit.

II.

[4] Defendant contends that his conviction of conspiracy must be set aside because neither of the two individuals with whom he was alleged to have conspired was convicted of felonious conspiracy charges. Prior to defendant's trial the conspiracy charges against Burcham were dismissed upon a district court finding of no probable cause. After defendant's trial at which Melton testified for the State, the State accepted from Melton a plea of no contest to a misdemeanor charge of maintaining a vehicle for the purpose of sale and delivery of a controlled substance. Defendant maintains that those actions, i.e., dismissal of charges against Burcham and a negotiated plea to a lesser charge by Melton, constitute judgments of acquittal as to both on the charges of conspiracy. We do not agree.

On an indictment for conspiracy in which the co-conspirators are named, if all named co-conspirators but the defendant are acquitted, the conviction of the one may not stand. *State v. Raper*, 204 N.C. 503, 168 S.E. 831 (1933); *State v. Gardner*, 84 N.C. 732 (1881); *State v. Tom*, 13 N.C. 569 (1830). In the absence of acquittals of all named co-conspirators, the defendant's conviction will stand. *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947).

Here, however, there is no evidence that the two named co-conspirators were acquitted. While defendants urge that the dismissal of the charges upon a finding of no probable cause is the equivalent of an acquittal, it clearly is not. In addition, the record makes reference to a plea arrangement between Burcham and the

State but contains no evidence of an acquittal of Burcham. The record is not clear as to whether the plea arrangement concerns misconduct pursuant to this conspiracy. Where one defendant charged with conspiracy enters a plea of no contest to a lesser included charge, his co-conspirator may alone be convicted of the conspiracy. *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935). Further, Melton's plea of no contest to lesser related charges clearly does not serve as a judgment of acquittal to the conspiracy charges. Since there is no evidence that both named co-defendants have been acquitted of the conspiracy charge, defendant's argument must fail.

III.

[5] The last two issues raised relate to the denial of defendant's motion for appropriate relief. They are considered together because the resolution of one issue necessarily resolves the other.

In his motion, defendant contends that he is entitled to relief because the prosecution improperly influenced Burcham so as to cause him to refrain from testifying on defendant's behalf and because the court refused to permit defendant to offer oral testimony in support of his motion for appropriate relief. The basis for this first contention is the allegation that an assistant district attorney contacted Burcham's attorney and told him that the State would not honor a plea arrangement with Burcham if he testified for the defendant. Affidavits from two assistant district attorneys show that neither improperly influenced Burcham or his attorney, but that they merely tried to clarify whether or not Burcham was to testify at trial. Burcham's attorney's response was that his client "knew nothing" about which he could testify. Further, he stated that his client had not been called to testify. Burcham was never subpoenaed by defendant. From these facts the trial court properly concluded that there was no evidence of prosecutorial misconduct and properly denied defendant's motion for appropriate relief.

[6] The trial court is not required to permit oral testimony when considering a motion for appropriate relief if made pursuant to G.S. 15A-1414, when only questions of law arise, or when the court determines from the materials submitted that the motion is without merit. G.S. 15A-1420(c)(1). Here the motion was based on

grounds stated in G.S. 15A-1414(b) and acceptance of testimony in addition to affidavits was not required.

In the trial and in denial of the motion for appropriate relief, there was

No error.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. LARRY ALFRED GREENE

No. 8325SC1006

(Filed 17 April 1984)

1. **Assault and Battery § 14.3; Robbery § 4.3— sufficiency of evidence that dangerous weapon used**

In a prosecution for armed robbery and assault with a deadly weapon inflicting serious injury, although the State presented no evidence regarding what kind of weapon was used, the jury could infer from the appearance of the wound on the back of the victim's scalp that a dangerous or deadly weapon was used. The victim was hit in the back of the head with an object of sufficient size so as to stun the victim, knock him to the floor, and cause a hematoma and a one to one-half inch laceration requiring four to five stitches in the back of the victim's head, and the treating physician testified that he would not have considered the wound minor if it had been inflicted to his head and that the blow would have been considered life-threatening had it been delivered a little harder.

2. **Assault and Battery § 14.3— sufficiency of evidence of "serious injury"**

In a prosecution for assault with a deadly weapon inflicting serious injury, the evidence was sufficient for the jury to find beyond a reasonable doubt that the victim incurred a "serious injury," where the testimony of a physician indicated that due to the location of the injury, it would have been life-threatening had the victim been hit a little harder, and that he would not have considered the blow minor had it been committed on him. Further, the victim's head was cut and stitches were required as treatment.

APPEAL by defendant from *Sitton, Judge.* Judgments entered 25 April 1983 in Superior Court of CATAWBA County. Heard in the Court of Appeals 15 March 1984.

The State's evidence tends to show that on 3 January 1983 Kenneth Hagee was employed at Quality Market Number 5 in

Hickory. At approximately 5:15 a.m. the defendant entered the store, as he had done almost every morning over the past two months, placed a quarter on the counter, and went around the counter and poured himself a cup of coffee. Hagee deposited the coin in the cash register and was writing down some figures when he felt a hard hit on the back of his head. Hagee was stunned and did not remember falling to the floor. Nevertheless, he heard someone open the cash register drawer and felt someone reach into his pocket and pull out his wallet. He noticed someone open and close the cash register drawer. He later was able to call the police.

Gerald Lynn Harris stopped at the Quality Market at 5:25 that morning and saw a black male run across the road directly in front of her car and into the bushes. The man was 5 feet 8 inches tall, weighed 135 to 140 pounds, and wore a light blue windbreaker, dark blue pants, and white tennis shoes. Ms. Harris entered the store, observed blood around the counter area, and noticed that Hagee had a laceration and a raised area on the back of his head. She placed wet paper towels on top of Hagee's head to stop the bleeding.

Greg Sellars arrived at Quality Market at 5:30 a.m. and observed a black male exit the front door of the store and cross the street. The man was in his mid-twenties, weighed 140 to 150 pounds, and wore a bluish grey coat, blue pants, and white shoes. Suspecting something was wrong, he had a ham radio operator call the police, and returned to the store. He observed Ms. Harris holding wet towels to a laceration on Hagee's head. Mr. Sellars was a paramedic and attended the wound which he described as a raised area on the back of Hagee's head with a one inch laceration which was not bleeding severely.

When the police arrived, Hagee told them he knew the man who robbed him but could not remember his name. He further identified defendant as working for Your City Taxi.

Hagee was taken by ambulance to the hospital. The treating physician testified that he might have given Hagee something for pain; that Hagee suffered a "hematoma" on the back of his scalp and a one to one and one-half inch laceration which had been inflicted by a hard blunt instrument. The physician treated the laceration with four or five stitches. He testified that he would

not have considered the wound minor if it had been inflicted upon him, and due to its location, it would have been a life-threatening wound if Hagee had been hit a little harder.

Defendant told the police that three parties were involved. One operated the car and another person named Nelson went into the store. According to the defendant, Nelson struck Hagee over the head and defendant took the money from the cash register and Hagee's wallet.

Hagee identified the defendant at a police lineup the following morning. He also identified defendant at the trial as the person who assaulted and robbed him.

Defendant was convicted of armed robbery in violation of G.S. 14-87, larceny from the person in violation of G.S. 14-72(b)(1), and assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b). Defendant received an active sentence. He appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Archie W. Anders for the State.

Assistant Appellate Defender Marc D. Towler for defendant appellant.

HILL, Judge.

[1] For his first assignments of error defendant contends the trial judge erred in denying his motion to dismiss the charges of armed robbery and assault with a deadly weapon inflicting serious injury, contending the State had failed to prove beyond a reasonable doubt that a dangerous weapon was used to endanger or threaten the life of the victim.

The essentials of the offense of armed robbery set forth in G.S. 14-87 are (1) the unlawful taking or attempting to take personal property from another; (2) the possession, use, or threatened use of firearms, or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim. *State v. Gibbons*, 303 N.C. 484, 489, 279 S.E. 2d 574, 578 (1981), *quoting, State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978). Defendant contends the State has failed to present sufficient evidence of the last two elements, which constitute the difference between armed

robbery and common law robbery. Defendant incorporates the same argument of no evidence of a dangerous weapon in assigning as error the denial of his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

The critical and essential difference between the offense of armed robbery and common law robbery is whether the victim's life was endangered or threatened by the use or threatened use of a firearm or other dangerous weapon. *State v. Joyner, supra* at 63, 243 S.E. 2d at 373; *State v. Chambers*, 53 N.C. App. 358, 362, 280 S.E. 2d 636, 639 (1981). Actual possession and use or threatened use of firearms or other dangerous weapons are necessary to constitute the offense of robbery with firearms or other dangerous weapons. *State v. Faulkner*, 5 N.C. App. 113, 168 S.E. 2d 9 (1969). Admittedly, the State presented no evidence regarding any kind of weapon, either from the victim or the defendant. But we conclude this case falls within the guidelines set forth in *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). In that case the court cited with approval *People v. Liner*, 168 Cal. App. 2d 411, 335 P. 2d 964 (4th Dist. Ct. of Appeals), which held that the jury could infer, from the appearance of the wound on the back of the victim's scalp that a blunt object—a dangerous or deadly weapon—was used.

In the case under review, the victim was hit in the back of his head with an object of sufficient size so as to stun the victim, knock him to the floor, and cause a hematoma and a one to one and one-half inch laceration requiring four to five stitches on the back of the victim's head. The treating physician, with 30 years experience, testified that he would not have considered the wound minor if it had been inflicted to his head. He further testified that had the blow been delivered a little harder, such would have been life-threatening. This evidence is sufficient from which the jury could infer the instrument used by defendant was a dangerous weapon, implement or means, and created a danger or threat to the life of the victim. As stated in *State v. West*, 51 N.C. 505, 509 (1859), "the actual effects produced by the instrument, may aid in determining its character in this respect, and in showing that the person using it, ought to be aware of the danger of thus using it." Defendant's first assignments of error are overruled.

[2] Defendant also contends the court erred in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury on the ground that there was insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the victim incurred a "serious injury." We disagree.

The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a dangerous weapon with intent to kill. "The injury must be serious but it must fall short of causing death. . . . Whether such serious injury has been inflicted must be determined according to the particular facts of each case." *State v. Jones*, 258 N.C. 89, 91, 128 S.E. 2d 1, 3 (1962). The facts of this particular case include the unrebutted testimony of the physician that due to its location the injury would have been life-threatening had the victim been hit a little harder, and that he would not have considered the blow minor had it been committed on him. The victim's head was cut; stitches were required as treatment. There was enough evidence from which the jury could infer the blow inflicted serious injury.

Lastly, defendant contends the court erred in failing to instruct the jury on the lesser included offense of simple assault. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). There was ample evidence of the greater offense in this case, while the record is void of any evidence tending to show that defendant may be guilty of a lesser included offense. The proper charges were given.

In the trial of the case we find

No error.

Judges HEDRICK and JOHNSON concur.

In re Wade

IN THE MATTER OF REGINALD LEE WADE, JUVENILE

No. 839DC1047

(Filed 17 April 1984)

1. **Infants § 17— admission of confession by juvenile—failure to make findings**

The trial court in a juvenile delinquency proceeding erred in admitting a statement made by the juvenile during custodial interrogation without making specific findings of fact as to whether the juvenile knowingly, willingly and understandingly waived the rights accorded him by G.S. 7A-595(d).

2. **Infants § 20— determination of delinquency—failure to state standard of proof —insufficient evidence**

The trial court erred in adjudicating respondent a delinquent child without affirmatively stating that the allegations of the juvenile petition had been proved beyond a reasonable doubt. Furthermore, the trial court's findings of fact were not sufficient to sustain the court's conclusion that respondent committed the crimes of breaking and entering and larceny.

APPEAL by respondent from *Wilkinson, Judge.* Order entered 18 April 1983 in District Court, PERSON County. Heard in the Court of Appeals 10 April 1984.

Respondent Reginald Lee Wade was adjudicated a delinquent child upon a finding by the district court that he had willfully and feloniously broken into and entered a building and stole and carried away merchandise having a value of $200.00.

At the adjudication hearing the State offered evidence which tended to show that on 3 December 1982 an unauthorized entry was made into the Western Auto Store of Roxboro, N.C. The perpetrators removed from the premises a cassette player, a clock radio, a cassette radio, a toy airplane, a digital clock, and some batteries. The investigating officer, David Ramsey, visited the scene and observed: a broken window, a rock on the floor, and broken display cases.

Respondent was interrogated on 27 December 1982. After an initial denial of involvement in the break-in, respondent made a formal statement admitting guilt. This statement was admitted into evidence after voir dire was held to determine whether it was knowingly, willingly, and understandingly given. The State's evidence consisted of the testimony of Marvin Green, alleged co-

perpetrator, and Officer David Ramsey. Respondent offered evidence during voir dire only.

At the close of all the evidence, the court found respondent to be delinquent and committed him to the Division of Youth Services for an indefinite term not to exceed his eighteenth birthday. From this order respondent appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Jackson & Hicks, by Alan S. Hicks, for respondent.

HEDRICK, Judge.

[1] Respondent first contends that the trial court erred by failing to suppress the inculpatory statement made by him during an in-custody interrogation. He contends that his statement was not voluntarily given, that he was not advised of his right to have a parent present, and he was not advised of his right to counsel.

During the proceedings, the trial judge conducted a voir dire hearing to determine whether respondent had knowingly, willingly, and understandingly waived his rights. Officer Ramsey testified that he read respondent his juvenile rights, that respondent indicated he understood them, and that respondent "signed an adult waiver form because we did not have any juvenile rights forms at that time. . . ." Respondent, on the other hand, testified that, ". . . Mr. Ramsey read my rights off a sheet of paper, but I did not hear anything about a parent coming with me. . . . I gave him a written statement because he kept pressuring me. I knew what to tell him because he told me everything that happened."

After voir dire, the trial judge, without making findings of fact, admitted the challenged statement into evidence.

Although juvenile proceedings are not criminal prosecutions, due process rights attach when the violation complained of places the juvenile in danger of confinement. *In re Vinson,* 298 N.C. 640, 652, 260 S.E. 2d 591, 599 (1979). *In re Johnson,* 32 N.C. App. 492, 493, 232 S.E. 2d 486, 488 (1977). In addition to their constitutional rights, juveniles have been granted additional rights by our state legislature. N.C. Gen. Stat. Sec. 7A-595 states in pertinent part that:

(a) Any juvenile in custody must be advised prior to questioning:

. . .

(3) That he has a right to have a parent, guardian or custodian present during questioning; . . .

(4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

. . .

(d) Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

Section 7A-595(d) of this statute "clearly provides that before *any* statement flowing from custodial interrogation is admitted the judge *must* make the required findings." (Emphasis added.) *In re Riley*, 61 N.C. App. 749, 750, 301 S.E. 2d 750, 751 (1983). Prior to the enactment of Sec. 7A-595(d), the courts of this State enunciated well established precepts regarding the admissibility of challenged confessions. Our Supreme Court stated in *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971):

> [i]f, on *voir dire*, there is conflicting testimony bearing on the admissibility of a confession, it is error for the judge to admit it upon a mere statement of his conclusion that the confession was freely and voluntarily made. In such a situation the judge must make specific findings so that the appellate court can determine whether the facts found will support his conclusions.

Id. at 14-15, 181 S.E. 2d at 570. *Accord State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506, 512 (1976). *State v. Silver*, 286 N.C. 709, 720, 213 S.E. 2d 247, 254 (1975). When, as in this case, no findings or conclusions were made prior to admitting the challenged confession, it is error for the trial judge to admit the confession without making specific findings of fact. *In re Riley*, 61 N.C. App. 749, 750, 301 S.E. 2d 750, 751 (1983). G.S. Sec. 7A-595(d).

[2] Respondent further assigns as error, the trial court's failure to find facts sufficient to support its determination of delinquency. He argues that the trial judge's failure to state the standard of proof used in making the determination of delinquency constitutes reversible error. The court found as follows:

> Facts
>
> Upon evidence of Detective David Ramsey: That on or about the 3rd day of December 1982 at 2:00 a.m. the delinquent child Reginald Lee Wade and Marvin Green went to the side entrance (Depot Street) of Western Auto Store threw a rock through the top window on the side entrance, and gained entrance to the store. Two glass show cases inside the store were broken and merchandise was missing. Damages to broken glass and merchandise $200.00.

Prior to the establishment of a statutory quantum of proof in juvenile proceedings, our Supreme Court stated that, "the better practice dictates that the judge's order recite affirmatively that the findings are made beyond a reasonable doubt." *In re Walker*, 282 N.C. 28, 41, 191 S.E. 2d 702, 711 (1972). Since *Walker* our legislature has enacted Secs. 7A-635 and -637 of the Juvenile Code. N.C. Gen. Stat. Sec. 7A-637 states in pertinent part that, "If the judge finds that the allegations in the petition have been proved as provided in G.S. Sec. 7A-635 [beyond a reasonable doubt], he shall so state." The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt. Failure to follow the mandate of the statute is error.

Respondent also argues that the facts as found do not support the court's conclusion that respondent committed the crimes of breaking and entering and larceny. The foregoing findings of fact which represent all the facts as found by the court are not sufficient to sustain the court's conclusion that respondent committed the crimes of breaking and entering and larceny.

For the reasons stated, the decision of the trial court is

Reversed.

Judges ARNOLD and PHILLIPS concur.

IN RE: BAREFOOT AND TOLER

No. 8311DC583

(Filed 17 April 1984)

Parent and Child § 1.6— termination of parental rights—sufficiency of evidence

The evidence was sufficient to support a trial court's order terminating parental rights and finding the children were neglected as defined by G.S. 7A-517(21) where the evidence tended to show that respondent did not provide the children with "proper care" and "supervision"; that they had on various occasions been "abandoned," and that they had not been provided "necessary medical care"; that respondent chose to serve an active prison term in lieu of probation thereby diminishing the opportunity to care and supervise her minor children; and that upon release from incarceration, respondent made very little effort to visit with her children.

APPEAL by respondent from *Pridgen, Judge.* Order entered 30 December 1982 in District Court, JOHNSTON County. Heard in the Court of Appeals 5 April 1984.

This is a proceeding instituted by petitioner, Johnston County Department of Social Services, for the termination of the parental rights of Joyce Ann Barefoot, parent of Christi Ann Toler, Jeremy Lee Barefoot, and Joey Lynn Barefoot. The Department of Social Services (hereinafter DSS) obtained legal and physical custody of the three children on 28 October 1981, and on 30 September 1982, DSS petitioned the court to terminate the parental rights of respondent.

At the termination hearing, the trial judge made the following pertinent findings of fact:

. . .

(2) That the mother graduated from high school, but has never had gainful employment except for brief work at Export Leaf Tobacco Company and occasional farm work.

(3) That beginning in April, 1981, the Johnston County Dept. of Social Services has been involved with the mother and the three children by offering homemaker services, transportation services and medical treatment; that the Johnston County Dept. of Social Services has disbursed to the mother for the benefit and support of the children

$277.00 per month in food stamps, $192.00 in AFDC payments and W.I.C. payments which included quantities of milk, juice, eggs and cereal having a value of approximately $50.00 per month.

(4) That the mother did not use this income and food to the advantage of the children in that on numerous occasions there was no food in the house, the children were unclean, improperly dressed and the mother failed to cooperate in obtaining the necessary needs for the children.

(5) That the mother, until October, 1981, failed to be available in the home to supervise and discipline the children; that she was away from the home for several extended periods, leaving the children with her mother, whom she knew to be in ill health.

(6) The mother failed to keep appointments for medical attention for the children and the AFDC and food stamp payments were assigned to a homemaker who made arrangements to secure food and services for the family.

(7) That in October, 1981, the mother, Joyce Barefoot was convicted of criminal abandonment and elected to serve active time in prison in lieu of a probation sentence.

(8) That the children were adjudicated neglected and placed in the custody of the Johnston County Dept. of Social Services by order dated October 28, 1981.

(9) That the children have remained in the custody of the Johnston County Dept. of Social Services since that time without visitations by the mother upon her release in January, 1982, from incarceration in the N.C. Dept. of Correction except for two visits, one in May, 1982, and one in June, 1982.

. . .

(12) That the mother has not contributed anything to the Johnston County Dept. of Social Services since the children have been in her [sic] custody and specifically within the six months next preceding the filing of the petition; . . .

Whereupon the trial judge made the following conclusions of law:

(1) That the Court concludes as a matter of law that the children are neglected in that while living with their mother they were in an environment injurious to their welfare; that they have not received from their mother proper care, supervision or discipline; that they have on various occasions been abandoned and have not been provided necessary medical care.

(2) That the mother has failed to provide reasonable support during the six months immediately preceding the institution of this action.

. . .

(4) That the Court further finds that the best interests of the children and each of them require that the parental rights of the mother be terminated.

. . .

Based upon the findings of fact and the conclusions of law the trial judge entered an order terminating the parental rights of Joyce Ann Barefoot, respondent. From this order, respondent appealed.

No counsel for Johnston County Department of Social Services, appellee.

Robert A. Spence, Jr., Guardian Ad Litem, for Christi Ann Toler, Jeremy Lee Barefoot, and Joey Lynn Barefoot, appellees.

James E. Floors for the respondent, appellant.

HEDRICK, Judge.

Respondent has failed to comply with the provisions of Rules 10 and 28 of the North Carolina Rules of Appellate Procedure. Thus, the only question presented on this appeal is whether the findings of fact support the conclusions of law and the order entered.

N.C. Gen. Stat. Sec. 7A-289.32 sets forth six separate grounds upon which a termination of parental rights order can be based. Portions of the statute pertinent to this case are as follows:

Grounds for terminating parental rights.—The court may terminate the parental rights upon a finding of one or more of the following:

. . .

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).

. . .

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

. . .

In the present case the trial judge based his order of termination on the grounds of (1) neglect, and (2) failure of respondent to provide support. If either of these grounds is supported by findings of fact based on clear, cogent, and convincing evidence, we must affirm. G.S. Sec. 7A-289.30(e). *In re Allen*, 58 N.C. App. 322, 325, 293 S.E. 2d 607, 609 (1982). *In re Moore*, 306 N.C. 394, 404, 293 S.E. 2d 127, 133 (1982), *appeal dismissed*, --- U.S. ---, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). *In re Ballard*, 63 N.C. App. 580, 586, 306 S.E. 2d 150, 154 (1983).

Turning to the first ground upon which the trial court based its termination order, evidence that the children were neglected as defined by N.C. Gen. Stat. Sec. 7A-517(21) is abundant. The evidence tended to show that respondent did not provide the children with "proper care" and "supervision," that they have on various occasions been "abandoned," and that they have not been provided "necessary medical care." Moreover, there is undisputed evidence that respondent chose to serve an active prison term in lieu of probation thereby diminishing the opportunity to care and supervise her minor children. Upon release from incarceration, respondent made very little effort to visit with her children. In fact,

respondent visited with her children only two (2) times between January, 1982 and December, 1982. She contributed nothing to the support of her children from January, 1982 to December, 1982. We think the evidence supporting the trial court's conclusion of neglect is clear, cogent, and convincing.

The order of the trial court terminating the parental rights of the respondent is

Affirmed.

Judges HILL and JOHNSON concur.

FRANK RAMSEY AND WIFE, DOROTHY JEAN RAMSEY v. STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY

No. 8330SC477

(Filed 17 April 1984)

Dedication §§ 1.3, 4— dedication of street—no abandonment—no adverse possession of street

Defendant presented sufficient evidence that a street was dedicated and accepted for public use where such evidence tended to show that the street had been a part of the State highway system since 1925; the street was formerly a part of N.C. Highway 28, the main highway leading east from Murphy; in 1932 N.C. Highway 28 was relocated and redesignated as U.S. 64, leaving a loop of what had been a part of Highway 28 in front of plaintiffs' property; and maintenance trucks and highway machinery have used the road in front of plaintiffs' property in performing duties of maintenance and repair. The evidence was also sufficient to show that the street had not been abandoned by the State where it showed that the street was a part of the system of streets on the Powell Bill map submitted by the Town of Murphy to the State to obtain money to maintain city streets. Therefore, plaintiffs did not gain title to a portion of the street by adverse possession after they extended their lot into the street by grading, filling and building a wall and sidewalk.

APPEAL by defendant from *Howell, Judge.* Order entered 18 October 1982 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 13 March 1984.

This is an action for inverse condemnation. Plaintiffs claim the area condemned for highway purposes was acquired by them

through adverse possession, and that such area was damaged by flooding as a result of highway construction. The property involved is a part of Parker Street in the City of Murphy. Parker Street formerly was a part of N.C. Highway 28, the main highway leading east from Murphy. N.C. Highway 28 had been a part of the State Highway System at least since 1925. As such it was a paved road. In 1932 N.C. Highway 28 was updated and relocated, paved and redesignated U.S. 64. The relocated situs of U.S. 64 was northeast of N.C. Highway 28, and left a loop, such loop being the road which fronted and abutted the plaintiffs' property, which was then designated Parker Street. Plaintiffs extended their lot into Parker Street by grading, filling, and building a wall and a sidewalk. In 1980, U.S. 64 was upgraded and improved by widening, straightening, curbing, guttering, and paving. These improvements were completed within the area designated as Parker Street.

The trial judge denied defendant's motion to dismiss at the end of plaintiffs' evidence and at the end of all the evidence. He then made findings of fact, conclusions of law, and entered an order holding that plaintiffs had not demonstrated any flood damage but that they had through adverse possession acquired a portion of Parker Street, a dedicated right of way, and were entitled to compensation for the taking of a portion thereof by the defendant for highway purposes. The court then ordered the matter be calendared for trial to determine what compensation, if any, should be. Defendant appeals.

Attorney General Rufus L. Edmisten by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General Guy A. Hamlin for the State.

Pachnowski & Collins, P.A., by Joseph A. Pachnowski for plaintiff appellees.

HILL, Judge.

Defendant contends the court erred in denying his motion to dismiss at the conclusion of plaintiffs' evidence and again at the close of all the evidence. Because defendant presented sufficient evidence that Parker Street was dedicated to and accepted for public use and an abandonment of Parker Street never occurred,

we hold that the trial court erred in denying defendant's motion to dismiss at the close of all the evidence.

There is ample evidence by plaintiffs from which the trial judge, sitting as a jury, could have found that defendants had acquired title by adverse possession under ordinary circumstances. Plaintiffs and their predecessors in title had owned the property abutting Parker Street for more than thirty years. The State had relocated U.S. 64 to be the main highway east of Murphy. Old N.C. Highway 28 ceased to be used in the same manner as previously. Although N.C. Highway 28 in front of plaintiffs' house became a loop road with both ends abutting U.S. 64, there was evidence of washing and growing up to the extent that travel by vehicle was at best difficult. Plaintiffs had repaired the street area in front of their property, and on occasion blocked the street; and there was evidence that the street had been blocked on occasion on the other end. Plaintiffs had extended their lot nearly fifteen feet into Parker Street. There was no evidence of repair of the street by the town of Murphy, although the street appeared on the city map for Powell Bill purposes.

Nevertheless, in North Carolina it is the law that a street or highway, once dedicated and never abandoned, does not lose its status as a street or highway. *Salisbury v. Barnhardt*, 249 N.C. 549, 107 S.E. 2d 297 (1959). Therefore, implicit in the issue of whether the plaintiff adversely possessed property inversely condemned by the State is the question of whether Parker Street was ever dedicated to public use, and if so, whether such street was thereafter abandoned.

(1) *Dedication.* Once a highway or street is dedicated, acceptance of such dedication cannot be revoked except by proper procedure. Before this rule may apply, however, it must first be established by competent evidence that such dedication was offered and such acceptance was made. Such offer and acceptance are necessary elements of the dedication of a road to public use. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967).

Tommy Cline testified that he was special assistant to the manager of right of way for the State Department of Transportation. Among his duties was finding material from microfilm records of old plans and determining the location and designation of

old roads. He found plans from 1932 showing the designation of the old loop of what is now called Parker Street and shown on the plans as N.C. Highway 28. Although the map showing N.C. Highway 28 indicated Parker Street by two white lines, different from the rest of the map, Mr. Cline testified he had seen the originals, and the plans submitted were correct reproductions; that N.C. Highway 28 is Parker Street. He further testified that N.C. Highway 28 shown on the original road map in 1932 was the main travelled road from Murphy to Brasstown; that there was no other road designation between those two cities or towns. When asked if N.C. Highway 28 was a State maintained North Carolina highway, he responded: "The only answer I could make was that this road was designated North Carolina 28. It was one of the main travelled lines. As far as actual maintenance on the road, I have no records to show that the State did not maintain it, did not keep it open; as well as I do not have records to show that they did."

In 1932, prior to the construction of U.S. 64, governmental agencies, boards of county commissioners, and the State Highway Commission were vested with the responsibility for the construction and maintenance of the public streets and highways. See *Young v. Highway Commission*, 190 N.C. 52, 128 S.E. 401 (1925). The uncontroverted testimony reveals that N.C. Highway 28 was a part of the State system and the only road designated on the State highway map between Murphy and Brasstown for many years. Roads must be repaired periodically, particularly mountain roads. Although there is no evidence the area of land in question in front of plaintiffs' property was repaired as such, it was a part of N.C. Highway 28, the only road between two towns in Cherokee County in the period and subject to repair. Maintenance trucks and highway machinery at least have used the road in front of plaintiffs' property in performing duties of maintenance and repair. We conclude there was ample evidence that N.C. Highway 28 was a dedicated road.

(2) *Abandonment.* The record reveals that Parker Street was a part of the system of streets on the Powell Bill map submitted by the town to the State. The proceeds recovered from the State were used to maintain city streets. This does not mean that all streets were maintained annually with Powell Bill money, but

their very presence on the map indicates the town never abandoned the street.

There is conflicting evidence as to the condition of Parker Street in 1980. The Highway Commission offered evidence that the street was passable. A highway employee testified he drove over Parker Street prior to construction of U.S. 64. There was other evidence of pavement in the old roadbed. Plaintiffs' witnesses admitted the road could be used as a path. Abandonment will not ordinarily be implied from mere nonuse when the public need has not required the use. 39 Am. Jur., Highways, Streets, and Bridges, § 151, p. 524. We conclude there was no abandonment of N.C. Highway 28 by the State.

We affirm that portion of the judgment finding that no flood damage existed.

We reverse that portion of the order of the trial judge finding a taking by the defendant and remand the case to the Superior Court of Cherokee County for entry of an order in conformity herewith.

Affirmed in part.

Reversed and remanded in part.

Judges HEDRICK and BECTON concur.

SHELTON W. POYTHRESS v. LIBBEY-OWENS FORD COMPANY

No. 8315SC504

(Filed 17 April 1984)

1. Trial § 6— failure of court to allow plaintiff to "explain" stipulations—no error

In a personal injury action, the plaintiff failed to show an abuse of discretion by the trial court in refusing to allow plaintiff to offer evidence to "explain" certain stipulations where an examination of the record revealed that plaintiff did not move to set aside the stipulations, nor did he show that his attorney was not authorized to enter into such stipulations.

2. Master and Servant § 87— workers' compensation claim—no right of common law action

Where plaintiff stipulated that he was an employee of defendant and that the injuries which are the basis of his suit were sustained during the course of his employment, the stipulations when considered in conjunction with G.S. 97-3 and G.S. 97-10.1 clearly showed that defendant was entitled to judgment as a matter of law since the North Carolina Workers' Compensation Act barred plaintiff's recovery for injuries in a common law action.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 15 February 1983 in ALAMANCE County Superior Court. Heard in the Court of Appeals 15 March 1984.

In his complaint, plaintiff alleged that on or about 2 February 1978 plaintiff was injured while on the premises of the defendant; that he was employed by Transpersonnel, Inc., as a long haul truck driver; and that Transpersonnel had contracted his services to defendant Libbey-Owens Ford. Plaintiff's injuries were allegedly caused when plaintiff fell from an aluminum ladder while removing a tarp from a truck plaintiff had driven for defendant. Plaintiff further alleged that the ladder was defective and that the working conditions at defendant's business were unsafe.

Defendant answered denying any negligence and interposing two affirmative defenses. The affirmative defenses were that plaintiff was contributorily negligent, and that an employee-employer relationship existed between the parties which established a bar to recovery under the North Carolina Workers' Compensation Act.

Defendant served interrogatories, and based upon plaintiff's answers, moved for summary judgment on the grounds of contributory negligence. This motion was denied.

A pre-trial order was prepared by the attorney for plaintiff and mailed to defendant's attorney. Defendant then filed another motion for summary judgment. This motion was predicated upon stipulations in the pre-trial order. At the hearing on defendant's motion, plaintiff sought leave of the court to present evidence in opposition to defendant's motion and to explain the stipulations relied upon by defendant. The motion to present evidence was denied, and based upon the pre-trial stipulations, the trial court entered summary judgment in favor of defendant. From the entry of judgment, plaintiff appealed.

Messick, Messick & Messick, by T. Paul Messick, Jr., for plaintiff.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Joseph F. Brotherton, for defendant.

WELLS, Judge.

Plaintiff's counsel prepared a proposed pre-trial order with a number of stipulations. This order was signed by counsel for both parties and ordered filed by the court. The order contained the following stipulations pertinent to this appeal:

. . .

(3) In addition to the other stipulations contained herein, the parties hereto stipulate and agree as to the following uncontroverted facts:

a. That on February 2, 1978, the Plaintiff, Shelton W. Poythress, was employed as a tractor-trailer driver by the Defendant, Libbey-Owens Ford Company, that at said time the Plaintiff had been employed by the Defendant for approximately eleven months, and that the Plaintiff drove a tractor-trailer truck leased by, or owned by, the Defendant.

b. That as part of the Plaintiff's duties as an employee of the Defendant, the Plaintiff was required to drive a tractor-trailer truck transporting products of the Defendant, and that the Plaintiff drove a tractor that pulled an open-top trailer covered with a canvas tarpaulin.

c. That the Plaintiff had additional employment duties with the Defendant, which additional duties included the preparation of the tractor-trailer unit for either loading or unloading of products to be transported.

d. That the preparation of the tractor-trailer unit for loading and unloading involved the covering and uncovering of the trailer unit by the Plaintiff with a canvas tarpaulin, and that the covering and uncovering of said trailer unit was performed by the Plaintiff with tools provided for Plaintiff's use by the Defendant.

e. That the open-top trailer driven by the Plaintiff for the Defendant has a height in excess of ten feet.

f. That at the Defendant's Laurinburg Plant, the Plaintiff was provided by the Defendant with aluminum ladders with which to perform his duties of removing and replacing the canvas tarpaulin.

g. That in the course of his employment duties with the Defendant, while using an aluminum ladder to remove the canvas tarpaulin from the open-top trailer the Plaintiff fell.

[1] In his first assignment of error plaintiff contends that the trial court erred by refusing to allow plaintiff to offer evidence to "explain" the stipulations. Plaintiff argues the trial court abused its discretion in refusing to hear such evidence. In *Thomas v. Poole*, 54 N.C. App. 239, 282 S.E. 2d 515 (1981), *disc. rev. denied*, 304 N.C. 733, 287 S.E. 2d 902 (1982), Judge Clark writing for this Court stated:

> The courts in this State look with favor upon stipulations designed to simplify, shorten or settle litigation and save costs to the parties. . . . Parties may establish by stipulation any material fact that has been in controversy between them. Where the stipulations of plaintiff and defendant have been entered of record, and there is no contention that the attorney for either party was not authorized to make such stipulations, the parties are bound and cannot take a position inconsistent with the stipulations. . . . Where facts are stipulated, they are deemed established as fully as if determined by a jury verdict. The stipulations are judicial admissions and therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact. . . . (Citations omitted.)

An examination of the record reveals that plaintiff did not make a motion to set aside the stipulations, *see Blair v. Fairchilds*, 25 N.C. App. 416, 213 S.E. 2d 428, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 622 (1975), nor was there any showing that plaintiff's attorney was not authorized to enter into such a stipulation.

In the absence of such showings we are unable to find any error or abuse of discretion by Judge Preston. The stipulations are clear and unambiguous. The extrinsic evidence which plaintiff sought to introduce to "explain" them was in effect a contradiction of the stipulations. This is not allowed. The assignment of error is overruled.

[2] By his second assignment of error, plaintiff contends the trial court erred by allowing the defendant's second motion for summary judgment because there were genuine issues of material fact to be decided in the action. N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure directs that a motion for summary judgment should 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."

We have previously determined that plaintiff is bound by the stipulations entered into by his attorney in the pre-trial order. As a part of those stipulations plaintiff agreed that he was an employee of defendant and that the injuries which are the basis of this suit were sustained during the course of his employment. N.C. Gen. Stat. § 97-3 (1979) in pertinent part provides:

> From and after January 1, 1975, every employer and employee . . . shall be presumed to have accepted the provisions of this Article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby.

N.C. Gen. Stat. § 97-10.1 (1979) in pertinent part provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights . . . of the employee . . . as against the employer at common law or otherwise on account of such injury or death.

The stipulations when considered in conjunction with these statutes clearly show that defendant is entitled to judgment as a matter of law. The assignment of error is overruled.

Having determined that the trial court properly refused to allow plaintiff to offer extrinsic evidence to attack the stipulations, and having further determined that the valid stipulations show facts which would bar plaintiff from recovery, we hold that the trial court's order granting summary judgment for the defendant must be and is, hereby,

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. DAVID EDWARD HARRIS, JR.

No. 8314SC1032

(Filed 17 April 1984)

1. **Criminal Law §§ 23, 146.5— plea bargain agreement—appeal of sentence**

Defendant could appeal from a sentence imposed pursuant to a plea bargain where the plea bargain provided only that defendant's convictions would be consolidated for sentencing and did not deal with the question of length of punishment.

2. **Criminal Law § 138— conviction of two crimes—separate findings as to aggravating and mitigating factors**

Where a defendant is convicted of more than one crime but only one sentencing hearing is held, the trial judge should list aggravating and mitigating factors separately as they relate to each crime whether or not the crimes are consolidated for judgment.

3. **Criminal Law § 138— pecuniary gain aggravating factor—necessity for hiring**

The trial court erred in finding as an aggravating factor that the offense was committed for pecuniary gain where there was no evidence that defendant was hired to commit the offense. G.S. 15A-1340.4(a)(1)(c).

4. **Criminal Law § 138— aggravating factor—lesser sentence would depreciate seriousness of crime**

The trial court erred in finding as an aggravating factor that a lesser sentence would unduly depreciate the seriousness of the crime since such factor is unrelated to the purposes of sentencing.

5. **Criminal Law § 138— plea bargain—aggravating factor—concurrent or consecutive jail terms**

Where two crimes were consolidated for judgment pursuant to a plea bargain, the trial court erred in finding as an aggravating factor that it could have entered concurrent or consecutive jail terms.

6. Criminal Law § 138— aggravating factors—determination in breaking criminal law and criminal history—use of same evidence

The trial court erred in finding as aggravating factors that defendant has an obvious continued determination in breaking the criminal law and that defendant's criminal history makes it necessary to separate him from the general public for its safety, since both of these factors were based upon the same evidence of defendant's prior criminal record.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 3 February 1982 in DURHAM County Superior Court. Heard in the Court of Appeals 15 March 1984.

Defendant entered into a plea agreement with the state, whereby he pleaded guilty to common law robbery and attempting to obtain property by false pretense. In return, the state consolidated the two crimes for sentencing, and dismissed another charge pending against defendant. Following a sentencing hearing, the trial court found that the following eight aggravating factors had been proven by a preponderance of the evidence: (1) the offense was committed for pecuniary gain, (2) one of the victims was physically infirm, (3) the offense was committed while defendant was on pre-trial release on another felony charge, (4) defendant has a prior conviction for an offense punishable by a jail term of more than sixty days, (5) defendant's criminal history makes it necessary to separate him from the general public for its safety, (6) a lesser sentence would unduly depreciate the seriousness of defendant's crimes, (7) the defendant was convicted of crimes for which consecutive sentences could have been imposed, but for which concurrent sentences are being imposed and (8) defendant's obvious continued determination in breaking the criminal law. The trial court held further that no mitigating factors had been shown and that the aggravating factors outweighed the factors in mitigation. Defendant was sentenced to ten years in prison. From imposition of the sentence in excess of the presumptive term, defendant appealed.

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

James B. Archbell for defendant.

WELLS, Judge.

[1] The state opposes defendant's appeal on the grounds that criminal defendants may not appeal from sentences imposed pur-

suant to a plea agreement approved and accepted by the trial court. We disagree. Defendant's plea agreement provided only that his convictions would be consolidated for sentencing, and did not deal with the question of length of punishment. Therefore, defendant is free to contend on appeal that the trial court erred in finding certain factors in aggravation of his sentence. *State v. Jones*, 66 N.C. App. 274, 311 S.E. 2d 351 (1984). *Compare State v. Simmons*, 64 N.C. App. 727, 308 S.E. 2d 95 (1983), where defendant's plea bargain provided he could be sentenced up to ten years in jail, the sentence imposed was within this limit, and no appeal was permitted.

[2] We turn now to the merits of defendant's appeal. Where a defendant is convicted of more than one crime, but only one sentencing hearing is held, the trial judge should list aggravating and mitigating factors separately, as they relate to each crime. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). This rule applies both to the situation in which the crimes are consolidated for judgment, and where they are not. *Id.* Because the trial court in the case at bar failed to treat each offense separately and make findings tailored to the individual offense, the case must be remanded for resentencing. *State v. Farrow*, 66 N.C. App. 147, 310 S.E. 2d 418 (1984).

We deem it appropriate to note several additional errors committed by the trial court during the sentencing hearing.

[3] In aggravating factor number one, the court found that the offense was committed for pecuniary gain, as provided under the former version of N.C. Gen. Stat. § 15A-1340.4(a)(1)(c) (1981 Cum. Supp.). It is clear, however, that a finding of this factor must be supported by evidence that defendant was hired to commit the crime. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). The mere fact that defendant profited in some way from his crime is insufficient. *See also* amended version of G.S. § 15A-1340.4(a)(1)(c), effective 1 October 1983, substituting the term "was hired or paid" for the term "for hire or pecuniary gain."

[4] In factor number six, the trial court held that a lesser sentence would unduly depreciate the seriousness of the crime. This non-statutory factor was rejected as unrelated to the purposes of sentencing by our supreme court in *State v. Chatman*,

308 N.C. 169, 301 S.E. 2d 71 (1983). Therefore, it was error for the trial court to use this factor.

[5] Next, we note that the trial court also erred as to factor number seven. "Fundamental fairness requires that once the trial judge accepted the plea bargain . . . the court was required to consolidate the cases for sentencing under one judgment and not treat the offenses separately. . . . [T]he court could not, in violation of the terms of the accepted negotiated plea, have imposed a separate sentence in each case to run concurrently or consecutively." *State v. Jones, supra.* It was error for the court to find as a factor in aggravation that it could have entered concurrent or consecutive jail terms. *Id.*

[6] We turn next to factor number eight, "defendant's obvious continued determination in breaking the criminal law," and factor number five, "defendant's criminal history makes it necessary to separate him from the general public for its safety." It is clear that both of these factors in aggravation are based only upon evidence of defendant's prior criminal record, the same evidence used in finding factor number four. It is beyond question that a trial court may not use the same evidence to support more than one aggravating factor, *see, e.g., State v. Higson,* 310 N.C. 418, 312 S.E. 2d 437 (1984), and therefore the trial court erroneously found factors number eight and five.

Remanded for resentencing.

Judges ARNOLD and BRASWELL concur.

STOKES COUNTY SOIL CONSERVATION DISTRICT v. CLAVIS SHELTON AND P. O. SHELTON

No. 8217SC1359

(Filed 17 April 1984)

Injunctions § 7.2— permanent injunction restraining defendants from interfering with maintenance and operation of dam proper

Plaintiff was entitled to a permanent injunction restraining the defendants from interfering with the maintenance and operation of a dam where there was no dispute that the plaintiff had an easement to maintain and operate a

dam, and that the defendants had interfered with this maintenance and operation and threatened to do so in the future. Injunctive relief was proper because plaintiff's remedy at law would be inadequate in that money damages to the plaintiff would be difficult to calculate and would not be adequate compensation, and plaintiff should not be required to engage in multiple lawsuits.

APPEAL by defendants from *Hairston, Judge.* Judgment entered 18 October 1982 in Superior Court, STOKES County. Heard in the Court of Appeals 18 November 1983.

This is an appeal by defendants from a summary judgment entered against them. The plaintiff brought this action for a permanent injunction restraining the defendants from interfering or prohibiting the plaintiff from closing the gates to a dam owned by the plaintiff. The plaintiff was granted a temporary restraining order and a preliminary injunction pending trial.

The plaintiff made a motion for summary judgment. The materials submitted in support and in opposition to the motion for summary judgment showed the following matters are not in dispute. The plaintiff is organized under Chapter 139 of the General Statutes and has the power to construct and maintain dams. The parents of the defendants conveyed an easement in 1960 to the plaintiff on 50 acres of land for the purpose of constructing a dam and maintaining a pond on the land. The dam was constructed, water impounded, and the pond maintained by the plaintiff until the commencement of this action. The defendants had opened the gates to the dam and allowed water to escape.

The court granted the plaintiff's motion for summary judgment. The defendants were permanently enjoined from opening or closing the dam or interfering with the plaintiff in doing so. The defendants appealed.

J. Tyrone Browder for plaintiff appellee.

White and Crumpler, by Craig B. Wheaton, for defendant appellants.

WEBB, Judge.

We affirm the judgment of the superior court. There is no dispute that the plaintiff had an easement to maintain and operate the dam; that the defendants have interfered with this

maintenance and operation and threaten to do so in the future. We hold that on these undisputed facts the plaintiff is entitled to a permanent injunction restraining the defendants from interfering with the maintenance and operation of the dam. Injunctive relief is proper because a remedy at law would be inadequate. Money damages to the plaintiff would be difficult to calculate and would not be adequate compensation to the plaintiff. The plaintiff should not be required to engage in multiple lawsuits. For these reasons, it was not error for the court to grant injunctive relief. *See* Dobbs, *Handbook on the Law of Remedies* § 2.5 (1973).

The defendants argue that by granting the injunction, the superior court has denied them the full right to the use of their land. The defendants do not have the right to the full use of the land so long as the plaintiff maintains the dam under the easement. They also argue that an injunction may not be used as a possessory remedy. *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116 (1953), which they cite as authority for the proposition, deals with an interlocutory order. In this case, the injunction was entered as part of a final judgment. At any rate, we do not believe it was a possessory remedy. The plaintiff had possession of the dam. The defendants were enjoined from interfering with this possession. The defendants also argue that there is nothing in the record to indicate the intent of the parties to lower the level of the pond in the future. We do not so read the record. As we read the affidavits of the defendants, each of them takes the position that he has the right to lower the water level and will do so in the future if he feels it should be done.

The defendants argue further that there are genuine issues as to material facts. They say that there are issues as to (1) the extent of the property interest which the plaintiff has in the lands of the defendants pursuant to the easement; (2) whether the failure on the part of the plaintiff to maintain the dam which was built pursuant to the easement for an unreasonable length of time constitutes an abandonment of the easement; (3) the extent of benefits the servient estate was granted at the time of the making of the easement, and whether the plaintiff is now estopped from preventing the grantor of the assigns of the easement from operating the dam gates; and (4) whether the defendants, by lowering the water level of the lake, caused any damage.

We do not believe there is a genuine issue as to any of these matters. The easement is not disputed. It gives the plaintiff the sole right to control the water level. There is no competent evidence that the plaintiff failed to maintain the easement or that the servient estate was granted the right to control the water flow at the time the easement was granted. Interference with its control of the dam is all the damage the plaintiff has to prove.

The defendants also argue that there was no proof that the plaintiff would suffer irreparable injury if an injunction were not granted and absent such proof, there cannot be a permanent injunction. As we have said, the difficulty of calculating damages, the multiplicity of lawsuits that could be required to protect the plaintiff's rights, and the inadequacy of damages are sufficient to justify a permanent injunction.

The defendants also assign error to the manner in which the court ruled on the plaintiff's motion for summary judgment. On 4 October 1982 after considering materials and hearing arguments, Judge Hairston stated that he would deny the motion. On 5 October 1982 he announced that he had considered the matter overnight and was of a different opinion. After hearing further arguments, he granted the motion. Judge Hairston could change the judgment during the same term of court. *See Hopkins v. Hopkins*, 268 N.C. 575, 151 S.E. 2d 11 (1966).

Affirmed.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. DONNIE LEE GODWIN AND JAMES WILLIAM HALL

No. 8312SC489

(Filed 17 April 1984)

1. Criminal Law § 89.3— prior statement of witness—admissibility for corroboration

An officer's testimony that a cashier who had previously viewed a photographic lineup "stated that she had thought about this further and she was almost positive that this was the man that had held the gun on" the phar-

macist was not inadmissible hearsay but was properly admitted to corroborate the cashier's testimony.

2. **Criminal Law § 116— failure of defendant to testify—refusal to give requested instruction**

The trial court did not err in failing to give a requested jury instruction on defendant's failure to testify where the court gave the pattern jury instruction which clearly informed the jury of the law and gave the substance of the requested instruction. G.S. 15A-1232.

3. **Criminal Law § 92.2— consolidation of charges against two defendants—additional charge against one defendant—failure of other defendant to testify**

The trial court did not err in consolidating charges against defendant and a co-defendant for trial because defendant was charged with only armed robbery and the co-defendant was charged with armed robbery and misdemeanor possession of hydromorphone where there was evidence that the hydromorphone was taken in the robbery, and the possession charge was thus part of the same act or transaction as the robbery. Nor were the charges improperly consolidated on the ground that defendant's trial strategy was compromised by the co-defendant's failure to testify where defendant and the co-defendant did not raise any antagonistic defenses or try to shift the onus of criminal responsibility but offered mutually independent alibi defenses. G.S. 15A-926(b).

APPEAL by defendants from *Cornelius, Judge.* Judgment entered 10 December 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 December 1983.

Defendants were both charged with armed robbery; defendant Godwin was also charged with misdemeanor possession of hydromorphone. The State's evidence tended to show the following: A pharmacist and cashier had just opened up a drugstore for the day. Two men came in and one asked the pharmacist for information about gum troubles. The man, identified by both witnesses as defendant Godwin, then jumped on the counter and pulled out a gun. He pointed it at the pharmacist and demanded the store's "Dilaudids." Dilaudid is the trade name for hydromorphone, a powerful and addictive painkiller prescribed infrequently, usually for cancer patients. The other man, identified by both witnesses as defendant Hall, pulled a gun on the cashier and demanded she turn over the cash from the register. The robbers' demands were complied with; they fled with approximately 240 Dilaudid tablets and $144 in cash. Other eyewitnesses, two of whom knew both defendants, placed them and Godwin's car near the store at the time of the crime. Three days after the robbery, police stopped a car being driven erratically by defendant Godwin. A bottle containing

Dilaudid was found in the car. An investigation resulting from this evidence led to the arrest of Godwin and Hall for the armed robbery.

Defendant Hall presented evidence from himself, the woman he was living with and a babysitter, that he was with them at the time of the crime. The store employees had described Hall as having brown hair and a "Fu Manchu" mustache at the time of the robbery; he presented eight witnesses who testified they had known him before and since that he had always had red hair and never had a "Fu Manchu" mustache.

Defendant Godwin presented evidence from the woman he was living with that he had been at their trailer all morning on the day of the crime, and that she was there with him at the time the robbery occurred. The State's rebuttal evidence included testimony by the investigating officer that she had told him a different story the day of defendant Godwin's arrest.

Both defendants were found guilty as charged. Both received the statutory fourteen-year sentence for armed robbery. In addition, defendant Godwin received two years for the possession of hydromorphone, to run consecutively following the armed robbery sentence.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Joe Morris, for defendant appellant Hall.

James R. Parish, for defendant appellant Godwin.

JOHNSON, Judge.

DEFENDANT GODWIN'S APPEAL

[1] Defendant Godwin contends that the court improperly admitted hearsay testimony through the investigating officer. The officer testified that he had taken a photographic lineup to the store and that the cashier had tentatively identified Godwin. He returned later with the same lineup. Over defendant Godwin's objection, the officer then testified that the cashier "stated that she had thought about this further and she was almost positive that this was the man that had held the gun on" the pharmacist. The

cashier had earlier testified on direct that she was able to identify Godwin positively. On cross-examination she admitted that she wasn't sure that she identified him the first time she saw the lineup, but that she did identify him positively. The testimony objected to thus corroborated her testimony and was properly admitted. *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). Assuming error, *arguendo*, defendant still must show prejudice. G.S. 15A-1443(a). The pharmacist testified repeatedly that he unequivocally identified defendant Godwin; in addition, the officer later repeated without objection substantially the same testimony concerning the cashier's statements. Defendant Godwin has thus failed to meet his burden and this assignment is overruled. *See State v. King*, 64 N.C. App. 574, 307 S.E. 2d 805 (1983).

[2] Defendant Godwin also challenges the court's failure to give a requested jury instruction on his failure to testify. Defendant Hall presented many witnesses and testified himself. Godwin argues that the jury was impressed to his prejudice by this "striking" difference, and the court's failure to give his expanded instruction requires a new trial. The court gave the pattern jury instruction, which clearly informed the jury of the law and gave the substance of the requested instruction. That is all that is required by law. *See* G.S. 15A-1232. This assignment is overruled.

DEFENDANT HALL'S APPEAL

[3] Upon oral motion of the prosecutor when defendant Hall's case was called for trial, the court joined his trial with defendant Godwin's. Defendant Hall assigns error. The prosecutor's motion was timely and in proper form. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Whether to allow it was within the discretion of the court. *Id.* Defendant Hall argues that his trial strategy was unfairly compromised by Godwin's failure to testify. This argument has previously been rejected by this Court. *State v. Wilhite; State v. Rankin; State v. Rankin*, 58 N.C. App. 654, 294 S.E. 2d 396, *cert. denied and appeal dismissed sub nom. State v. Wilhite & Rankin*, 307 N.C. 129, 297 S.E. 2d 403 (1982). Defendant Hall also argues that the additional drug charge against Godwin made consolidation unfair. The chemical identity with the stolen drugs of the drugs found in Godwin's car, the short time interval between their discovery and the robbery, and the relatively rare use of the drugs, easily permit the conclusion that the possession

charge was part of the same act or transaction, G.S. 15A-926(b), and consolidation was thus proper. The defendants did not raise any antagonistic defenses or try to shift the onus of criminal responsibility. Instead, they offered mutually independent alibi defenses. We conclude that the court did not abuse its discretion in joining the cases. *See State v. Cook*, 48 N.C. App. 685, 269 S.E. 2d 743, *disc. rev. denied*, 301 N.C. 528, 273 S.E. 2d 456 (1980) (consolidation held proper where each defendant testified that the other shot victim).

Defendant Hall's other assignment challenges the sufficiency of the State's evidence, apparently for its failure to refute his substantial alibi and identification evidence. There was ample contradictory eyewitness evidence from which the jury could find him guilty, however. This assignment is, therefore, totally without merit.

Both defendants received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

ETHEL B. CULLER v. MAURICE WATTS

No. 8221DC1362

(Filed 17 April 1984)

Evidence § 11.2; Landlord and Tenant § 13.3— sufficiency of evidence of waiver of notice to renew lease—exclusion of evidence under dead man's statute error

In an action for summary ejectment where defendant entered into a contract with plaintiff and her now-deceased husband for the lease of part of the couple's land for a sand pit, the court erred in granting summary judgment for plaintiff where defendant proceeded on the theory that by accepting rental payments for a period of 18 months following expiration of the original lease term, plaintiff and her husband waived any right they otherwise had to require written notice of renewal. The trial court erred in sustaining plaintiff's objection to testimony by plaintiff's son establishing the identity of his father's signature on the back of certain checks defendant contended were received and negotiated by the deceased since although the dead man's statute prevented the son from testifying that he *saw* the deceased negotiate the

checks, it did not make him incompetent to testify to the handwriting on the checks. Had this testimony been allowed, defendant would have offered evidence of all four elements necessary to show plaintiff waived the breach, *i.e.*, the failure to give notice of renewal. G.S. 8-51.

APPEAL by defendant from *Harrill, Judge.* Judgment entered 19 August 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 29 November 1983.

Defendant entered into a contract with plaintiff and her now-deceased husband for the lease of part of the couple's land for a sand pit. The lease provided for a one-year term at $150.00 per month, with an option, exercisable by defendant on thirty days' written notice, to renew for an additional five years at the same rent. The one-year term expired and defendant continued in possession and continued to pay the agreed rent. After eighteen months, in March 1982, plaintiff's husband died. Shortly thereafter, before the next payment was due, plaintiff refused to accept further rent. Defendant refused to vacate, and plaintiff filed an action in summary ejectment. From a judgment in favor of plaintiff in Magistrate's Court, defendant appealed. Upon trial *de novo* before a jury, the court denied defendant's motion for a directed verdict at the close of all the evidence but allowed a similar motion by plaintiff. From a judgment ordering him to vacate at the end of the second year of holdover tenancy, defendant appeals.

Sparrow & Bedsworth, by W. Warren Sparrow and George A. Bedsworth, for defendant appellant.

Hutchins, Tyndall, Doughton & Moore, by Thomas W. Moore, Jr., for plaintiff appellee.

JOHNSON, Judge.

Defendant proceeded on the theory that by accepting rental payments for a period of eighteen months following expiration of the original lease term, plaintiff and her husband, and hence plaintiff, waived any right they otherwise had to require written notice of renewal. Defendant bore the burden of proving that plaintiff had waived the breach, i.e., the failure to give notice of renewal. *Wachovia Bank v. Rubish,* 306 N.C. 417, 293 S.E. 2d 749, *reh'g denied,* 306 N.C. 753, 302 S.E. 2d 884 (1982). To survive a

motion for directed verdict, absent evidence of additional consideration to support the waiver, defendant had to offer evidence of four elements. *Id. First,* that the waiving party, here plaintiff, was the non-breaching party. It is undisputed that prior to giving defendant notice of termination plaintiff had performed her obligations under the contract. *Second,* that the breach did not involve total repudiation of the lease, so that the innocent party continued to receive some of the bargained-for consideration. Defendant attempted to introduce rent checks signed by the deceased, but these were excluded under the "dead man's statute," G.S. 8-51. *Third,* that the innocent party was aware of the breach. Plaintiff admitted that she was aware of defendant's operations on her land; the notice of termination, and her trial testimony, clearly indicate that plaintiff was aware of the lease and its terms. *Fourth,* that the innocent party intentionally waived her right to repudiate by continuing to accept the partial performance of the breaching party. Acceptance by the lessor of rent which the lease provides shall be paid during the extended term is considered such a waiver, nothing else appearing. *Wachovia Bank v. Rubish, supra; Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367 (1946). No evidence was introduced contradicting intent to waive during the period the checks were allegedly received and negotiated by the deceased. Therefore, the excluded checks would have been sufficient evidence to satisfy this fourth element, since a covenant to renew is not personal, but runs with the land and is binding on the legal successors of the lessor, in this case plaintiff as the survivor of the entireties estate. *Trust Co. v. Frazelle, supra; see also Nolan v. Nolan,* 45 N.C. App. 163, 262 S.E. 2d 719 (1980) (option to purchase runs with land); J. Webster, Real Estate Law in North Carolina §§ 247, 251 (Hetrick rev. ed. 1981).

It is clear then, that if the court's ruling excluding the checks was proper, defendant failed to present evidence on all the elements of waiver as required by *Wachovia Bank v. Rubish, supra.* The directed verdict for plaintiff would therefore be entirely proper. G.S. 8-51, the "dead man's statute," operates to exclude evidence of the acts or statements of deceased persons, since those persons are not available to respond. *See generally* 1 H. Brandis, N.C. Evidence §§ 66-67 (1982). The statute provides in relevant part:

> Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic. . . .

Defendant called plaintiff's son as a witness and established that the son could identify his father's, the deceased's, signature. Defendant then attempted to have the son identify the deceased's signature on the back of certain checks. The court sustained plaintiff's objection; thereby it committed prejudicial error. Although the statute prevented the son from testifying that he *saw* the deceased negotiate the checks, it is well established that it did not make him incompetent to testify to the handwriting on the checks. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957); *Batten v. Aycock*, 224 N.C. 225, 29 S.E. 2d 739 (1944). The son testified for the record that the handwriting was in fact his father's. Such evidence, if admitted, would have been sufficient to authenticate *prima facie* the deceased's *signature* on the checks; defendant then could have taken the stand to identify and authenticate the *contents* of the checks. Thus, the erroneous ruling prevented defendant from establishing *prima facie* all four elements of waiver and thereby surviving the motion for directed verdict. Defendant has met his burden of showing prejudicial error, and there must accordingly be a new trial.

Since the matter will undoubtedly arise on retrial, we note that the court's other ruling under G.S. 8-51, barring evidence of what the deceased said he was going to do, was entirely proper.

Reversed.

Judges ARNOLD and PHILLIPS concur.

CLIFTON D. CAULDER, EMPLOYEE-PLAINTIFF v. WAVERLY MILLS v. EMPLOYERS MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8310IC481

(Filed 17 April 1984)

Master and Servant § 68— workers' compensation—last exposure to hazards of byssinosis

The evidence supported a determination that plaintiff's last injurious exposure to the hazards of his occupational lung disease occurred while he was employed by defendant where there was medical evidence that plaintiff had byssinosis and that his exposure to synthetic dust in defendant's mill augmented that disease.

APPEAL by defendants Waverly Mills and Employers Mutual Insurance Company from the North Carolina Industrial Commission. Opinion and award entered 20 December 1982. Heard in the Court of Appeals 13 March 1984.

Hassell & Hudson, by Robin Hudson and Charles E. Hassell, Jr., for plaintiff.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendants.

WELLS, Judge.

The dispositive question in this case is whether plaintiff's last injurious exposure to his occupational lung disease occurred while he was employed by defendant Waverly Mills (Waverly). We answer that question in the affirmative and affirm the Industrial Commission's award.

> '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 or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.'

(Citations omitted) *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

In order for plaintiff to be entitled to compensation, it was necessary for him to show that (1) he suffers from an occupational disease, defined by N.C. Gen. Stat. § 97-53(13) (1979) as a disease ". . . due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment," (2) that the disease arose, at least in part, out of the conditions of the employer-defendant's work environment, *Frady v. Groves Thread*, 56 N.C. App. 61, 286 S.E. 2d 844, *disc. rev. allowed*, 305 N.C. 585, 292 S.E. 2d 570 (1982), and (3) that defendant is ". . . the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . .," N.C. Gen. Stat. § 97-57 (1979).

The medical evidence in this case conflicted concerning the question of plaintiff's occupational disease. Dr. Ted R. Kunstling testified that plaintiff was suffering from byssinosis; Dr. Douglas G. Kelling, Jr. testified that plaintiff did not have byssinosis. Defendants do not, however, challenge the Commission's findings that plaintiff suffered from occupational chronic obstructive lung disease or that plaintiff's disability was caused by such disease. Defendants do contend, however, that the evidence does not support the Commission's findings and conclusion that plaintiff's last injurious exposure to such disease occurred while he was employed by Waverly; and particularly that plaintiff had no injurious exposure after 15 July 1979, the date when defendant Employers Mutual Insurance Company became the workers' compensation carrier for Waverly.

In brief, the evidence shows that plaintiff was employed by Waverly from May 1967 to February 1980, when plaintiff retired due to his disability. During this entire period of time, the only cotton processed in the mills in which plaintiff worked was that contained in about 363 pounds of polyester-cotton blend material. There was no cotton processed after 15 July 1979. Plaintiff's work environment at Waverly was dusty but the overwhelming source of dust he was exposed to was from synthetic yarns. Dr. Kunstling testified that (1) plaintiff suffered from byssinosis; (2) even the small amount of cotton dust plaintiff was exposed to at Waverly was injurious to plaintiff; i.e., made his lung disease worse; and (3) that plaintiff's exposure to synthetic dust was also injurious; i.e., made plaintiff's lung disease worse.

Relying on our opinion in *Frady v. Groves Thread, supra,* defendants argue that the Commission's finding and conclusion that plaintiff's last injurious exposure occurred while employed at Waverly must fall. In *Frady,* we held that where there was no medical evidence to show byssinosis was initially caused by exposure to synthetic dust, the plaintiff's last injurious exposure to byssinosis could not have occurred in a mill where he was exposed only to synthetic dust. After our opinion in *Frady,* our Supreme Court ruled in *Rutledge v. Tultex Corp.,* 308 N.C. 85, 301 S.E. 2d 359 (1983) that under G.S. § 97-57, the term "last injuriously exposed" means an exposure which proximately augments an occupational disease, however slight. The court held that in a case such as this one, plaintiff need only show (1) that he has a compensable occupational disease and (2) that he was last injuriously exposed to the hazards of such disease while in defendant's employment.

We hold that in this case, where there was medical evidence to show that plaintiff had byssinosis and that his exposure to synthetic dust augmented that disease, the rule in *Rutledge v. Tultex, supra,* requires us to affirm the Commission's award.

Since there was evidence that plaintiff's injurious exposure continued beyond 15 July 1979, we affirm as to both defendants.

Affirmed.

Judges BRASWELL and EAGLES concur.

INDUSTROTECH CONSTRUCTORS, INC. v. DUKE UNIVERSITY AND TURNER CONSTRUCTION COMPANY

No. 8214SC1198

(Filed 17 April 1984)

Arbitration and Award § 1; Evidence § 13— order directing defendant to produce transcripts of arbitration proceeding involving defendant and another prime contractor—no error

In an action filed by plaintiff prime contractor against Duke University for damages arising from a construction contract, the trial court did not err in ordering defendant, under certain protective restrictions, to produce tran-

scripts of an arbitration proceeding involving defendant and another prime contractor on the same job where nothing in the North Carolina statutes governing arbitration requires strict confidentiality, G.S. 1-567.1 *et seq.*, and where defendant admits that in at least one instance it had already disclosed the transcripts to a non-party. Further, defendant failed to meet the burden of proving that the materials ordered to be disclosed were prepared in anticipation of litigation and are therefore privileged.

Judge JOHNSON concurs in the result.

APPEAL by defendant Duke University from *Lee, Judge.* Order entered 30 July 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 September 1983.

Manning, Fulton & Skinner, by Howard E. Manning and John B. McMillan; Mitchener, Swindle, Whitaker, Pratt & Mercer, Fort Worth, Texas, by Daniel J. Davis; and Gardere & Wynne, Dallas, Texas, by Joe Harrison, for plaintiff appellee.

Powe, Porter and Alphin, by Charles R. Holton and Laura B. Luger, for defendant appellant Duke University.

PHILLIPS, Judge.

Plaintiff was one of numerous prime contractors who worked on the new Duke University Medical Center. It filed an action against Duke University for damages arising from various breaches of their construction contract. The sole issue presented by this appeal concerns the propriety of an order directing defendant, under certain protective restrictions, to produce transcripts of an arbitration proceeding involving defendant and another prime contractor on the same job.

We must first address the appealability of the order. Orders allowing or denying discovery are interlocutory and not ordinarily appealable. *Dworsky v. Travelers Insurance Co.*, 49 N.C. App. 446, 271 S.E. 2d 522 (1980). There is substantial authority allowing appeals from orders imposing sanctions for failure to comply with orders compelling production of discovery material. *See Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E. 2d 191 (1976); *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E. 2d 386 (1982). However, we find no authority for allowing direct appeal from the production orders themselves. Nevertheless, since an important legal question is involved, we have elected in our discretion to treat the purported appeal as a petition for writ of certiorari and

proceed to address the merits. G.S. 7A-32(c); Rule 21(a), N.C. Rules of Appellate Procedure; *Ziglar v. E. I. DuPont De Nemours & Co.*, 53 N.C. App. 147, 280 S.E. 2d 510, *rev. denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981).

Defendant appellant first argues that the parties to the arbitration stipulated that the proceedings would remain confidential; but no such stipulation appears in the record. The appellant has the duty of ensuring that the record is properly made up and includes all matters necessary for decision. Rule 9(a), N.C. Rules of Appellate Procedure; *Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E. 2d 66 (1959). The stipulation does not constitute a matter of which we may take judicial notice. *See West v. G. D. Reddick, Inc.*, 302 N.C. 201, 274 S.E. 2d 221 (1981). Therefore, this argument must fail.

Even absent evidence of a stipulation of confidentiality, argues defendant, the strong public policy in favor of arbitration requires confidentiality. Defendant contends that the order appealed from, by tending to expose normally relaxed arbitration proceedings to public scrutiny, will cause parties to such proceedings to become circumspect and overly litigious and thus chill the informal process. Defendant cites no case law for this proposition. We note that the Construction Industry Arbitration Rules, under which the subject arbitration took place, provide that attendance of non-parties at the hearings lies within the discretion of the arbitrator, not the parties. Furthermore, the arbitrator *must* release, upon application of *one* party, copies of all documents in the arbitrator's possession which "may be required in judicial proceedings relating to the arbitration." These provisions suggest a somewhat diminished expectation of confidentiality. Nothing in the North Carolina statutes governing arbitration requires strict confidentiality. *See* G.S. 1-567.1 *et seq.* In at least one New York case, transcripts of arbitration have been held discoverable, without mention of the policy of confidentiality. *Milone v. General Motors Corp.*, 84 A.D. 2d 921, 446 N.Y.S. 2d 650 (1981). Thus the law and the contract do not appear to bar disclosure.

In addition, defendant admits that in at least one instance it has already disclosed the transcripts to a non-party. It is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure. *See State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981)

[attorney-client privilege waived as to affidavit where two others present during execution]; *State v. Tate*, 294 N.C. 189, 239 S.E. 2d 829 (1978) [attorney's testimony as to what letter did *not* contain waived privilege as to contents of letter]; *Jones v. Marble Co.*, 137 N.C. 237, 49 S.E. 94 (1904) [attorney's opinion testimony as to contents of letter waived privilege]; *United States v. Glaxo Group, Ltd.*, 302 F. Supp. 1 (D.D.C. 1969) [disclosure to non-party waived privilege objection to discovery request; party requesting discovery not required to seek information from non-party]. In the circumstances of the case, then, we must conclude that confidentiality does not require reversal of the court's order.

Defendant contends that the arbitration transcripts are materials "prepared in anticipation of litigation" under Rule 26(b)(3) of the N.C. Rules of Civil Procedure. And defendant further contends that good cause was not shown. Before examining the question of cause, however, we must determine the correctness of defendant's assertion that the transcripts were "prepared in anticipation of litigation." The protective order entered by the court, and defendant's own application for stay, recite only the "compelling" nature of the confidentiality considerations discussed. The record contains no indication and defendant advances nothing but conclusory statements as to what, if any, litigation the transcripts were prepared in anticipation of. In fact, this argument, taken at face value, confounds the traditional notion that the law favors arbitration as a means of *avoiding* litigation.

Privilege, of course, is determined by the court, not by the party asserting it. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E. 2d 386 (1982). The matter cannot rest upon the *ipse dixit* of the defendant. *Id.; Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Thus, the burden of establishing, at least as a preliminary matter, that the materials were prepared in anticipation of litigation and are therefore privileged was on the defendant. *Heathman v. United States Dist. Court for the Cent. Dist. of Cal.*, 503 F. 2d 1032 (9th Cir. 1974); 23 Am. Jur. 2d Depositions and Discovery § 29 (1983); 27 C.J.S. Discovery § 35 at 118 (1959). This burden has not been met, as the record contains no basis for the privilege that defendant claims.

Finally, defendant argues that plaintiff should not be permitted to see the transcripts because they are "peppered" with the

opinions, legal theories, and other work product of its attorneys. But this problem was solved by the court permitting defendant to excise such portions of the transcript, with plaintiff bearing the costs. The terms of the order indicate the court's concern for defendant's rights and appear to guarantee defendant such protection as it is entitled to. Nor are the terms unduly burdensome. In both *Spivey v. Zant*, 683 F. 2d 881 (5th Cir. 1982) and *Resident Advisory Board v. Rizzo*, 97 F.R.D. 749 (E.D. Pa. 1983), it was held that excising work product portions of otherwise discoverable papers is a proper means of complying with Rule 26(b)(3).

The order entered not having been shown to be erroneous, it must be and is affirmed.

Affirmed.

Judge BRASWELL concurs.

Judge JOHNSON concurs in result.

IN THE MATTER OF VIRGIL KEMP LEGGETT, JR., D.O.B. 10/29/68

No. 832DC807

(Filed 17 April 1984)

Infants § 13— juvenile delinquency proceeding—sufficiency of service of process

Although the return of summons in a juvenile delinquency proceeding stated only that service was effected on a particular date but did not state that the juvenile and one of his parents were served as required by G.S. 7A-565, the record was sufficient to support the conclusion that respondent was properly served since the statement on the return that service was accomplished implies that it was done in the manner required by law, and such implication was supported by the fact that respondent, both of his parents and his counsel were present at the hearing, and by the fact that the question of service was not raised at the hearing.

APPEAL by respondent-juvenile from *Hardison, Judge.* Order entered 11 April 1983 in District Court, BEAUFORT County. Heard in the Court of Appeals 8 February 1984.

The respondent-juvenile was charged with making certain lewd and indecent telephone calls in violation of G.S. 14-196(a)(1). Evidence at the hearing tended to show that: Someone telephoned the Gerald Cannon residence on February 4, 7, 8 and 11 and March 4, 1983, using lewd and indecent language. The Cannons reported this to the police and tracing equipment was connected to their telephone. On March 10, 1983, Mrs. Cannon received a telephone call, recognized the voice as being that of the previous caller, and activated the tracing equipment. The police were called, and after checking with the telephone company, Officer Barnes was dispatched to the respondent's residence while another officer waited by the Cannon telephone. After arriving at the Leggett residence and speaking with respondent's mother, Officer Barnes picked up the telephone and spoke with the officer at the Cannon residence over the open line. The respondent was the only male in the house at that time.

The trial judge found beyond a reasonable doubt that respondent had violated the statute referred to, adjudicated him a delinquent child, and placed him on supervised probation for one year.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Carter, Archie & Hassell, by Sid Hassell, Jr., for respondent appellant.

PHILLIPS, Judge.

By his first assignment of error, respondent contends that the court had no jurisdiction over him in that the record fails to show that he and one of his parents were properly served with the juvenile summons and petition, as required by G.S. 7A-565. It is true that the return of the summons states only that service was effected March 30, 1983 and does not state who was served. But this does not necessarily mean, as respondent argues, that the court had no jurisdiction. It is the service of summons, rather than the return of the officer, that confers jurisdiction. *State v. Moore*, 230 N.C. 648, 55 S.E. 2d 177 (1949). The statement on the return that service was accomplished implies that it was done in the manner required by law. *Strayhorn v. Blalock*, 92 N.C. 292 (1885). The implication that service was properly accomplished on

the respondent is supported by several things in the record and contradicted by nothing. At the hearing scheduled for April 11, 1983, respondent, both of his parents, and counsel, obviously prepared to contest the charges, were present; and the question of service was not raised by objection, affidavit, or otherwise. Had it been, the officer's incomplete return, no doubt a clerical mistake, could have been corrected by amendment. *Calmes v. Lambert*, 153 N.C. 248, 69 S.E. 138 (1910). Under the circumstances, completing the return is deemed to be unnecessary, though requiring or permitting officers to complete returns is the preferred practice when a return is noted to be incomplete in the trial court. Since the record, which imports verity, supports the conclusion that respondent was properly served with process, we need not consider whether personal jurisdiction was obtained over him, in any event, through the general appearance that he and his parents made at the hearing. *See In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951); *In re Collins*, 12 N.C. App. 142, 182 S.E. 2d 662 (1971). Respondent's reliance upon *In re McAllister*, 14 N.C. App. 614, 188 S.E. 2d 723 (1972) as requiring a dismissal of the case is misplaced. In that case, there was nothing of record to show that service had been made; whereas, in this case the return, though incomplete, shows that service was made.

Respondent also contends that the judge committed error in asking questions of witnesses while sitting as the trier of fact, and in support thereof cites *In re Thomas*, 45 N.C. App. 525, 263 S.E. 2d 355 (1980). But, in our judgment, *Thomas* has no application to this case. In *Thomas*, also a delinquency proceeding, the trial judge actively assumed the role of prosecuting attorney because the solicitor was absent; whereas, here, the State's counsel prosecuted the case and Judge Hardison asked only a few questions to clarify testimony already given. Questions to witnesses by the trial judge are permissible if within proper bounds. *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977). In our opinion the questions asked by the judge were within the proper bounds.

The respondent's other assignments of error require no discussion. Our study of the record leaves us with the impression that the evidence supports his conviction, his trial was without prejudicial error, and the adjudication made must be affirmed.

Affirmed.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. PRINCESS OHEEDA DULA

No. 8325SC358

(Filed 17 April 1984)

1. Burglary and Unlawful Breakings § 5.8— breaking or entering and larceny—sufficiency of evidence of occupancy of apartment

In a prosecution for breaking or entering and larceny, the evidence was sufficient for the jury to find Ramona Barlow occupied the apartment and that defendant did not have consent to enter the apartment where the evidence tended to show that Miss Barlow's sister had leased the apartment and Miss Barlow paid the rent on it and lived there. G.S. 14-54.

2. Burglary and Unlawful Breakings § 5.8— breaking or entering and larceny—sufficiency of evidence of no permission to enter apartment

In a prosecution for breaking or entering and larceny, where the defendant testified on cross-examination that no one gave her permission to enter the apartment, this was sufficient evidence for the jury to find that she did not have such permission.

3. Burglary and Unlawful Breakings § 6.4— instructions on permission to break or enter apartment—no error

In a prosecution for breaking or entering and larceny where defendant testified that she did not have permission to enter the premises, an instruction that the jury must be satisfied beyond a reasonable doubt that Ramona Barlow did not give defendant permission to break or enter the apartment, when there were at least two other persons who could have given her permission to enter the apartment, was not prejudicial to defendant. G.S. 15A-1443(a).

4. Criminal Law § 142.3— condition of probation that defendant make restitution—proper

In a prosecution for felonious breaking or entering and larceny, where defendant was acquitted of the larceny charge but was convicted of breaking or entering with intent to commit larceny, the trial court did not err in requiring defendant, as a condition of probation, to make restitution to the victim of the value of the stereo equipment that was not recovered and the amount of damage to the equipment that was recovered. G.S. 15A-1443(d).

Judge EAGLES concurring in part and dissenting in part.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 3 November 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 18 November 1983.

The defendant was tried for felonious breaking or entering and larceny. A witness testified for the State that she saw the defendant enter Ramona Flemming Barlow's apartment and come out a few minutes later carrying what appeared to be stereo equipment. Some of Miss Barlow's stereo equipment was later found embedded in the ground below defendant's apartment window. Miss Barlow testified that the apartment was leased by her sister but she paid the rent and lived there with a friend. She testified further that she did not give the defendant permission to enter her apartment that day and when she returned after being away that her stereo was missing.

The defendant denied breaking into the apartment or taking anything from it. She testified that no one gave her permission to enter the apartment.

The defendant was found guilty of felonious breaking or entering and not guilty of larceny. She was given a sentence which was suspended and she was put on probation. One of the conditions of probation was that she make restitution of $918.90 to Miss Barlow. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Walter M. Smith, for the State.

Whisnant, Simmons and Groome, by G. C. Simmons, III, for defendant appellant.

WEBB, Judge.

[1] In her first assignment of error, the defendant contends it was error not to dismiss the charges against her. She argues that there was insufficient evidence for the jury to find that Ramona F. Barlow occupied the apartment and that the defendant did not have consent to enter the apartment. The indictment alleged that Ramona Barlow occupied the apartment. The evidence showed that Miss Barlow's sister had leased the apartment and Miss Barlow paid the rent on it and lived there. We believe this evidence shows she occupied the apartment. Occupancy of the

premises is not made an element of breaking or entering by G.S. 14-54. Our Supreme Court has held that it is necessary to allege occupancy in an indictment in housebreaking cases for the purpose of showing that the house that was allegedly broken or entered was not the house of the accused and for the purpose of so identifying the house that the accused may be protected from a second prosecution for the same offense. *See State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). We believe both these purposes were fulfilled by the indictment and proof in this case. It was not necessary to show who had legal title to the apartment.

[2] The defendant also contends the State failed to prove a breaking or entering because it did not show that Jane Flemming, who had leased the apartment, and Jean Hollifield, who lived in the apartment with Miss Barlow, did not give her permission to enter the apartment. The defendant testified on cross-examination that no one gave her permission to enter the apartment. This is sufficient evidence for the jury to find that she did not have such permission.

[3] The defendant next assigns error to the charge. The court charged the jury, among other things, that in order to convict the defendant they must be satisfied beyond a reasonable doubt that Ramona F. Barlow did not give the defendant permission to break or enter the apartment. The defendant contends that there were at least two other persons who could have given her permission to enter the apartment and the court expressed an opinion on the evidence by saying that the State only had to prove Miss Barlow did not give such permission. We do not believe this statement by the court was prejudicial to the defendant. *See* G.S. 15A-1443(a). Permission to enter the apartment was not at issue in the trial. The defendant testified she did not have permission to enter the apartment. We hold she was not prejudiced by this statement in the charge.

[4] The defendant's last assignment of error is to a condition of probation. The court required the defendant, as a condition of probation, to make restitution of $918.90 to Miss Barlow, this being the value of the stereo equipment that was not recovered and the amount of damage to the equipment that was recovered. G.S. 15A-1343(d) provides in part:

> "As a condition of probation, a defendant may be required to make restitution to an aggrieved party . . . for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant."

The defendant, relying on *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970) and *State v. Bass,* 53 N.C. App. 40, 280 S.E. 2d 7 (1981) argues that she was acquitted of the larceny charge and the loss to Miss Barlow was not related to the breaking or entry. The defendant was convicted of breaking or entry with intent to commit larceny. We believe the evidence shows the loss and damage to Miss Barlow was caused by and arose out of this crime as required by G.S. 15A-1343(d). We do not believe that *Caudle* or *Bass* govern in this case. In each of those cases the trial court was reversed for requiring restitution for damages not related to the crime to which the defendant was found guilty.

No error.

Judge PHILLIPS concurs.

Judge EAGLES concurs in part and dissents in part.

Judge EAGLES concurring in part and dissenting in part.

I concur in the majority opinion except for that portion which approves restitution of $918.90 as a condition of probation from which I respectfully dissent. As the majority notes, the $918.90 figure is the value of unrecovered stolen property plus the amount of damages to stereo equipment damaged in the course of the breaking and entering. Because the defendant was acquitted of the charge of larceny, restitution to the victim for the value of unrecovered stolen property, $360.00, is inappropriate. *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970); *State v. Bass,* 53 N.C. App. 40, 280 S.E. 2d 7 (1981). I would remand for modification of the judgment's conditions of probation to provide for restitution of $558.90, the value of damages to property incurred in the course of the breaking and entering.

SHARON LYNN WOLFE v. RONALD CHARLES WOLFE

No. 8320DC601

(Filed 17 April 1984)

1. **Contempt of Court § 6; Divorce and Alimony § 25.13— child custody order on appeal—ex parte order to show cause**

The trial court had authority to issue an *ex parte* order requiring plaintiff to relinquish custody of her two minor children to defendant and to appear and show cause why she should not be held in contempt for violating a valid custody order even though the last custody order was on appeal at the time the *ex parte* order was entered. G.S. 50-13.3.

2. **Contempt of Court § 6— child custody—ex parte order to show cause—no entitlement to notice and opportunity to be heard**

Plaintiff was not entitled to notice and an opportunity to be heard prior to the court's issuance of an *ex parte* order requiring plaintiff to relinquish custody of her two minor children to defendant and to appear and show cause why she should not be held in contempt of court for violating a valid child custody order.

3. **Appeal and Error § 6.2— show cause order—no right of appeal**

An *ex parte* order requiring plaintiff to appear and show cause why she should not be held in contempt for violating a valid child custody order was interlocutory and not directly appealable.

APPEAL by plaintiff from *Huffman, Judge.* Order entered 27 January 1983 in District Court, RICHMOND County. Heard in the Court of Appeals 5 April 1984.

Henry T. Drake for plaintiff appellant.

Leath, Bynum, Kitchin & Neal by Henry L. Kitchin and Timothy C. Barber for defendant appellee.

BRASWELL, Judge.

The present controversy stems from the issuance of an *ex parte* order by the trial judge ordering the plaintiff to relinquish custody of her two minor children to the defendant and to appear and show cause why she should not be held in contempt of court for violating a valid custody order. The defendant was awarded custody of these children in three previous orders. The last order granted in May of 1982 was on appeal to this Court at the time the *ex parte* order was issued. Subsequently, the defendant's

award of custody was upheld. *Wolfe v. Wolfe*, 64 N.C. App. 249, 307 S.E. 2d 400 (1983).

[1] The plaintiff asserts that to issue an *ex parte* order enforcing the previous custody award is error while the action is on appeal. We disagree. Yet, even though the May 1982 custody action had been appealed, an earlier enforceable custody award in favor of the defendant was in effect. G.S. 50-13.3 provides that "an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal." Thus, the trial court had the power to issue the *ex parte* show cause order. Also, because the defendant had made a showing that the plaintiff was in violation of the order and wrongfully had custody of the children the trial court could enforce the terms of the custody order by ordering the children's return to the defendant.

[2] The plaintiff also contends that because she was given no notice and no opportunity to be heard before the *ex parte* order was issued that her due process rights under the Fourteenth Amendment have been violated. Again, we disagree. An "order to show cause is one that is made *ex parte*," meaning that it is granted at the instance and for the benefit of one party only and without notice to the adversely affected party. 56 Am. Jur. 2d, *Motions, Rules, and Orders* §§ 33-34 (1971). As demonstrated in the present case by the return of the children, a show cause order can also grant specific relief which has been requested by the movant. *Id.* Once the order to show cause is made, notice is then served on the other party and the matter is later heard like other motions. 60 C.J.S., *Motions and Orders* § 20 (1969). In the present case, the *ex parte* order was signed on 20 December 1982, and the plaintiff was served with notice of it prior to 22 December 1982. The show cause hearing wherein all of the issues raised by the defendant's motion would be considered was set for 17 January 1983, sufficient time and opportunity for the plaintiff to prepare her contempt defense. We hold by the very nature of an *ex parte* order the plaintiff was not entitled to notice or an opportunity to be heard prior to the show cause hearing.

[3] Finally and most importantly, since an *ex parte* is not a final order, it is interlocutory and is not directly appealable. *See* 56 Am. Jur. 2d, *supra*, at § 45; *see generally Love v. Moore*, 305 N.C.

575, 580, 291 S.E. 2d 141, 144, *rehearing denied*, 306 N.C. 393 (1982). From a review of the record before this Court, it is evident that the plaintiff's appeal is taken from the issuance of the *ex parte* order alone. The record fails to show whether the children were placed back in the defendant's custody, whether the 17 January 1983 show cause hearing took place, or whether the plaintiff was later found in contempt for violating the prior custody order. We hold that since there has been no showing that a final disposition of this case has occurred, the plaintiff's appeal must be dismissed. We therefore decline to consider the plaintiff's remaining assignments of error.

Dismissed.

Judges ARNOLD and WELLS concur.

EDITH F. CORBETT v. ELTON CORBETT

No. 837DC549

(Filed 17 April 1984)

1. **Divorce and Alimony § 5— defense of recrimination—issue of justification**

In an action for divorce from bed and board in which the plaintiff-wife alleged indignities and the defendant-husband asserted the defense of recrimination, in view of the plaintiff's evidence of indignities, a question for the jury was raised as to whether plaintiff's alleged abandonment was justified and defendant's motions for a directed verdict were therefore properly denied.

2. **Divorce and Alimony § 28.1— judgment for divorce from bed and board—motion to eject defendant from home allowed—jurisdiction of district court**

Where a judgment granting plaintiff a divorce from bed and board was entered on 10 March 1983; defendant gave notice of appeal in open court; on 22 April 1983, plaintiff filed a motion in the cause seeking to have defendant ejected from her home, and the motion was allowed, under G.S. 1-294, the district court had jurisdiction to enter the order requiring defendant to vacate the premises since plaintiff's right to possession of her home was separate and unrelated to the matter of the judicially declared separation.

Judge WELLS dissenting in part.

APPEAL by defendant from *Ezzell, Judge.* Judgment entered 10 March 1983 in District Court, WILSON County. Heard in the Court of Appeals 3 April 1984.

Farris, Thomas and Farris by Robert A. Farris for plaintiff appellee.

George A. Weaver for defendant appellant.

BRASWELL, Judge.

This is an action for a divorce from bed and board in which the plaintiff-wife alleged indignities and the defendant-husband asserted the defense of recrimination. From a judgment granting plaintiff a divorce from bed and board in accordance with the jury's verdict, defendant appeals. The issues on appeal are (1) whether the trial court erred in denying defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence, and (2) whether the trial court had jurisdiction to enter an order in the cause ejecting defendant from plaintiff's house after an appeal had been taken from the judgment granting a divorce from bed and board.

[1] In his brief, defendant does not challenge the sufficiency of the plaintiff's evidence of the various indignities defendant inflicted upon her. Rather, he argues that his defense of recrimination was established as a matter of law because the evidence showed that plaintiff abandoned him by changing the locks to the house and leaving the house while he was out of town visiting his brother. We disagree.

An abandonment occurs when one spouse brings the cohabitation with the other spouse to an end *without justification,* without the consent of the other spouse and without intent of renewing it. (Emphasis added.) *Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E. 2d 387 (1971). The spouse alleging abandonment must prove the absence of justification for the abandonment. *Morris v. Morris,* 46 N.C. App. 701, 266 S.E. 2d 381, *aff'd,* 301 N.C. 525, 272 S.E. 2d 1 (1980). Recrimination is an affirmative defense which must be proven by the defendant with the same character of evidence and the same certainty as if the defendant were setting it up as a ground for divorce. *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492 (1945); 1 R. Lee, N.C. Family Law § 88 (4th ed.

1979). Here, Mr. Corbett has failed to carry his burden of showing the lack of justification as a matter of law. In view of plaintiff's evidence of indignities, a question for the jury was raised as to whether plaintiff's alleged abandonment was justified. Defendant's motions for a directed verdict were therefore properly denied.

[2] The judgment granting plaintiff a divorce from bed and board was entered on 10 March 1983. Defendant gave notice of appeal in open court. On 22 April 1983, plaintiff filed a motion in the cause seeking to have defendant ejected from her home. The trial court allowed the motion and entered an order requiring defendant to vacate the premises. The issue is whether the District Court had jurisdiction to enter that order during the pendency of the appeal from the judgment of divorce from bed and board. Under the facts of this case, we hold that the District Court did have jurisdiction.

G.S. 1-294 provides that an appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." The matter of plaintiff's right to possession of her own home, which was titled solely in her name, was separate and unrelated to the matter of the judicially declared separation. The trial court therefore had jurisdiction to enter the order. *Manufacturing Co. v. Arnold*, 228 N.C. 375, 387-88, 45 S.E. 2d 577, 585 (1947); *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900). *See also Cox v. Cox*, 33 N.C. App. 73, 75, 234 S.E. 2d 189, 190 (1977). In *Cox*, a divorce case, the court said, "It appears that the appraisal matter on the one hand and the reduction of support matter on the other are different and unrelated matters, and the appeal from the order relating to the appraisal did not divest the trial court of jurisdiction to hear and determine the plaintiff's motion for reduction of support." *Id.*

The judgment of the District Court is

Affirmed.

Judge ARNOLD concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS dissenting in part.

I dissent to that part of the majority opinion which holds that the trial court retained jurisdiction to consider plaintiff's post-appeal motion in the cause to have defendant ejected from the marital home, it being my position that plaintiff's appeal divested the trial court of jurisdiction to consider such motion. *See Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977).

STATE OF NORTH CAROLINA v. DONALD GENE PHILLIPS

No. 8328SC699

(Filed 17 April 1984)

Weapons and Firearms § 2— indictment for possession of dangerous weapon while prisoner

An indictment for unauthorized possession of a dangerous weapon while a prisoner was not fatally defective because it alleged that the weapon was capable of inflicting "bodily injury" rather than "*serious* bodily injury" where the indictment alleged that the weapon was a pocket knife and that the weapon was used to inflict serious injury upon a fellow prisoner.

APPEAL by defendant from *Lewis, Robert D., Judge.* Judgment entered 5 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 January 1984.

While an inmate at the Craggy Prison Unit in Buncombe County, defendant had a fight with another prisoner and stabbed him with a knife. Two serious wounds requiring long hospitalization and surgery were inflicted, in addition to several cuts. Defendant was charged with assault with a deadly weapon with intent to kill, inflicting serious injury, and unauthorized possession of a dangerous weapon while a prisoner. Upon being tried defendant was acquitted of the first charge, but convicted of the second.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

PHILLIPS, Judge.

Defendant first contends that the indictment was fatally defective and thus the court was without jurisdiction to proceed to judgment. In pertinent part, G.S. 14-258.2, the law that he allegedly violated, reads as follows:

> Any person while in the custody of the Division of Prisons, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death . . . shall be guilty of a misdemeanor. . . .

The indictment couched thereon, in pertinent part, was as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 24th day of September, 1982, in Buncombe County Donald Gene Phillips, aka Donnie Phillips unlawfully and wilfully did feloniously possess one pocket knife while in the custody of the Division of Prisons, without permission or authorization, a weapon capable of inflicting bodily injury and using said weapon to inflict serious injury upon Franklin C. Leonard. This is in violation of the following law: G.S. 14-258.2.

The fatal defect, according to defendant, is that whereas the crime consists of possessing a weapon "capable of inflicting *serious* bodily injury," the indictment alleges only that a weapon "capable of inflicting bodily injury" was possessed, which no statute forbids. But this deficiency was supplied elsewhere in the indictment. The allegation that the weapon possessed was used "to inflict serious injury upon Franklin C. Leonard" necessarily included the fact that the weapon was capable of inflicting such injury. An indictment is sufficient if it charges the statutory offense either in the language of the statute or specifically sets forth the acts constituting the offense. *State v. Loesch*, 237 N.C. 611, 75 S.E. 2d 654 (1953). Furthermore, by specifying that the weapon possessed was a pocket knife the indictment notified defendant that the weapon was capable of inflicting not only serious injuries, but lethal ones as well. *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967).

The defendant's two other assignments of error cannot be considered, since they are based on exceptions that the record shows were not properly taken. Rule 10, N.C. Rules of Appellate Procedure.

No error.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. GEORGE TRACY BRAGG

No. 8315SC530

(Filed 17 April 1984)

Criminal Law § 75.11— inadmissible confession—defendant indicating he did not wish to make a statement—officers continuing to talk to him

In a prosecution for armed robbery, the trial court erred in failing to suppress defendant's confession where defendant told the officers he did not want to make a statement, and they continued talking to him until he purported to waive his rights.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 14 January 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 December 1983.

The defendant was indicted for armed robbery. He made a motion to suppress his confession and a *voir dire* hearing was conducted prior to his trial. At the *voir dire* hearing, John Jones testified that he was an officer with the Chapel Hill Police Department and that between 4:00 and 4:30 a.m. on 28 August 1982 he went to the house in which the defendant was residing. He awoke the defendant and told him he was suspected of committing armed robbery. He asked the defendant to accompany him to the police headquarters. The defendant objected to going and was handcuffed. Officer Jones testified that he advised the defendant of his right to remain silent and his right to an attorney at the defendant's residence and again at police headquarters. The defendant denied he had participated in a robbery and then told Officer Jones he did not want to talk about it.

In the meantime, Ned Thorpe, a detective with the Chapel Hill Police Department, was called at home and asked to come to police headquarters and interview the defendant. Detective Thorpe testified that he "gathered" that the defendant was not being cooperative with the officers who were interviewing him and they were not making "much headway." When Detective Thorpe arrived at police headquarters, he took the defendant to his office accompanied by Officer Jones and again advised the defendant of his rights. The defendant said he wanted to make a statement. He signed a waiver of rights form and confessed to the robbery. Detective Thorpe testified that before he began to interview the defendant, Officer Jones told him the defendant had refused to discuss the matter. Detective Thorpe also testified that the defendant, from time to time, would stop talking and say that he did not want to talk anymore. He would then cry for awhile and start talking. Detective Thorpe arrived at police headquarters between 2:30 and 5:00 a.m. The waiver form was signed at 6:15 a.m.

The court overruled the defendant's motion to suppress his confession. The defendant pled guilty to common law robbery and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Christopher P. Brewer, for the State.

John S. Curry for defendant appellant.

WEBB, Judge.

We believe we are bound by *State v. Lang,* 309 N.C. 512, 308 S.E. 2d 317 (1983) to reverse. As we read that case, when a person in custody indicates he does not wish to make a statement, the officers may not take an inculpatory statement from him unless the defendant initiates the conversation in which he waives his rights. *Lang* deals with the waiver of counsel but we believe the principle is the same. In this case, we believe the evidence is undisputed that after the defendant had told the officers he did not want to make a statement, they continued talking to him until he purported to waive his rights. We do not believe there is evidence in the record which will support a finding that the defendant initiated a conversation with the officers after he had told

them he did not want to make a statement. For this reason, it was error to admit his confession.

Reversed and remanded.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. HENRY MATTHEWS GARNER, JR.

No. 8311SC998

(Filed 17 April 1984)

Criminal Law § 181.1— motion for appropriate relief—time for filing expired

Where defendant entered a plea of "no contest" to armed robbery on 24 October 1977, and when, pursuant to G.S. 15A-1415, defendant made a motion for appropriate relief on 17 November 1982, his right to appeal the armed robbery conviction had expired, and no appeal was pending on 19 May 1983 when the trial court denied defendant's motion. Pursuant to G.S. 15A-1422(c) defendant's appeal from the denial of his motion for appropriate relief must fail since the time for appeal from a conviction had expired and no appeal was pending at the time of the ruling.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 19 May 1983 in Superior Court, LEE County. Heard in the Court of Appeals 9 April 1984.

Defendant attempts to appeal from a trial court order denying his motion for appropriate relief.

Attorney General Edmisten, by Nonnie F. Midgette, Assistant Attorney General, for the State.

F. Jefferson Ward, Jr., for defendant appellant.

VAUGHN, Chief Judge.

The record shows that on 24 October 1977, defendant entered a plea of "no contest" to armed robbery and was thereby sentenced to forty years in state prison. When, pursuant to G.S. 15A-1415, defendant made a motion for appropriate relief on 17 November 1982, his right to appeal the armed robbery conviction

had expired. The record discloses no appeal pending on 19 May 1983, when the trial court denied defendant's motion.

The provisions of G.S. 15A-1422(c) allow appeals from a denial of a motion for appropriate relief made under G.S. 15A-1415 only if: (1) the time for appeal from a conviction has not expired or (2) an appeal is pending at the time of the ruling. The appeal, therefore, must be and is hereby dismissed. We have treated the purported appeal as a petition for the issuance of a writ of certiorari. After an examination of the record and briefs, in our discretion, we deny the issuance of the writ.

Appeal dismissed.

Petition for writ of certiorari denied.

Judges JOHNSON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 APRIL 1984

BAMBERG v. BAMBERG No. 8326DC434	Mecklenburg (81CVD7058)	Affirmed
DECKER v. CABLE No. 8327DC668	Gaston (81CVD3077)	Affirmed
HUDSON v. HUDSON No. 8230SC1284	Jackson (79CVS245)	No Error
IN RE BROTHERS No. 8318SC7	Guilford (81E649)	Reversed and Remanded
McSORLEY v. EDWARDS No. 833DC543	Carteret (82CVD386)	Affirmed
SIMPSON v. TROUTMAN ENTERPRISES No. 8320DC552	Union (80CVD659) (80CVD660) (80CVD661) (80CVD662)	Affirmed
STATE v. CREASON No. 8319SC1073	Rowan (82CRS12592)	No Error
STATE v. DEBOSE No. 835SC1074	New Hanover (83CRS4035)	No Error
STATE v. HOWELL No. 8313SC962	Bladen (82CRS783)	No Error
STATE v. JONES No. 8316SC1062	Robeson (83CRS2934)	No Error
STATE v. RAWLINS No. 837SC905	Nash (83CRS221)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TOPICS COVERED IN THIS INDEX

ABATEMENT AND REVIVAL

§ 13. Death of Party; Actions Arising out of Domestic Relationships

An action for an absolute divorce abated upon the death of the plaintiff during the pendency of his appeal from the trial court's entry of a directed verdict denying the divorce as a matter of law. *Elmore v. Elmore*, 661.

ACCOUNTS

§ 2. Accounts Stated

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ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

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APPEAL AND ERROR

§ 3. Review of Constitutional Questions

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§ 6.2. Finality as Bearing on Appealability

An order awarding child support and alimony *pendente lite* is not immediately appealable. *Berger v. Berger*, 591.

An *ex parte* order requiring plaintiff to appear and show cause why she should not be held in contempt for violating a valid child custody order was not immediately appealable. *Wolfe v. Wolfe*, 752.

§ 6.3. Appeals Based on Jurisdiction

An order denying a motion to dismiss for lack of subject matter jurisdiction was not immediately appealable. *Berger v. Berger*, 591.

Defendant's motion to dismiss for lack of personal jurisdiction raised a question of sufficiency of service of process rather than of due process and was not immediately appealable. *Ibid.*

§ 6.6. Appeals Based on Motions to Dismiss

An order denying defendant's motion to dismiss for failure to state a claim was not immediately appealable. *Berger v. Berger*, 591.

§ 9. Moot Questions

The Commissioner of Insurance in effect consented to the assertion of a cross-claim against him by the N.C. Guaranty Assn. in an interpleader action and rendered moot the issue as to whether the court should have dismissed the cross-claim. *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 359.

APPEAL AND ERROR—Continued

§ 16. Powers of Trial Court after Appeal

Defendant's appeal from an order denying his motions to dismiss for failure to state a claim and for lack of subject matter and personal jurisdiction was interlocutory and a nullity and did not divest the trial court of jurisdiction to enter an award of child support, alimony and counsel fees *pendente lite*. *Berger v. Berger*, 591.

§ 17. Supersedeas and Stay Bonds

Execution of an interlocutory order awarding child support, alimony and counsel fees *pendente lite* may not be stayed by posting a bond pursuant to G.S. 1-289. *Berger v. Berger*, 591.

§ 31.1. Necessity for Objections, Exceptions and Assignments of Error to Charge

The "plain error" rule for errors in the charge applies only in criminal cases. *Wachovia Bank v. Guthrie*, 622.

§ 36.1. Timeliness of Serving Case on Appeal

A contempt order was filed on 14 March rather than on 14 February, and the time for serving the record on appeal began to run on 14 March. *Berger v. Berger*, 591.

§ 57.5. Specific Instances Where Findings Not Supported by Evidence

In an action instituted by plaintiff to recover a sum of money plus interest on an alleged account which was tried before a judge without a jury, the evidence did not support the findings of fact, and the findings did not support the conclusions of law. *Plymouth Fertilizer Co. v. Selby*, 681.

§ 68.2. Law of the Case and Subsequent Proceedings; Decisions as to Sufficiency of Evidence

In an action in which plaintiff sought a judgment requiring defendants to reconvey to plaintiff a tract of land that plaintiff had deeded to his brother, the defendant, the Court adopted an earlier holding by the Court as the law of the case where the same facts and the same questions were involved in both appeals. *Hodges v. Hodges*, 290.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

Defendants' Rule 12(b)(6) motion to dismiss was not equivalent to a demand for arbitration. *Adams v. Nelsen*, 284.

In an action filed by plaintiff prime contractor against Duke University for damages arising from a construction contract, the trial court did not err in ordering defendant, under certain protective restrictions, to produce transcripts of an arbitration proceeding involving defendant and another prime contractor on the same job. *Industrotech Constructors v. Duke University*, 741.

§ 2. Agreements to Arbitrate as Bar to Action

By contractually agreeing to arbitration, plaintiff did not thereby waive his right to file a laborers' and materialmen's lien claim and institute court action to enforce such lien. *Adams v. Nelsen*, 284.

Plaintiff waived his contractual right to arbitration by pursuing an action in court, and defendants waived their right to arbitration by failing to demand arbitration within the time specified in the contract. *Ibid.*

ARBITRATION AND AWARD—Continued

The arbitrator is the proper person to determine the issue of waiver of arbitration only when such issue is intertwined with the substance of the parties' dispute. *Ibid.*

Where appellee and appellants had filed cross-claims against each other and both demanded a jury trial, the trial court erred in allowing appellee's motion to stay litigation pending arbitration pursuant to an arbitration agreement contained in their contract. *Cyclone Roofing Co. v. LaFave Co.*, 278.

ASSAULT AND BATTERY

§ 14.3. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Injury

In a prosecution for armed robbery and assault with a deadly weapon inflicting serious injury, although the State presented no evidence regarding what kind of weapon was used, the jury could infer from the appearance of the wound on the back of the victim's scalp that a dangerous or deadly weapon was used. *S. v. Greene*, 703.

In a prosecution for assault with a deadly weapon inflicting serious injury, the evidence was sufficient for the jury to find beyond a reasonable doubt that the victim incurred a "serious injury." *Ibid.*

ATTORNEY GENERAL

§ 1. Generally

The Attorney General's office, when representing a State department, has no authority to enter a consent judgment without the department's consent. *Tice v. Dept. of Transportation*, 48.

ATTORNEYS AT LAW

§ 5. Duty to Represent Client

In an action challenging the validity of a separation agreement, plaintiff failed to show misconduct on the part of defendant's attorney. *Johnson v. Johnson*, 250.

§ 7.5. Allowance of Fees as Part of Costs

A municipal housing authority was properly required to pay an award of counsel fees to respondents after it voluntarily dismissed and abandoned a condemnation proceeding for an urban renewal project. *Housing Authority v. Clinard*, 192.

§ 11. Disbarment Procedure

The Disciplinary Hearing Commission did not lack jurisdiction over charges against an attorney because the attorney received no letter of notice setting forth the charges before formal action was taken against him. *N.C. State Bar v. Braswell*, 456.

§ 12. Grounds for Disbarment

The evidence before the Disciplinary Hearing Commission was sufficient to support a charge that an attorney engaged in conduct involving fraud or deceit by falsely representing to a criminal defendant that an appeal for which the attorney was court-appointed counsel had been perfected. *N.C. State Bar v. Braswell*, 456.

AUTOMOBILES AND OTHER VEHICLES

§ 76.1. Contributory Negligence; Following too Closely; Hitting Slowly Moving Vehicles

Plaintiff's evidence did not show that she was contributorily negligent as a matter of law in colliding with defendants' unlighted trailer which extended across her lane of travel. *Dunn v. Herring*, 306.

§ 89.2. Cases Where Evidence of Last Clear Chance Was Insufficient with Respect to Other Motorists

The trial court properly failed to submit the doctrine of last clear chance to the jury in an action arising from an automobile accident. *Pippins v. Garner*, 484.

§ 105.2. Sufficiency of Evidence on Issue of Respondeat Superior

In an action arising from an automobile accident, there was a genuine issue of fact as to whether an agency relationship existed between the owner of a truck and the driver of the vehicle where the vehicle was leased to a couple and the driver was not an employee of the owner of the truck. *DeArmon v. B. Mears Corp.*, 640.

§ 122. Driving under the Influence; "Highway" Within Purview of Statute

The trial court in a prosecution for driving under the influence erred in ruling as a matter of law that the driveway of a condominium complex was a "public vehicular area" within the meaning of G.S. 20-4.01(32). *S. v. Bowen*, 512.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not abuse its discretion in dismissing the charges against defendant for the State's failure to comply with an order for discovery. *S. v. Adams*, 116.

The trial judge did not abuse his discretion in failing to employ a remedy available under G.S. 15A-910 when the State failed to disclose a supplemental FBI handwriting analysis report damaging to defendant. *S. v. Martin*, 265.

The trial court properly denied defendant's pretrial motion for discovery of a recorded conversation between a rape victim and a police detective. *S. v. Lefever*, 419.

In a civil action where the trial judge found as a fact that defendant's failure to comply with a court order compelling discovery was willful and without cause, the findings provided ample support for an order granting plaintiff's motion for sanctions and entering a default judgment in favor of plaintiff and against defendant. *Routh v. Weaver*, 426.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.1. Sufficiency of Identification of Defendant as Perpetrator; Fingerprints

The State's fingerprint evidence was insufficient to support conviction of defendant for felonious breaking or entering of a house where defendant offered a reasonable explanation for the presence of his prints at the crime scene. *S. v. White*, 348.

§ 5.4. Sufficiency of Evidence; Presumption from Possession of Recently Stolen Property

The State's evidence was sufficient to support conviction of defendant for felonious breaking or entering and felonious larceny under the doctrine of possession of recently stolen property. *S. v. Hardy*, 122.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 5.8. Sufficiency of Evidence of Breaking and Entering of and Larceny from Residential Premises

In a prosecution for breaking or entering and larceny, the evidence was sufficient for the jury to find occupancy of an apartment and that defendant did not have consent to enter the apartment. *S. v. Dula*, 748.

In a prosecution for breaking or entering and larceny, where the defendant testified on cross-examination that no one gave her permission to enter the apartment, this was sufficient evidence for the jury to find that she did not have such permission. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 8. Actions to Rescind; Pleading Generally

In an action to set aside a deed and a change of a life insurance beneficiary executed by the mother of the parties, plaintiff's complaint was insufficient to state a claim based on constructive fraud, but the issue of constructive fraud was tried by implied consent. *Benfield v. Costner*, 444.

CONSPIRACY

§ 6. Sufficiency of Evidence

The State's evidence was sufficient to permit the jury to find an agreement to use a deadly weapon so as to support conviction of defendant for conspiracy to assault with a deadly weapon inflicting serious injury. *S. v. Brown*, 223.

CONSTITUTIONAL LAW

§ 23. Scope of Protection of Due Process

Petitioners' challenge to annexation statutes and ordinances failed to state a claim for relief under the due process clause. *Forsyth Citizens v. City of Winston-Salem*, 164.

§ 30. Discovery

The trial judge did not abuse his discretion in failing to employ a remedy available under G.S. 15A-910 when the State failed to disclose a supplemental FBI handwriting analysis report damaging to defendant. *S. v. Martin*, 265.

§ 34. Double Jeopardy

In a prosecution for the murder of defendant's wife's boyfriend, the trial court improperly entered a mistrial over defendant's objection, and defendant's plea of former jeopardy or motion to dismiss at a subsequent trial should have been granted and defendant should have been discharged. *S. v. Jones*, 377.

Defendant does not have a right to appeal a denial of a motion to dismiss an indictment on double jeopardy grounds prior to being put to trial a second time. *S. v. Jones*, 413.

§ 40. Right to Counsel Generally

The admission of taped conversations between defendant and an undercover officer in which defendant solicited the officer to murder two persons involved in three charges against defendant arising from an assault did not violate defendant's Sixth Amendment right to counsel because the conversations were taped after defendant had been indicted for the three crimes arising from the assault and after

defendant had been before the trial court for his first appearance with respect to those charges since (1) defendant's right to counsel with respect to the solicitation to commit murder charges had not attached, and (2) defendant had waived his right to counsel with respect to the other charges. *S. v. Brown*, 223.

§ 51. Speedy Trial; Delays Between Indictment and Trial

Defendant's constitutional right to a speedy trial was not violated by a delay of 224 days between the date of the indictment for rape and the commencement of the trial. *S. v. Lefever*, 419.

§ 63. Jury Trial; Exclusion from Jury for Opposition to Capital Punishment

The procedure of death qualifying the jury did not violate defendant's constitutional rights. *S. v. Bennett*, 407.

§ 65. Right of Confrontation Generally

The admission of taped statements made by a nontestifying informant to an undercover officer did not violate defendant's right to confrontation where the statements were offered for non-hearsay purposes. *S. v. Brown*, 223.

§ 67. Identity of Informants

In a prosecution for trafficking in heroin, the trial court properly excluded, at a suppression hearing, questions about the specific time the informant had seen defendant with heroin since defendant was not entitled to know the identity of the informant. *S. v. Willis*, 320.

CONTEMPT OF COURT

§ 6. Hearings on Orders to Show Cause Generally

The trial court had authority to issue an *ex parte* order requiring plaintiff to relinquish custody of her two minor children to defendant and to appear and show cause why she should not be held in contempt for violating a valid custody order even though the last custody order was on appeal at the time the *ex parte* order was entered. *Wolfe v. Wolfe*, 752.

Plaintiff was not entitled to notice and an opportunity to be heard prior to the court's issuance of an *ex parte* order requiring plaintiff to relinquish custody of her two minor children to defendant and to show cause why she should not be held in contempt for violating a valid child custody order. *Ibid.*

CONTRACTS

§ 7. Contracts Restricting Business Competition Generally

The trial court properly denied defendants' motion to assert an additional alternative counterclaim alleging that defendants were damaged by a 1976 G.S. 75-5(b)(2) violation and by the opening of another store by plaintiff in 1979 in violation of alleged oral "franchise agreement" since the Chapter 75 violation was barred by the statute of limitations and the oral "franchise agreement" was barred by the statute of frauds. *Norlin Industries, Inc. v. Music Arts, Inc.*, 300.

A contract between plaintiff court reporting service and defendant, independent contractor, which forbade defendant from engaging in the court reporting business in Cumberland County or within a 50 mile radius of Cumberland County for two years from the termination of the business relationship between plaintiff and defendant was unenforceable. *Starkings Court Reporting Services v. Collins*, 540.

CRIMINAL LAW—Continued

§ 18.4. Trial de novo in Superior Court

On trial *de novo* in superior court for assault on a law enforcement officer, the trial court erred in allowing the State to admit into evidence and to publish to the jury the police officer's copy of the arrest warrant which charged defendant with assault on a law enforcement officer since the arrest warrant carried the officer's handwritten notation that in district court defendant had been found guilty of the same offense for which he was being tried. *S. v. Harrison*, 560.

§ 26. Plea of Former Jeopardy

Defendant's rights against double jeopardy were not violated where he was tried for burglary and larceny after being tried for murder. *S. v. Warren*, 337.

§ 26.3. Former Jeopardy; Same Offense

Where the jury, in returning a verdict of guilty of voluntary manslaughter, properly answered six of the seven special issues submitted to it but the trial court erred in its instructions on the seventh issue as to whether defendant used excessive force, a retrial on the untainted issues would violate defendant's right against double jeopardy under the doctrine of collateral estoppel. *S. v. O'Neal*, 65.

§ 26.5. Former Jeopardy; Same Acts or Transaction Violating Different Statutes

G.S. 15A-926(c)(2), dealing with failure to join related offenses, does not apply when indictments for the subsequent charges had not been brought when trial was had on the first charge. *S. v. Warren*, 337.

§ 34.8. Evidence of Defendant's Guilt of other Offenses to Show Common Plan or Scheme

The trial judge did not err in allowing testimony by the co-defendant regarding similar crimes in which the defendant participated. *S. v. Martin*, 265.

§ 42.6. Admissibility of Articles Connected with the Crime; Chain of Custody or Possession

The fact that officers other than those who sealed certain evidence may have had access to the evidence locker did not destroy the chain of custody of the evidence. *S. v. Essick*, 697.

§ 46. Defendant's Flight

There was sufficient evidence to support the prosecutor's argument that defendant fled to Florida after shooting the victim. *S. v. Braswell*, 609.

§ 48.1. Silence of Defendant as Implied Admission; Silence Incompetent

The use for impeachment purposes of defendant's silence, at the time of his arrest and after receiving the *Miranda* warnings, violated defendant's right to due process. *S. v. Williams*, 295.

§ 53. Medical Expert Testimony in General

Testimony by a witness who had been the victim's attending physician since a month after his injury that the victim's brain damage was caused by a gunshot wound to the head was admissible opinion testimony by an expert. *S. v. Braswell*, 609.

§ 60.5. Fingerprints; Sufficiency of Evidence

The State's fingerprint evidence was insufficient to support conviction of defendant for felonious breaking or entering of a house where defendant offered a

CRIMINAL LAW—Continued

§ 86.2. Credibility of Defendant; Prior Convictions Generally

G.S. 14-7.5 only precludes revealing to the jury the indictment which shows that defendant is a habitual felon. *S. v. Aldridge*, 655.

§ 87. List of Witnesses

The trial judge erred in ruling as a matter of law that a defense witness could not testify because her name was not on the list of potential witnesses furnished to the State. *S. v. McMahon*, 181.

§ 90. Rule that Party Is Bound by and May not Discredit his own Witness

The trial court did not err in refusing to declare a witness a hostile witness and to permit defendant to impeach him where defendant had examined the witness in the absence of the jury and was not misled or surprised to his prejudice. *S. v. McLeod*, 186.

§ 91. Speedy Trial

The statutory speedy trial period began to run when defendant was arrested and served with the indictment after a finding of no probable cause had previously been entered, and the time between the State's taking of a voluntary dismissal of the charge until he was again arrested after being reindicted for the offense was properly excluded from the statutory speedy trial period. *S. v. Lefever*, 419.

§ 92.2. Consolidation of Charges Against Multiple Defendants; Related Offenses

The trial court did not err in consolidating charges against defendant and a co-defendant for trial because defendant was charged with only armed robbery and the co-defendant was charged with armed robbery and misdemeanor possession of hydromorphone; nor were the charges improperly consolidated on the ground that defendant's trial strategy was compromised by the co-defendant's failure to testify. *S. v. Godwin*, 731.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

The trial court did not err in consolidating for trial charges against defendant for possession of a firearm by a convicted felon and for breaking or entering and larceny of the firearm. *S. v. Hardy*, 122.

The statute requiring separate indictments on charges of unlawful possession of a firearm by a convicted felon and other related offenses does not preclude the consolidation of these offenses for trial. *Ibid.*

G.S. 15A-926(c)(2), dealing with failure to join related offenses, does not apply when indictments for the subsequent charges had not been brought when trial was had on the first charge. *S. v. Warren*, 337.

§ 92.4. Consolidation of Multiple Charges Against Same Defendant Held Proper

Charges against defendant arising from defendant's hiring of another to assault a neighbor were properly consolidated for trial with two charges of solicitation to commit murder of persons involved in the prosecution of the assault-related charges. *S. v. Brown*, 223.

§ 98.2. Sequestration of Witnesses

The trial court did not abuse its discretion in denying defendant's motion to sequester the State's six identification witnesses. *S. v. Walston*, 110.

There was no abuse of discretion in the denial of defense counsel's motion to sequester the prosecution witnesses. *S. v. Harrell*, 57.

CRIMINAL LAW—Continued

In a prosecution for attempting to take indecent liberties with a child, there was no abuse of discretion in a trial judge's denial of defendant's motion to sequester juvenile witnesses at the probable cause hearing. *S. v. Byrd*, 168.

§ 99.1. Conduct of Court; Expression of Opinion on the Evidence During Trial

The trial court in a rape case did not express an opinion on the evidence when it denied defense counsel's request to recapitulate evidence regarding testimony by the prosecutrix that she removed her own clothing. *S. v. Lefever*, 419.

§ 102.6. Particular Comments in Prosecutor's Jury Argument

The prosecutor's jury argument that this country is overrun by violence "because we compromise with violent people" was not prejudicial error. *S. v. Braswell*, 609.

§ 102.8. Prosecutor's Comment on Defendant's Failure to Testify

The prosecutor's jury argument in a rape case that the evidence was "uncontradicted" and that there had "not been any evidence you have heard but what you find she has told you the truth" did not constitute an improper comment on defendant's failure to testify. *S. v. Lefever*, 419.

§ 102.10. Prosecutor's Argument Referring to Defendant's Prior Convictions or Criminal Conduct

The prosecutor's jury argument in a robbery case concerning defendant's regular receipt of shoplifted goods was not prejudicial error although the court had suppressed defendant's statement relating thereto. *S. v. Bradley*, 81.

§ 112.7. Instruction on Alibi

The trial court erred in failing to give defendant's requested instruction that "if, upon considering all the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, you must find him not guilty," but such error was not prejudicial to defendant. *S. v. Bradley*, 81.

The court's placement of a detailed statement of the State's theory that defendant planned and procured a robbery but had left the scene before the robbery was committed in the middle of an instruction on the legal effect of alibi evidence was harmless error. *Ibid.*

§ 113.1. Instructions Summarizing Evidence

In a prosecution for first degree burglary, a trial court's summary of the evidence did not constitute "plain error." *S. v. Eason*, 460.

§ 116. Charge on Defendant's Failure to Testify

The trial court did not err in failing to give a requested instruction on defendant's failure to testify where the court gave the pattern jury instruction. *S. v. Godwin*, 731.

§ 117.4. Charge on Credibility of Witnesses; Accomplices

Defendant failed to show error in the trial court's giving of only an accomplice instruction and in its failure to give a special interested witness instruction concerning the testimony of a witness for the State who testified pursuant to a sentence reduction agreement. *S. v. Aldridge*, 655.

CRIMINAL LAW—Continued

§ 119. Requests for Instructions

The trial court did not err in refusing to give defendant's requested instruction on alibi which was not submitted in writing and signed. *S. v. Harris*, 97.

§ 121. Instructions on Entrapment

The defendant in a prosecution for felonious possession for the purpose of sale and the felonious sale of marijuana was entitled to an instruction on the defense of entrapment where he presented evidence that he bought drugs for an undercover agent only because he needed a job and he believed that the agent had promised him a job. *S. v. Blackwell*, 432.

§ 128. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial

In a prosecution for the murder of defendant's wife's boyfriend, the trial court improperly entered a mistrial over defendant's objection, and defendant's plea of former jeopardy or motion to dismiss at a subsequent trial should have been granted and defendant should have been discharged. *S. v. Jones*, 377.

§ 128.2. Particular Grounds for Mistrial

Where defendant made a motion for mistrial during a homicide case on the ground that the jury could not agree within a reasonable time, and the jury thereafter returned a verdict of guilty of voluntary manslaughter, the trial court exceeded its authority in retroactively allowing defendant's motion for a mistrial five days after the trial had ended. *S. v. O'Neal*, 65.

§ 134.4. Sentence; Youthful Offenders

The trial court did not abuse its discretion in refusing to consider the possibility of youthful offender status for defendant because he had been convicted of armed robbery. *S. v. Harris*, 97.

§ 138. Severity of Sentence and Determination Thereof

Where defendant was convicted of attempting to take indecent liberties with a child in violation of G.S. 14-202.1(a)(2) and sentenced to the presumptive term of three years, the trial judge was not required to find aggravating or mitigating factors. *S. v. Byrd*, 168.

Testimony by defendant's father did not require the trial court to find as a mitigating factor that defendant was a person of good character and reputation. *S. v. McLeod*, 186.

In a prosecution for felonious child abuse in which defendant placed her child in a hot tub causing burns, the record did not support the aggravating factor that the crime was especially heinous, atrocious, or cruel, and the court erred in considering as an aggravating factor that defendant took advantage of a position of trust and confidence which she held as a parent of the child. *S. v. Young*, 139.

Defendant had no standing to assert the unconstitutionality of the voluntary acknowledgment of wrongdoing mitigating circumstance. *S. v. Brown*, 223.

The trial court did not improperly use the same evidence to prove more than one aggravating factor in sentencing defendant upon two convictions of solicitation to commit murder when the court found that each crime was committed to hinder the enforcement of laws by disrupting a prosecution against defendant and that the intended victims were a law enforcement officer and a State's witness against defendant. *Ibid.*

CRIMINAL LAW — Continued

In sentencing defendant for malicious damage to real property by use of an explosive, the trial court improperly used evidence necessary to prove an element of the offense in finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device normally hazardous to the lives of more than one person. *S. v. Williams*, 295.

Defendant was not prejudiced by the trial court's inadvertent reference at the sentencing hearing to defendant having been convicted of first degree rape when defendant was convicted of first degree burglary. *S. v. Yarn*, 325.

The trial court erred in consolidating misdemeanor and felony charges against defendant for judgment and then using the misdemeanor to increase the sentence of the felony. *S. v. Benfield*, 490.

In sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as an aggravating factor that defendant inflicted serious bodily injury on the victim substantially in excess of the minimum amount to prove the offense. *Ibid.*

The trial court erred in finding as an aggravating factor for the offense of discharging a firearm into an occupied dwelling that defendant knowingly created a great risk of death to more than one person. *Ibid.*

The trial court erred in finding as an aggravating factor that an offense of breaking or entering was committed for hire or pecuniary gain. *S. v. Bryan*, 558.

In a prosecution for first degree burglary, the evidence supported an "additional" aggravating factor that the victim was particularly vulnerable because of the fact that she was 8½ months pregnant and defendant was aware of her condition. *S. v. Eason*, 460.

The trial court properly found as an aggravating factor in sentencing defendant for attempted first degree rape that defendant took advantage of a position of trust to commit the offense by attempting to rape a young victim who was for all practical purposes his stepdaughter. *S. v. Goforth*, 537.

There was no merit to defendant's contention that it was error for a trial judge to impose the identical length of sentence on resentencing where at the first sentencing hearing the trial court found six aggravating factors and two mitigating factors while at the second hearing two aggravating factors and two mitigating factors were found. *S. v. Mitchell*, 549.

In a prosecution for breaking and entering, the trial court erred in considering as an aggravating factor that the offense of possession of stolen goods was committed for hire or pecuniary gain. *S. v. Aldridge*, 655.

In imposing a sentence for assault with a deadly weapon inflicting serious injury, the trial court erred in finding as aggravating factors that defendant used a deadly weapon and that the offense was cruel. *S. v. Braswell*, 609.

Where two crimes were consolidated for judgment pursuant to a plea bargain, the trial court erred in finding as an aggravating factor that it could have entered concurrent or consecutive jail terms. *S. v. Harris*, 725.

The trial court erred in finding as aggravating factors that defendant had an obvious continued determination in breaking the criminal law and that defendant's criminal history makes it necessary to separate him from the general public for its safety since both factors were based on the same evidence of defendant's prior criminal record. *Ibid.*

CRIMINAL LAW—Continued

§ 142.3. Particular Conditions of Probation

There was no statutory requirement for the sentencing judge to inquire into defendant's ability to pay restitution where the judge merely recommended restitution as a condition of his parole or work release. *S. v. Arnette*, 194.

The evidence supported the trial court's recommendation that, as a condition of obtaining work release, defendant be required to make restitution of $400.00 to one of his victims. *S. v. Bryan*, 558.

In a prosecution for felonious breaking or entering and larceny, where defendant was acquitted of the larceny charge but was convicted of breaking or entering with intent to commit larceny, the trial court did not err in requiring defendant, as a condition of probation, to make restitution to the victim of the value of the stolen stereo equipment. *S. v. Dula*, 748.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

Defendant could appeal from a sentence imposed pursuant to a plea bargain where the plea bargain did not deal with the question of length of punishment. *S. v. Harris*, 725.

§ 148.1. Judgments Appealable; Judgments or Orders Before Trial

Defendant does not have a right to appeal a denial of a motion to dismiss an indictment on double jeopardy grounds prior to being put to trial a second time. *S. v. Jones*, 413.

§ 163. Necessity for Exceptions and Objections to Charge

The trial court's summary of the State's evidence in an armed robbery case and its instructions on the element of intent permanently to deprive the victim of the property did not constitute plain error. *S. v. Bradley*, 81.

The trial court's failure in an armed robbery case to define "firearm" and the court's use of "twenty-two caliber rifle" for "firearm" in its final mandate to the jury did not constitute plain error. *S. v. Joyner*, 134.

The trial court's failure in a homicide case to instruct on imperfect self-defense did not constitute "plain error." *S. v. Bennett*, 407.

§ 163.1. Form and Sufficiency of Assignments of Error to Charge

Defense counsel failed to "state distinctly that to which he objects" within the meaning of App. Rule 10(b)(2) so as to preserve for appellate review the trial court's failure to instruct that defendant could be found guilty of voluntary manslaughter on the basis of imperfect self-defense. *S. v. Bennett*, 407.

§ 167.1. Miscellaneous Errors as Harmless

In a prosecution for armed robbery, although the district attorney erred in naming the defendant as the robber in question before any identification of the defendant as the robber had been made, the error was harmless. *S. v. King*, 524.

§ 173. Invited Error

There was no merit to defendant's contention that he was denied a fair trial by the allowance into evidence of records of similar crimes committed by defendant where the record disclosed that defendant "opened the door" to further inquiry by the prosecution. *S. v. Martin*, 265.

Testimony by one of the arresting officers that he had personally seen defendant selling heroin and testimony by a witness that he did not like defendant because of defendant's involvement in heroin traffic was properly admitted after defendant had "opened the door." *S. v. Willis*, 320.

CRIMINAL LAW—Continued

§ 181. Postconviction Hearing

The trial court was not required to permit oral testimony in considering a motion for appropriate relief. *S. v. Essick*, 697.

§ 181.1. Petition for Postconviction Hearing; Time for Filing

Defendant's appeal from a denial of his motion for appropriate relief must fail since the time for appeal from his conviction of armed robbery had expired and no appeal was pending at the time of the ruling. *S. v. Garner*, 761.

DEDICATION

§ 1.3. Sufficiency of Acts of Dedication Generally

Defendant presented sufficient evidence that a street was dedicated and accepted for public use, that the street had not been abandoned by the State, and that plaintiffs therefore did not gain title to a portion of the street by adverse possession. *Ramsey v. N.C. Dept. of Transportation*, 716.

§ 2.2. Dedication by Map or Plat; Sufficiency of Acts of Dedication

A trial court properly entered a declaratory judgment in the plaintiffs' favor as to their right to use a 20-foot strip of land as a drive and in permanently enjoining defendants from interfering with plaintiffs' use of such drive. *Houghton v. Woodley*, 475.

DEEDS

§ 20.4. Restrictive Covenants in Subdivisions; Architectural and Aesthetic Restrictions

The subsequent enactment of a less restrictive zoning ordinance concerning billboards by a city governing body did not invalidate a more restrictive covenant imposed by a servient governmental agency by deed given and recorded prior to passage of the less restrictive zoning ordinance. *Redevelopment Commission of Greensboro v. Ford*, 470.

§ 25. Proceedings to Register Land under Torrens Act

The trial court in a Torrens proceeding erred in refusing to certify for trial by jury the issues of fact arising from the title examiner's report upon proper demand by defendants. *Wilkinson v. Weyerhaeuser Corp.*, 154.

DIVORCE AND ALIMONY

§ 5. Recrimination

In an action for divorce from bed and board in which the plaintiff-wife alleged indignities and the defendant-husband asserted the defense of recrimination, in view of the plaintiff's evidence of indignities, a question for the jury was raised as to whether plaintiff's alleged abandonment was justified, and defendant's motions for a directed verdict were therefore properly denied. *Corbett v. Corbett*, 754.

§ 19.4. Modification of Alimony Decree; Sufficiency of Showing Changed Circumstances

There was sufficient evidence from which the trial judge could have found and concluded that plaintiff's monthly living expenses had risen from 1979 to 1982 in an action brought by plaintiff to increase the amount of her alimony payments. *Faught v. Faught*, 37.

DIVORCE AND ALIMONY—Continued

§ 19.5. Modification of Alimony Decree; Effect of Separation Agreements

A trial court cannot alter the terms of a separation contract even though the court can, in the exercise of its powers in equity, order specific performance of only such amount as it finds to be proper. *Erhart v. Erhart*, 189.

§ 21.4. Enforcement of Alimony Award; Attachment, Execution, Etc.

A trial judge had the authority to compel defendant to execute an assignment of his United States Army retirement benefits. *Faught v. Faught*, 37.

§ 21.5. Enforcement of Alimony Award; Punishment for Contempt

Defendant could properly be found in contempt of court for failure to comply with a court's order concerning alimony payments even though the alimony payments and various catch-up payments totalled nearly 100% of his monthly income. *Faught v. Faught*, 37.

The evidence and findings supported the trial court's order finding defendant in contempt for failure to pay child support, alimony and counsel fees *pendente lite*. *Berger v. Berger*, 591.

§ 21.9. Equitable Distribution of Marital Property Generally

Where plaintiff sought three claims of relief: (1) absolute divorce, (2) enforcement of a validly executed separation agreement, and (3) equitable distribution, the trial court erred in granting defendant's motion to dismiss the equitable distribution claim since a party may plead alternative claims. *Hendrix v. Hendrix*, 354.

§ 23. Jurisdiction of Child Custody Generally

A North Carolina court did not have subject matter jurisdiction to modify a Texas divorce decree and award plaintiff custody of his daughter. *Naputi v. Naputi*, 351.

§ 24.7. Modification of Child Support Order Where Evidence of Changed Circumstances Is Sufficient

The evidence and findings supported the trial court's order requiring defendant father to increase his child support payments from $130 per month to $320 per month. *Quick v. Quick*, 528.

§ 24.10. Termination of Support Obligation

A separation agreement and consent judgment obligating defendant to pay child support of $45.00 per week per child "until the younger child reaches the age of eighteen (18) years" requires defendant to pay support for the older child until the younger child reaches the age of 18 even though the older child has reached his eighteenth birthday. *Berrier v. Berrier*, 498.

§ 24.11. Review of Support Orders

An award of child support in a custody order which was based upon affidavits of the respective parties was not a gross abuse of judicial discretion amounting to reversible error. *Dixon v. Dixon*, 73.

§ 25. Child Custody Generally

The trial court in a child custody case did not err in directing the Department of Social Services to appear for a deposition and produce documents in its possession subject to the limitation that plaintiff not be given access to the names of, or identifying information regarding, persons making reports of child abuse and neglect. *Ritter v. Kimball*, 333.

DIVORCE AND ALIMONY—Continued

§ 25.11. Modification of Custody Order; Findings

The findings of fact in an order awarding custody of the minor child to defendant-wife were not supported by competent evidence and failed to treat an important issue raised by the evidence. *Dixon v. Dixon*, 73.

§ 25.13. Review of Child Custody Orders

The trial court had authority to issue an *ex parte* order requiring plaintiff to relinquish custody of her two minor children to defendant and to appear and show cause why she should not be held in contempt for violating a valid custody order even though the last custody order was on appeal at the time the *ex parte* order was entered. *Wolfe v. Wolfe*, 752.

§ 27. Child Support; Attorney's Fees Generally

The trial court erred in ordering defendant to pay a portion of plaintiff's attorney fees in a proceeding to increase child support where the findings indicated that plaintiff had sufficient means to defray the costs of the suit and to employ adequate counsel. *Quick v. Quick*, 528.

§ 28.1. Attack on Decrees Based on Jurisdiction

Where a judgment granting plaintiff a divorce from bed and board was entered, defendant gave notice of appeal, and plaintiff subsequently filed a motion in the cause seeking to have defendant ejected from her home, and the motion was allowed, the district court had jurisdiction to enter the order requiring defendant to vacate the premises since plaintiff's right to possession of her home was separate and unrelated to the matter of the judicially declared separation. *Corbett v. Corbett*, 754.

EMINENT DOMAIN

§ 7.1. Proceedings to Take Land and Assess Compensation Generally

Title to condemned land and the right to immediate possession vests in the DOA as soon as the DOA has filed a complaint and declaration of taking and deposited with the court the estimated compensation. *S. v. Forehand*, 148.

ESTOPPEL

§ 6. Pleading an Estoppel

Defendant could not rely on appeal on the affirmative defense of equitable estoppel where she neither pled such defense nor tried the case on this theory. *Nationwide Mut. Insur. Co. v. Edwards*, 1.

EVIDENCE

§ 11.2. What Constitutes a "Transaction" or "Communication" with Dead Persons; Personal Transactions

The dead man's statute did not prevent deceased's son from identifying his father's signature on the back of certain checks defendant contended were received and negotiated by deceased. *Culler v. Watts*, 735.

§ 12. Communications between Husband and Wife

Where defendant offered plaintiff's wife as a witness in an action for criminal conversation and alienation of affections, he waived any objection to her competency to testify. *Chappell v. Redding*, 397.

EVIDENCE—Continued

§ 13. Transactions between Attorney and Client

In an action filed by plaintiff prime contractor against Duke University for damages arising from a construction contract, the trial court did not err in ordering defendant, under certain protective restrictions, to produce transcripts of an arbitration proceeding involving defendant and another prime contractor on the same job. *Industrotech Constructors v. Duke University*, 741.

§ 24. Depositions

In a civil action, the trial court erred in permitting the plaintiff to read into evidence the deposition of a plaintiff where, although the court did properly determine that the plaintiff-witness was unable to attend court, the record also showed that defendant was neither present nor represented at the taking of the deposition, and the court should have determined whether defendant had been properly served with notice. *St. Clair v. Rakestraw*, 602.

§ 27. Telephone Conversations; Tape Recordings

A trial judge's ruling that tapes of telephone conversations would be received into evidence "for the limited purpose of being identified as such" did not violate the rule set forth in 18 U.S.C. 2515 and *Rickenbaker v. Rickenbaker* since the contents of the tape were never introduced into evidence. *Chappell v. Redding*, 397.

§ 45. Evidence as to Value

The trial court properly admitted plaintiff's testimony as to the value of an automobile as a used car and as a demonstrator. *Lee v. Payton*, 480.

§ 48.1. Failure to Prove Qualification of Expert

The trial court did not err in permitting a social worker to give her opinion as to whether respondents were capable of providing a stable home environment for their child although the witness was not tendered as an expert. *In re Pierce*, 257.

EXECUTION

§ 1. Property Subject to Execution

A judgment debtor could exempt from the collection of the judgment his interest in a van in the amount of $1,000 under section (a)(3) of G.S. 1C-1601 and the remaining interest in the van, worth $211.64, and his interest in a motorcycle, worth $1,200, under the "wild card" provision of section (a)(2) of that statute. *Avco Financial Services v. Isbell*, 341.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime

A transfer of title is not a necessary element of the offense of obtaining property by false pretense. *S. v. Walston*, 110.

§ 2.1. Indictment Sufficient

An indictment alleging that defendant rented a typewriter with the promise to return it in an hour but failed to return it at any time thereafter was sufficient to charge the offense of obtaining property by false pretense. *S. v. Walston*, 110.

FORGERY

§ 2.2. Sufficiency of Evidence

The State's evidence was sufficient to support an inference that defendant knew that checks were forged so as to support his conviction for forgery and uttering. *S. v. Walston*, 110.

FRAUD

§ 9. Pleadings

In an action to set aside a deed and a change of a life insurance beneficiary executed by the mother of the parties, plaintiff's complaint was insufficient to state a claim based on constructive fraud, but the issue of constructive fraud was tried by implied consent. *Benfield v. Costner*, 444.

Plaintiffs' causes of action alleging defendant acted in bad faith by refusing to provide coverage for plaintiffs' theft losses and alleging fraud by defendant were properly pleaded, and the trial court erred in granting defendant's motion to dismiss plaintiffs' causes of action. *Payne v. N.C. Farm Bureau Mutual Ins. Co.*, 692.

FRAUDS, STATUTE OF

§ 6. Contracts Affecting Realty Generally

The trial court properly denied defendants' motion to assert an additional alternative counterclaim alleging that defendants were damaged by a 1976 G.S. 75-5(b)(2) violation and by the opening of another store by plaintiff in 1979 in violation of alleged oral "franchise agreement" since the Chapter 75 violation was barred by the statute of limitations and the oral "franchise agreement" was barred by the statute of frauds. *Norlin Industries, Inc. v. Music Arts, Inc.*, 300.

§ 8. Leases

Two written leases, each of which had been signed by one of the parties, and other correspondence between the parties constituted a sufficient memorandum of an oral lease to give rise to an enforceable lease under G.S. 22-2. *Satterfield v. Pappas*, 28.

HOMICIDE

§ 19. Evidence Competent on Question of Self-Defense

The trial court in a homicide and assault case did not err in excluding expert psychiatric testimony offered by defendant to show that he possessed the ability to perceive accurately a life threatening situation. *S. v. Bennett*, 407.

§ 28.4. Instructions on Self-Defense; Duty to Retreat

The trial court did not err in failing to instruct on defendant's "lack of obligation to retreat when he is assaulted in his own home." *S. v. Bennett*, 407.

HUSBAND AND WIFE

§ 10. Requisites and Validity of Separation Agreements

The evidence supported the trial court's finding that plaintiff entered into and executed a separation agreement freely, willingly, voluntarily, and without being under any duress, coercion or fear. *Johnson v. Johnson*, 250.

HUSBAND AND WIFE—Continued

§ 24. Alienation of Affections in General

The trial court properly denied defendant's motions for directed verdict on plaintiff's claim for alienation of affections. *Chappell v. Redding*, 397.

§ 26. Alienation of Affections; Damages and Instructions

Because the trial court erred in denying defendant's motions for directed verdict as to plaintiff's criminal conversation cause of action, and because the trial court submitted one issue of compensatory damages on the alienation of affections and criminal conversation causes of action, the case must be remanded for a rehearing on damages. *Chappell v. Redding*, 397.

The trial court erred in failing to direct a verdict for defendant as to the punitive damages element of plaintiff's claim in an alienation of affections action. *Ibid.*

§ 28. Sufficiency of Evidence of Criminal Conversation

The evidence was insufficient to withstand defendant's motions for directed verdict on the issue of criminal conversation. *Chappell v. Redding*, 397.

§ 29. Criminal Conversation; Damages and Instructions

Because the trial court erred in denying defendant's motions for directed verdict as to plaintiff's criminal conversation cause of action, and because the trial court submitted one issue of compensatory damages on the alienation of affections and criminal conversation causes of action, the case must be remanded for a rehearing on damages. *Chappell v. Redding*, 397.

INFANTS

§ 6.1. Conclusiveness of Order Awarding Custody

In an action in which custody of a minor child was sought by the juvenile's parental aunt and the juvenile's maternal first cousin once removed, the paternal aunt had no right to appeal from an order placing custody with the maternal first cousin. *In re Williamson*, 184.

§ 13. Right to Notice of Delinquency Hearing and Charges

Although the return of summons in a juvenile delinquency proceeding stated only that service was effected on a particular date but did not state that the juvenile and one of his parents were served as required by statute, the record was sufficient to support the conclusion that proper service was had. *In re Leggett*, 745.

§ 17. Delinquency Hearing; Confessions

The trial court in a juvenile proceeding erred in admitting in-custody statements made by the juvenile without making specific findings as to whether the juvenile knowingly, willingly and understandingly waived the rights accorded him by G.S. 7A-595(d). *In re Wade*, 708.

§ 20. Delinquency Hearing; Judgments and Orders

The court erred in adjudicating respondent a delinquent child without affirmatively stating that the allegations of the juvenile petition had been proved beyond a reasonable doubt. *In re Wade*, 708.

INJUNCTIONS

§ 7.2. Injunctions to Restrain Use of Land Where Use Constitutes a Nuisance

Plaintiff was entitled to a permanent injunction restraining the defendants from interfering with the maintenance and operation of a dam. *Stokes Co. Soil Conservation Dist. v. Shelton*, 728.

INSURANCE

§ 1. Control and Regulation Generally

Funds resulting from a credit by the N.C. Reinsurance Facility to an insolvent insurance company for claims paid by the N.C. Guaranty Assn. on automobile liability policies ceded by the insolvent company to the Reinsurance Facility do not constitute a "right of action," "property" or other "assets" which are recoverable by the insolvent's receivers, and the Guaranty Assn. is entitled to reimbursement from such funds. *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 359.

The trial court did not err in allowing expenses of the N.C. Guaranty Assn. as a second priority claim against surplus proceeds from the special deposit of an insolvent insurer. *Ibid.*

The trial court properly ordered the Commissioner of Insurance, as ancillary administrator of an insolvent insurance company, to transfer immediately to the domiciliary receiver all funds remaining after the payment of special deposit and secured claims and expenses. *Ibid.*

§ 8. Contract and Policy Generally; Estoppel

A statement by plaintiff liability insurer's agent that only the titleholder of a tractor could be the "named insured" did not constitute a false representation of a material fact which estopped plaintiff insurer from asserting an exclusion from coverage for a vehicle while used by one other than the named insured with any trailer owned by such other person and not covered by like insurance in the company. *Nationwide Mut. Insur. Co. v. Edwards*, 1.

§ 79. Automobile Liability Insurance Generally

Defendant automobile dealer did not become an insurer of a salesman to whom he loaned a dealer tag so as to be liable for injuries to plaintiff where the salesman did not have permission from defendant to use the tag on his personal truck. *Kraemer v. Moore*, 505.

§ 90. Automobile Liability Insurance; Limitations on Use of Vehicle

A liability insurer had no liability above the limits required by the Financial Responsibility Act for an accident involving an insured tractor because of a clause excluding coverage for a vehicle while used by one other than the named insured with any trailer owned by such other person and not covered by like insurance in the company where the driver was purchasing the tractor from a person who retained title pending full payment, the titleholder was listed as the named insured, and the driver was operating the tractor to pull his own uninsured trailer. *Nationwide Mut. Insur. Co. v. Edwards*, 1.

§ 91.1. Automobile Liability Insurance; Persons Whose Injuries Are Covered or Excepted; Employees of Insured

An insurer may not exclude employees from coverage under an automobile policy required by the Financial Responsibility Act unless workers' compensation is available to those employees. *South Carolina Ins. Co. v. Smith*, 632.

INSURANCE—Continued

§ 122. Fire Insurance; Conditions; Forfeiture

Misrepresentations made by insureds during a fire loss investigation concerning their finances and marital status were not material misrepresentations which voided their fire insurance policy. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 616.

§ 140.2. Actions on Hail Policies

In an action in which plaintiff sought to recover premiums paid to defendant in which plaintiff alleged that defendant had been unjustly enriched by retaining premiums paid to provide insurance for plaintiff's tobacco crop when no risk attached under the policy, the trial court erred in granting summary judgment for defendant and should have granted summary judgment for plaintiff. *Latta v. Farmers County Mutual Fire Ins. Co.*, 494.

INTEREST

§ 1. Items Drawing Interest in General

A claimant was not entitled to interest on an award under the State Tort Claims Act. *Myers v. Dept. of Crime Control*, 553.

JUDGES

§ 1.2. Jurisdiction within District of Judge's Residence

A trial judge was properly assigned by the chief district judge, who recused himself, to hear a motion. *Routh v. Weaver*, 426.

KIDNAPPING

§ 1.1. Competency of Evidence

In a prosecution for kidnapping in which three prison inmates held as many as six prison employees and two other inmates as hostages at Central Prison for approximately 42 hours, the trial court properly found that duress, coercion, compulsion or necessity, based on general prison conditions, could not be raised as a defense in the case. *S. v. Little*, 128.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Lien of Contractor or Person Dealing Directly with Owner

By contractually agreeing to arbitration, plaintiff did not thereby waive his right to file a laborers' and materialmen's lien claim and institute court action to enforce such lien. *Adams v. Nelsen*, 284.

LANDLORD AND TENANT

§ 13.3. Notice of Renewal

In an action for summary ejectment where defendant entered into a contract with plaintiff and her now-deceased husband for the lease of part of the couple's land for a sand pit, the court erred in granting summary judgment for plaintiff where defendant proceeded on the theory that by accepting rental payments for a period of 18 months following expiration of the original lease term, plaintiff and her husband waived any right they otherwise had to require written notice of renewal. *Culler v. Watts*, 735.

LIBEL AND SLANDER

§ 16. Sufficiency of Evidence

Plaintiff's evidence was insufficient for the jury in an action for slander arising from statements made by an employee of defendant insurer concerning problems with plaintiff's automobile body shop. *Williams v. State Farm Mut. Auto. Ins. Co.*, 271.

MARRIAGE

§ 4. Consequences of Marriage Being Void or Voidable

In an annulment action instituted by plaintiff bank purporting to act on behalf of its ward against his wife, the trial court properly denied plaintiff's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial since a marriage of a person incapable of contracting for want of understanding is not void, but voidable, and prior adjudication of incompetency is not conclusive of later capacity to marry and does not bar a party from entering a contract to marry. *Geitner v. Townsend*, 159.

§ 5. Attack on Marriage

In an annulment action initiated by plaintiff bank purporting to act on behalf of its ward, the trial judge properly placed the burden of proof on plaintiff to prove that its ward lacked the mental capacity and understanding sufficient to contract a valid marriage. *Geitner v. Townsend*, 159.

MASTER AND SERVANT

§ 65.2. Workers' Compensation; Back Injuries

The Industrial Commission could properly reject a deputy commissioner's finding that plaintiff's injury sustained in the course of his employment was exclusively a scheduled injury under G.S. 97-31, and in light of testimony that plaintiff was totally and permanently disabled, its conclusion that plaintiff was entitled to compensation under G.S. 97-29 was entirely proper. *Fleming v. K-Mart Corp.*, 669.

§ 68. Workers' Compensation; Occupational Diseases

In a workers' compensation case, the Commission's conclusion that plaintiff's disease was not compensable was supported by findings of fact detailing the testimony of two doctors. *Dean v. Cone Mills Corp.*, 237.

The evidence supported a determination that plaintiff's last injurious exposure to the hazards of his occupational lung disease occurred while he was employed by defendant where there was medical evidence that his exposure to synthetic dust in defendant's mill augmented his byssinosis. *Caulder v. Waverly Mills*, 739.

§ 87. Workers' Compensation; Claim Under Act as Precluding Common Law Action

Where plaintiff stipulated that he was an employee of defendant and that the injuries which are the basis of his suit were sustained during the course of his employment, defendant was entitled to judgment as a matter of law since the North Carolina Workers' Compensation Act barred plaintiff's recovery for injuries in a common law action. *Poythress v. Libbey-Owens Ford Co.*, 720.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Claimant was discharged from her work as a security officer for misconduct connected with her work by discussing security matters with store sales personnel. *Douglas v. J. C. Penney Co.*, 344.

NARCOTICS

§ 2. Indictment

There was no fatal variance in an indictment which charged possession of four grams or more but less than 14 grams of heroin but did not recite the statute number or name the offense as trafficking. *S. v. Willis*, 320.

§ 3.3. Opinion Testimony

A police detective was sufficiently qualified to give an opinion that the "vegetable type material" which he observed "appeared to be marijuana." *S. v. Essick*, 697.

§ 4. Sufficiency of Evidence

The State's circumstantial evidence was sufficient to support conviction of defendant for conspiracy to sell and deliver marijuana. *S. v. Essick*, 697.

§ 4.1. Insufficiency of Evidence

The State's evidence was insufficient to show that defendant had possession of cocaine found in a briefcase taken by a codefendant from a private airplane. *S. v. DiNunno*, 316.

NEGLIGENCE

§ 29.3. Sufficiency of Evidence; Proximate Cause

In an action in which plaintiff alleged the negligent construction of a room addition and fireplace, although the failure of plaintiff's insured to obtain a building permit constituted negligence *per se*, there was no evidence that this violation was a proximate cause of the fire damage to their house. *Federated Mutual Insurance Co. v. Hardin*, 487.

PARENT AND CHILD

§ 1.6. Sufficiency of Evidence in Proceeding to Terminate Parental Rights

A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. *In re Phifer*, 16.

In a proceeding to terminate parental rights, there were insufficient findings of fact to support the trial judge's conclusion that respondent failed to pay a reasonable sum for her child's care while he was in DSS custody. *Ibid.*

In a proceeding to terminate parental rights, the evidence supported a finding that appellant willfully left the minor child in foster care for two years without showing positive response to the significant efforts of the Department of Social Services to encourage her to strengthen her parental relationship with her child. *In re Tate*, 89.

In a proceeding to terminate parental rights, there was ample evidence to support a finding and conclusion that appellant failed to pay a reasonable portion of the cost of foster care of the minor child. *Ibid.*

There was clear, cogent, and convincing evidence to support a trial court's finding of lack of substantial progress in a proceeding to terminate parental rights. *Ibid.*

The evidence was sufficient to support the trial court's order terminating respondents' parental rights in a five-year-old child on grounds that (1) the child was neglected, (2) the child was left in foster care for more than two consecutive

years without substantial progress in correcting the conditions which led to the removal of the child, and (3) neither parent had paid a reasonable portion of the cost of the child's care in the six months preceding the filing of the action. *In re Pierce*, 257.

In a proceeding to adopt a child, the trial court erred in finding that respondent "willfully abandoned" her child pursuant to G.S. 48-2(1). *In re Clark v. Jones*, 516.

The evidence was sufficient to support a trial court's order terminating parental rights and finding the children were neglected. *In re Barefoot*, 712.

§ 2.2. Child Abuse

In a prosecution for felonious child abuse, the trial court erred in failing to submit an issue and instruct the jury with respect to misdemeanor child abuse. *S. v. Young*, 139.

In a prosecution for felonious child abuse, the trial judge committed prejudicial error in charging the jury that if defendant placed her daughter in a tub with the knowledge that it was hot enough to "cause pain" and intended to cause her pain, "then that would be proof beyond a reasonable doubt of an intentional burning or scalding," since intending to cause a child pain is not tantamount to intending to scald, burn, or seriously injure a child. *Ibid.*

The failure of the petitioner to sign and verify a petition alleging that a minor child was an abused child and a neglected child before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter. *In re Green*, 501.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 5. Licensing and Regulation of Dentists

The State Board of Dental Examiners did not exceed its statutory authority or commit an error of law in suspending petitioner's license to practice dental hygiene for 14 months for practicing without the supervision of a licensed dentist and in conditioning the restoration of her license after a period of only 60 days upon her written agreement not to own, manage, supervise or control a dental practice for a 12-month period. *In re DeLancy*, 647.

§ 13. Limitations of Actions for Malpractice

The purpose of the exception in G.S. 1-15(c) allowing a four-year limitation period in certain medical malpractice cases is to provide for latent injuries where the physical damage to plaintiff is not readily apparent and not for those cases in which the injury is obvious but the alleged negligence of the doctor is not. *Black v. Littlejohn*, 211.

PROCESS

§ 8. Personal Service on Nonresident Individuals in this State

The trial court had personal jurisdiction over defendant under our "long-arm statute" in an action for alimony, child support and equitable distribution. *Berger v. Berger*, 591.

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

The trial court was correct in holding, for purposes of a Rule 12(b) motion, that North Carolina did have personal jurisdiction over a corporation which owned a

RULES OF CIVIL PROCEDURE—Continued

§ 8. General Rules of Pleading

Although it may have been better practice for the trial judge to omit characterizing plaintiff's attorneys' failure to file a reply to defendant's counterclaim as an "oversight" in the charge to the jury, there was no prejudicial error in the judge's instructions. *Chappell v. Redding*, 397.

§ 13. Counterclaim

Although plaintiff's claim should have been filed as a compulsory counterclaim, for equity reasons, the trial court erred in dismissing plaintiff's cause of action for unfair trade practices. *Moretz v. Northwestern Bank*, 312.

§ 15. Amended and Supplemental Pleadings Generally

The trial court properly denied defendants' motion to assert an additional alternative counterclaim alleging that defendants were damaged by a 1976 G.S. 75-5(b)(2) violation and by the opening of another store by plaintiff in 1979 in violation of alleged oral "franchise agreement" since the Chapter 75 violation was barred by the statute of limitations and the oral "franchise agreement" was barred by the statute of frauds. *Norlin Industries, Inc. v. Music Arts, Inc.*, 300.

The issue of constructive fraud was tried by implied consent. *Benfield v. Costner*, 444.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial court's denial of plaintiffs' motion to amend their complaint to allege an unfair trade practice was within the court's discretion to deny the amendment to avoid further delays in the trial. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 616.

§ 26. Depositions in a Pending Action

The trial court in a child custody case did not err in directing the Department of Social Services to appear for a deposition and produce documents in its possession subject to the limitation that plaintiff not be given access to the names of, or identifying information regarding, persons making reports of child abuse and neglect. *Ritter v. Kimball*, 333.

The trial court did not err in denying plaintiff's broad motion to compel discovery and in sustaining defendants' motion for a protective order. *Williams v. State Farm Mut. Auto. Ins. Co.*, 271.

§ 32. Use of Depositions in Court Proceedings

In a civil action, the trial court erred in permitting the plaintiff to read into evidence the deposition of a plaintiff where, although the court did properly determine that the plaintiff-witness was unable to attend court, the record also showed that defendant was neither present nor represented at the taking of the deposition, and the court should have determined whether defendant had been properly served with notice. *St. Clair v. Rakestraw*, 602.

§ 37. Failure to Make Discovery; Consequences

In a civil action where the trial judge found as a fact that defendant's failure to comply with a court order compelling discovery was willful and without cause, the findings provided ample support for an order granting plaintiff's motion for sanctions and entering a default judgment in favor of plaintiff and against defendant. *Routh v. Weaver*, 426.

RULES OF CIVIL PROCEDURE—Continued

§ 38. Jury Trial of Right

Where appellee and appellants had filed cross-claims against each other and both demanded a jury trial, the trial court erred in allowing appellee's motion to stay litigation pending arbitration pursuant to an arbitration agreement contained in their contract. *Cyclone Roofing Co. v. LaFave Co.*, 278.

§ 52. Findings by Court Generally

In an action in which plaintiff sought to declare a separation agreement invalid, the trial judge properly directed the attorney for defendant to prepare proposed findings and conclusions and draft the judgment and adopted the judgment as his own when tendered and signed. G.S. 1A-1, Rule 52 does not require the manual drafting of the judgment or oral dictation thereof by the trial judge. *Johnson v. Johnson*, 250.

§ 55. Default

Where plaintiff sought to recover from all defendants jointly and severally, entry of summary judgment against the defaulting corporate defendants should have been postponed until the conclusion of the action on the merits. *Gate City Printing v. Glace-Holden, Inc.*, 546.

§ 56.1. Timeliness of Summary Judgment Motion; Notice

A trial judge erred in entering summary judgment for the defendant without affording plaintiff the opportunity of the mandatory ten day notice requirement. *Zimmerman's Dept. Store v. Shipper's Freight Lines*, 556.

§ 56.3. Necessity for and Sufficiency of Supporting Material for Summary Judgment

In an action in which the trial court entered summary judgment finding a purchase money resulting trust in plaintiff's favor upon a parcel of property, there was no merit to defendant's arguments that the trial court should not have considered the contract of sale, which was attached to an unfiled deposition of defendant, or that entry of summary judgment was premature because discovery had not been completed. *Gebb v. Gebb*, 104.

SALES

§ 6.4. Warranties in Sale of House by Builder-Vendor

Plaintiffs' evidence was sufficient for the jury on the issue of defendant builder-vendor's breach of an implied warranty of habitability because of a defective septic tank system, and the builder-vendor was not insulated from liability because the system was designed, approved and inspected by the county health department. *George v. Veach*, 674.

§ 17.1. Sufficiency of Evidence; Cases Involving Express Warranties

Plaintiffs' evidence was sufficient for the jury on issues of defendants' breach of an express warranty of cabbage seeds and an implied warranty of fitness of the seeds for a particular purpose. *Warren v. Joseph Harris Co. and Perry v. Joseph Harris Co.*, 686.

SCHOOLS

§ 13.2. Dismissal of Teachers

Substantial evidence supported a school board's determination that a career art teacher's dismissal because of declining enrollment and reductions in funding was the result of a fair and consistent application of the board's "reduction in force" policy. *Goodwin v. Goldsboro Board of Education*, 243.

SEARCHES AND SEIZURES

§ 11. Search and Seizure of Vehicles on Probable Cause

The evidence supported a trial court's findings of fact and conclusion of law that items seized in an inventory search of an automobile were admissible. *S. v. Martin*, 265.

§ 12. Stop and Frisk Procedures

Defendant's Fourth Amendment protection against unreasonable searches and seizures was not violated when an officer approached defendant around 2:30 a.m. at a Cannon Mills plant and the circumstances created a reasonable suspicion of criminal activity and furnished ample justification for a brief investigatory stop. *S. v. Harrell*, 57.

§ 13. Search and Seizure by Consent

A search 23 hours after defendant executed a consent to search did not exceed the duration of the consent. *S. v. Williams*, 519.

Where defendant executed a consent to search authorizing search of his vehicle "located at . . . the Mecklenburg County Police Department," a search of defendant's automobile after an officer moved the vehicle from the premises of the police department to the department's impound area did not exceed the physical scope of defendant's consent. *Ibid.*

§ 15. Standing to Challenge Lawfulness of Search Generally

The trial court properly denied defendants' motions to suppress evidence of cocaine which officers seized without a warrant from a film container. *S. v. Joe'l and S. v. Wilson*, 177.

SETOFFS

§ 1. Generally

A bank had ten days after service of attachment notices from the city and county on one of its accounts to respond and assert its claim of setoff, and once the bank complied with the statute, its right became superior to the claims of the tax collectors. *In re Bob Dance Chevrolet*, 509.

SOLICITORS

§ 1. Generally

There was no evidence that a witness refrained from testifying for defendant because of prosecutorial misconduct. *S. v. Essick*, 697.

STATE

§ 2.1. Lands Beneath Navigable Waters

An intervenor's deed based on a 1909 State grant was void on its face to convey a fee title in land since the grant purported to convey 33 acres of submerged

WEAPONS AND FIREARMS

§ 2. Possessing Weapons

The statute requiring separate indictments on charges of unlawful possession of a firearm by a convicted felon and other related offenses does not preclude the consolidation of these offenses for trial. *S. v. Hardy*, 122.

The State's evidence was sufficient to support defendant's conviction of unlawful possession of a firearm by a convicted felon. *Ibid.*

An indictment for unauthorized possession of a dangerous weapon while a prisoner was not fatally defective because it alleged that the weapon was capable of inflicting "bodily injury" rather than "serious bodily injury." *S. v. Phillips*, 757.

WILLS

§ 21.4. Sufficiency of Evidence of Undue Influence

In a caveat proceeding, the trial court erred in directing a verdict against the caveators on the undue influence issue. *In re Daniels*, 533.

§ 22. Evidence of Mental Condition of Testator

In a caveat proceeding, the trial court erred in excluding evidence which indicated that the propounder and some of his witnesses, who had testified that the testator was of sound mind when the will was executed, had expressed a contrary opinion or taken a contrary position four years earlier. *In re Daniels*, 533.

WITNESSES

§ 5. Evidence Competent for Corroboration

A memorandum written by plaintiff's employee was not admissible for the purpose of corroborating the employee's testimony where it contained extraneous matters not in evidence. *Wachovia Bank v. Guthrie*, 722.

WORD AND PHRASE INDEX

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